Chapter DOC 331

PROBATION-PAROLE REVOCATION PROCEDURE

Register, June, 1994, No. 462.

Note: Chapter HSS 31 was renumbered chapter DOC 331 and revised under s. 13.93 (2m) (b) 1, 2, 6 and 7, Stats., Register, September, 1991, No. 429.

Note: Several sections in this chapter have explanatory notes which can be found in the APPENDIX to this chapter.

DOC 331.01 Authority and applicability. (1) These rules are promulgated under the authority of s. 227.11, Stats. They interpret ss. 46.001, 46.03 (6), 53.11, 53.19, 53.31, 57.06, 57.072, 161.47, 971.17, and 973.10, Stats.; ss. 54.04 and 54.07, Stats. (1975); and ch. 48, Stats.

(2) This chapter applies to the adults on probation or parole and youth on aftercare in the legal custody of the department. This chapter will cease to apply to youth on the effective date of revocation rules relating specifically to youth.

History: Cr. Register, December, 1981, No. 312, eff. 1-1-82; emerg. am. (2), eff. 9-25-89.

DOC 331.02 Definitions. The definitions under s. DOC 328.03 apply to this chapter.

History: Cr. Register, December, 1981, No. 312, eff. 1-1-82.

DOC 331.03 Revocation of probation and parole. (1) Revocation. A client's probation or parole may be revoked and the client transported to a correctional institution or court if the client violates a rule or condition of supervision.

(2) Investigation. A client's agent shall investigate the facts underlying an alleged violation and shall meet with the client to discuss the allegation within a reasonable period of time after becoming aware of the allegation.

(3) Recommendation. After investigation and discussion under sub. (2), the agent shall decide whether to:

(a) Take no action because the allegation is unfounded;

(b) Resolve alleged violations by:

1. A review of the rules of supervision followed by changes in them where necessary or desirable, including return to court;

2. A formal or informal counseling session with the client to reemphasize the necessity of compliance with the rules or conditions; or

3. An informal or formal warning that further violation may result in a recommendation for revocation; or

(c) Recommend revocation for an alleged violation.

(4) Report. An agent shall report all alleged client violations of the rules or conditions of supervision to the agent's supervisor. The following shall be reported:

(a) The facts underlying the alleged violation, including conflicting versions regarding the nature and circumstances of the alleged violation;

(b) The agent's investigatory efforts and conclusions;

(c) A brief summary of the agent's discussion with the client;

(d) The agent's recommendation regarding disposition and the reasons for it;

(e) A statement as to the custody status of the client;

(f) Any pending criminal charges, guilt plea, confession, or conviction for the conduct underlying the alleged violation; and

(g) Reference to the client's prior adjustment, including but not limited to alleged violations, violations, and abscondings.

History: Cr. Register, December, 198 1, No. 3 12, eff. l-l-82; r. (2) and (9), renum. (3) to (8), (10) and (11) to be HSS 31.05 to 31.12, Register, August, 1985, No. 356, eff. 9-l-85.

DOC 331.04 Preliminary hearing. (1) Requirement. If the agent's immediate supervisor reasonably concludes on the basis of the agent's report under s. DOC 33 1.03 (4) that revocation proceedings should be started, even if the agent did not recommend revocation, a preliminary hearing shall be held in accordance with this section, unless sub. (2) applies, to determine whether there is probable cause to believe that the client violated a rule or a condition of supervision.

(2) Exceptions. A preliminary hearing need not be held if one of the following is true:

(a) It is waived by the client in writing;

(b) The client has given and signed a written statement which admits the violation;

(c) There has been a finding of probable cause in a felony matter and the client is bound over for trial for the same or similar conduct;

(d) There has been an adjudication of guilt by a court for the same conduct that is alleged to be a violation of supervision; or

(e) The client is not being held in custody.

(3) Magistrate. The preliminary hearing shall be held before a magistrate. The magistrate shall be a supervisor or supervisor's designee who has not been directly involved in the decision to initiate proceedings to revoke the client's probation or parole.

(4) Notice. Written notice of the preliminary hearing shall be given to the client and either the client's attorney or the state public defender if the client claims to be or appears indigent and is not represented by a private attorney. The notice shall include:

(a) The rule or condition that the client is alleged to have violated;

(b) The facts underlying the alleged violation;

(c) A statement that the client has a right to a preliminary hearing before an impartial magistrate who shall determine if there is probable cause to believe the person has committed the alleged violation;

(d) A statement that the client has the right to waive the preliminary hearing;

(e) A statement that the client has a qualified right to be represented by an attorney at the preliminary hearing;

(f) A statement that the client and client's attorney, if any, may review all relevant evidence in the client's supervision file to be considered at the preliminary hearing, unless that evidence is otherwise confidential, such as the identity of confidential informants;

(g) An explanation of the possible consequences of any decision; and

(h) An explanation of the client's rights at the preliminary hearing which include:

1. The right to be present;

2. The right to deny the allegation and speak on his or her behalf;

3. The right to present relevant evidence, including witnesses who can give relevant information regarding the violation of the rules or conditions of supervision;

4. The right to receive a written decision stating the reasons for the decision based on the evidence presented; and

5. A qualified right to an attorney. If an attorney fails to appear at the preliminary hearing to represent the client, the magistrate may either proceed with the hearing or postpone the hearing. The hearing shall be postponed to permit representation by an attorney if the client, after being informed of his or her right to representation, requests an attorney based on a timely and colorable claim that he or she did not commit the alleged violation and the magistrate concludes either that the complexity of the issues will make it difficult for the client to present his or her case or that the client is otherwise not capable of speaking effectively for himself or herself.

(5) Detention pending final hearing. (a) When there is a preliminary hearing, the magistrate shall decide if the client is to remain in detention or is to be taken into custody and detained pending the outcome of the final hearing. When there is no preliminary hearing because the case meets one of the criteria under sub. (2), the agent's immediate supervisor shall make that decision.

(b) Detention is advisable and consistent with the goals and objectives of this chapter if one of the following is true:

1. The client is believed to be dangerous;

2. There is a likelihood that the client will flee;

3. The client is likely to engage in criminal behavior before the revocation takes place;

4. The client is likely to engage in an activity that does not comply with the rules and conditions of

supervision; or

5. The length of the term to be served upon revocation is great.

(c) A detained client is not eligible for release during working hours or for any other partial release from detention.

(d) The detention decision made pursuant to par. (b) shall remain in effect until the date that the decision of the hearing examiner takes effect and becomes final. If the final decision of the hearing examiner is to reinstate the client or to not revoke the client's supervision, and the department requests review of that finding, the custody decision made pursuant to par. (b) shall remain in effect pending a decision by the secretary. The secretary may alter the custody decision at any time if the public interest warrants it.

(6) Time and place. The preliminary hearing shall take place as close as feasible to the area of the state in which the alleged violation occurred. It shall take place not sooner than one working day and not later than 5 working days after receipt by the client of the service of notice of the preliminary hearing. The time limits do not apply if the preliminary hearing has been postponed under sub. (4) (h) 5 or if the time limits are waived in writing by the client.

(7) Decision. (a) After the preliminary hearing, the magistrate shall decide based upon the evidence presented whether there is probable cause to believe that the client committed the conduct and that the conduct constitutes a violation of the rules or conditions of supervision. The revocation process terminates without prejudice if the magistrate concludes that there is no probable cause.

(b) The magistrate shall issue a written decision stating his or her findings and conclusions and giving reasons for the decision. The decision shall be based on the evidence presented. The magistrate shall provide copies to the client within a reasonable time after the preliminary hearing. If probable cause was found, the immediate supervisor shall contact the hearing examiner's office in writing and request the scheduling of a final revocation hearing.

(8) Reissuance of notice. (a) If notice of the preliminary hearing is found to be improper and the impropriety in itself results in the dismissal of the revocation proceedings, the department may issue a proper notice and begin the proceedings again.

(b) If a magistrate decides that there is no probable cause to believe the client committed the violation and later the department learns of additional relevant information regarding the alleged violation, revocation proceedings may be started again with issuance of a new notice for the preliminary hearing.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

DOC 331.05 Final revocation hearing. History: Renum. from HSS 3 1.03 (3) and am. (1) (intro.) and (a), (2), (4) (d) and (5) (a), Register, August, 1985, No. 356, eff. 9-1-85; emerg. am. (10), eff. 11 -l O-86; r. and recr. (1) (i), cr. (6) (f), Register, February, 1987, No. 374, eff. 3-l-87; am. (10), Register, May, 1987, No. 377, eff. 6-l-87; removed under 1989 Wis Act 107.

Note: See ch. HA2 for replacement rules.

DOC 331.06 Procedure when revocation hearings are waived. (1) If a final revocation hearing was waived, the supervisor may recommend revocation. A waiver may be withdrawn by the client prior to the secretary's decision if the client establishes that it was not knowingly, voluntarily, or intelligently made.

(2) If the supervisor recommends revocation, the recommendation shall include the reasons for it and the facts underlying the alleged violation. A record of waivers, confessions, convictions for the conduct underlying the alleged violation, or evidence of a client's guilty pleas or continuation of a

criminal proceeding following a determination of probable cause for the conduct underlying the alleged violation shall be prepared. The complete record shall be sent to the secretary within a reasonable period of time after acceptance of the waivers, confession, or record of the guilty plea or conviction.

(3) The secretary shall decide whether to revoke the client's probation or parole.

(4) The secretary's decision shall state the reasons for it based upon the information provided and shall be delivered to the client, the client's attorney, if any, the regional chief, and the supervisory staff member who recommended revocation within 10 days of receipt of the recommendation.

History: Renum. from HSS 3 1.03 (4), Register, August, 1985, No. 356, eff. 9-l-85.

DOC 331.07 Termination of revocation proceedings. The supervisor may recommend to the regional chief that revocation proceedings be terminated without revocation of a client's probation or parole or that the client be released from custody status, or both, at any time before the hearing examiner's decision is issued, if there is sufficient reason for doing so. The regional chief shall decide.

History: Renum. from HSS 3 1.03 (5), Register, August, 1985, No. 356, eff. 9-l-85.

DOC 331.08 Concurrent criminal prosecution and acquittal in criminal proceeding. All revocation actions under this chapter shall proceed regardless of any concurrent prosecution of the client for the conduct underlying the alleged violation. An acquittal in a criminal proceeding for a client's conduct underlying an alleged violation shall not preclude revocation of that client's probation or parole for that same conduct.

History: Renum. from HSS 31.03 (6), Register, August, 1985, No. 356, eff. 9-1-85.

DOC 331.09 Records. A summary of all alleged violations, revocation actions, and proceedings under this section against a client shall be maintained in the client's record.

History: Renum. from HSS 3 1.03 (7), Register, August, 1985, No. 356, eff. 9-l-85.

DOC 331.10 Transport to a correctional institution. A client shall be transported to a correctional institution or to court for sentencing as soon as it is feasible after a revocation decision becomes final.

History: Renum. from HSS 31.03 (8), Register, August, 1985, No. 356, eff. 9-l-85.

DOC 331.11 Special revocation procedures. All clients are subject to revocation under ss. DOC 33 1.03 to 33 1.10 except as noted under this section. Those clients committed under s. 16 1.47 or 971.17, Stats., or s. 54.04 or 54.07, Stats. (1975), shall follow the revocation procedures under this section and ss. DOC 33 1.07 to 33 1.09 as follows:

(1) If a client committed under s. 161.47, Stats., allegedly violates the rules or conditions of supervision, an agent shall proceed as noted under s. DOC 33 1.03 (2) to (4) and shall, upon the approval of a supervisor, notify the committing court of the alleged violation and submit a report under s. DOC 33 1.03 (4) to the court within a reasonable time after becoming aware of the alleged violation. If the court decides that the client should remain on probation, supervision shall continue under the previous rules and conditions unless they are modified by the court.

(2) Clients committed under s. 97 1.17, Stats., may only have their parole revoked by the court.

(3) If a client committed under s. 54.04, Stats. (1975), allegedly violates the rules or conditions of probation, field staff shall proceed as noted under ss. DOC 33 1.03 (2) to (4) and 33 1.04 except that a case review shall be held and a decision issued by the supervisor within 96 hours after the detention of the client for the alleged misconduct. The supervisor may extend this time limit for good cause. If

the supervisor recommends revocation, the agent shall notify the committing court of the decision within a reasonable period of time. The court shall determine whether revocation shall occur. No final revocation hearing may be held by the department. If the court decides that the client should remain on probation, supervision shall continue under the previous rules and conditions unless they are modified by the court.

(4) If a client committed under s. 54.07, Stats. (1975), allegedly violates the rules or conditions of parole, field staff shall proceed as noted under ss. DOC 331.03 (2) to (4) and 33 1.04 except that a case review shall be held and a decision issued by the supervisorv staff member within 96 hours after the detention of the client for the alleged misconduct. A final revocation hearing shall then be held in accordance with this section.

History: Renum, from HSS 31.03 (10), Register, August, 1985, No. 356, eff. 9-l-85.

DOC 331.12 Harmless error. If any time requirement under this chapter is exceeded, the secretary may deem it harmless and disregard it if it does not affect the client's substantive rights. Substantive rights are affected when a variance tends to prejudice a fair proceeding or disposition involving a client.

History: Renum. from HSS 3 1.03 (11) and am., Register, August, 1985, No. 356, eff. 9-I-85.

DOC 331.13 Good time forfeiture hearing. (1) Applicability. This section applies to a client who, before June 1, 1984, committed the crime for which he or she was sentenced and did not choose to have 1983 Wis. Act 528 apply to him or her.

(2) Amount of time available for forfeiture. (a) Prior to a client's preliminary hearing under s. DOC 33 1.04, the client's agent shall contact in writing the registrar of the institution which has the client's record and advise the registrar to provide the amount of the client's total good time that is available for forfeiture upon revocation of the client's parole supervision.

(b) The agent shall notify the hearing examiner's office before the final revocation hearing of the amount of good time available for forfeiture.

(3) Criteria. (a) The agent shall recommend to the hearing examiner's office prior to the final revocation hearing that a specific amount of good time be forfeited and whether good time should be earned upon the forfeited good time upon revocation of a client's supervision. This amount of time shall be expressed in terms of days, months or years, or any combination of days, months and years. The amount of time may not be expressed in terms of fractions or percentages of time periods. The agent shall send with his or her recommendation the reasons and facts consistent with the criteria listed in par. (b) that support the recommendation.

(b) The following shall be considered by the agent in recommending the amount of good time forfeited and whether good time may be earned on the amount of good time forfeited:

1. The nature and severity of the original offense;

2. The client's institution conduct record;

3. The client's conduct and behavior while on parole;

4. The amount of time left before mandatory release if the client is a discretionary release parolee;

5. Whether forfeiture would be consistent with the goals and objectives of field supervision under ch. DOC 328;

6. Whether forfeiture is necessary to protect the public from the client's further criminal activity, to prevent depreciation of the seriousness of the violation or to provide a confined correctional

treatment setting which the client needs; and

7. Other mitigating or aggravating circumstances.

(c) The agent's supervisor shall review the agent's recommendation for a forfeiture, and the agent's recommendation shall be included in the client's chronological history along with the supervisor's comments on the recommendation.

(5) Records. Relevant records relating to the forfeiture of good time shall be maintained as part of the client's record.

History: Cr. Register, February, 1987, No. 374, eff. 3-l-87; removed (4) under 1989 Wis Act 107.

Note: See ch. HA2 for replacement for sub. (4) subject matter.

DOC 331.14 Reincarceration hearing. (1) Applicability. This section applies to a client who, on or after June 1, 1984, committed the crime for which he or she was sentenced, and to any other client who chose to have 1983 Wis. Act 528 apply to him or her.

(2) Amount of time available for reincarceration. (a) Before an agent requests a final revocation hearing under s. DOC 33 1.05, the agent shall, in writing, request the registrar of the institution which has the client's record to provide the amount of time remaining on the client's sentence, which is the entire sentence less time served in custody prior to release to field supervision.

(b) The agent shall notify the hearing examiner's office before the final revocation hearing of the amount of time available for reincarceration.

(3) Criteria. (a) The agent shall recommend to the hearing examiner a specific period of reincarceration upon revocation of a client's supervision. This amount of time shall be expressed in terms of days, months or years, or any combination of days, months and years. The amount of time may not be expressed in fractions or percentages of time periods. The agent shall send with his or her recommendation the reasons and facts consistent with the criteria listed in par. (b) that support the recommendation.

(b) The following criteria shall be considered by the agent in recommending a period of reincarceration and by the hearing examiner under sub. (4) (a) in determining the period of reincarceration:

1. The nature and severity of the original offense;

2. The client's institutional conduct record;

3. The client's conduct and behavior while on parole;

4. The period of reincarceration that would be consistent with the goals and objectives of field supervision under ch. DOC 328; and

5. The period of reincarceration that is necessary to protect the public from the client's further criminal activity, to prevent depreciation of the seriousness of the violation or to provide a confined correctional treatment setting which the client needs.

(c) The agent's supervisor shall review the agent's recommendation for a specific period of incarceration and the agent's recommendation shall be included in the client's chronological history along with the supervisor's comments on the recommendation.

(5) Records. Relevant records relating to reincarceration shall be maintained as part of the client's record.

History: Cr. Register, February, 1987, No. 374, eff. 3-l-87; removed (4) under 1989 Wis. Act 107.

Note: See ch. HA2 for replacement for sub. (4) subject matter.

DOC 331.15 Tolled time. (1) In this section, "tolled time" means the period of time between the date of a client's violation and the date the client's probation or parole is reinstated or revoked.

(2) The period of a client's probation or parole ceases to run during tolled time in accordance with s. 57.072, Stats., subject to sentence credit for time the client spent in custody pursuant to s. 973.155 (l), Stats. If a client is subsequently reinstated rather than revoked, time shall be tolled only if the reinstatement order concludes that the client did in fact violate the rules or conditions of his or her supervision.

(3) The amount of time to be tolled is officially determined by a hearing examiner or is the secretary's decision in accordance with s. DOC 33 1.13 or 33 1.14.

History: Cr. Register, February, 1987, No. 374, eff. 3-l-87.

DOC 331.16 Reinstatement. (1) General. Reinstatement may only take place in accordance with this section.

(2) Definition. For purposes of this section, "reinstatement" means the return of a client to field supervision after either:

(a) A client's personal written admission of a violation of the rules or conditions of supervision; or

(b) A finding by a hearing examiner or the secretary under this chapter that the client committed a violation of the rules or conditions of supervision sufficient to warrant revocation.

(3) Admission. (a) A client may knowingly and voluntarily make a written admission, signed and witnessed, of a violation of the rules or conditions of supervision sufficient to warrant revocation, and request reinstatement. The request shall acknowledge:

1. The date of the violation; and

2. That the client is aware that the period between the date of violation and the date of reinstatement or revocation may be tolled, i.e., the period of the client's commitment term ceases to run during this period of time.

(b) A staff member may accept a client's written admission and request, and shall submit it with the report under s. DOC 33 1.03 (4) to a supervisory staff member.

(c) The supervisory staff member shall decide whether to accept the admission and request, recommend reinstatement, and forward the admission, request and recommendation to the secretary for approval, or continue with revocation proceedings. Reinstatement shall only be recommended when it is consistent with the goals and objectives of supervision under ch. DOC 328. The recommendation shall include a statement of the reasons for it.

(d) The secretary shall decide within 5 working days after receiving an admission and request and the supervisory staff member's recommendation whether to order reinstatement. A copy of the secretary's decision, stating the reasons for it, shall be sent to the client and the supervisory staff member.

(e) If the secretary decides that reinstatement should not occur, the revocation process may be initiated in accordance with s. DOC 33 1.03.

(4) Finding of violation by hearing examiner. (a) Under s. DOC 33 1.05 (7), a hearing examiner may

order a client reinstated after finding that the client committed a violation of the rules or conditions of supervision. Reinstatement may only be ordered when it is consistent with the goals and objectives of supervision under ch. DOC 328. The order shall include a statement of the reasons for it.

(b) The date of a client's violation and the date that the client was reinstated shall be stated in the hearing examiner's order for reinstatement.

(c) A hearing examiner's order for reinstatement may be appealed to the secretary in accordance with s. DOC 33 1.05 (8) to (11).

(5) Records. Relevant records relating to a client's reinstatement shall be maintained as part of the client's records.

History: Cr. Register, February, 1987, No. 374, eff. 3-1-87.

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APPENDIX

Note: Providing a revocation procedure that is fair and effective, reasonably speedy and which does not hinder the overall correctional process is a difficult challenge. These objectives are sometimes in conflict. For example, it is important to give adequate and timely notice to a client and his or her attorney of revocation proceedings. At the hearings, the client should have the opportunity to examine and cross-examine witnesses. But there are costs involved in this. The period during which a client is subject to revocation proceedings can be very stressful. The client may be in custody. These 2 facts can seriously interrupt the correctional process. This is also true when a client is in an adversary relation to an agent, who probably will continue to supervise the client when the client returns to the community, or with parents, friends, or teachers who have information related to the revocation decision.

These are just a few examples of the issues that must be resolved in developing a fair, efficient revocation procedure that is consistent with these and the other objectives of this chapter.

The broad outlines for the revocation process have been drawn by the U.S. Supreme Court. This framework, which will be developed briefly here, leaves the state with some flexibility to devise a procedure that fairly resolves the sometimes conflicting goals of the supervision.

In Morrissey v. Brewer, 408 U.S. 471 (1972), the U.S. Supreme Court outlined the procedures for adult parole revocation. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the U.S. Supreme Court held that the procedures in Morrissey applied to the revocation of adult probation as well.

A final revocation hearing to determine whether the parolee violated and whether to revoke occurs within a reasonable time of a preliminary hearing under this chapter. While no specific time limit is set, it is the department's goal to hold the final hearing within 30 to 40 days of the preliminary hearing if the client is detained following the preliminary hearing. This is difficult to accomplish because of the shortage of hearing examiners, the difficulty of accommodating busy attorney's and agent's schedules, and the shortage of hearing rooms in county jails. It is clear that the public as well as the client have an interest in speedy revocation proceedings. These rules are intended to help expedite the process.

Revocation of parole under Morrissey requires an effective two-step process or a prompt final hearing. The hearing should be held within a reasonable time after a decision to pursue revocation at the preliminary hearing. The requirements for the hearing are:

(I) That the parolee must be given written notice of the alleged violations;

(2) That the parolee is entitled to disclosure of the evidence against him or her;

(3) That the parolee has the right to appear and speak on his or her own behalf;

(4) That the parolee has the right to present witnesses and evidence;

(5) That the parolee has the right to confront and cross-examine witnesses against him or her; and

(6) That the parolee has the right to receive a written decision, stating the reasons for it, based upon the evidence presented.

Morrissey gave the states flexibility to implement these requirements. The revocation procedures in this chapter reflect an attempt to provide a fair procedure that is also efficient and speedy.

Note: DOC 331.03. Subsection (1) states that a client may be revoked for violating the rules or conditions of supervision. The rules or conditions may proscribe an activity which is not in itself a violation of the criminal law. State v. Evans, 77 Wis. 2d 225 (1977). Some examples of violations for which revocation may result are failure to account for one's whereabouts, failure to report, absconding, leaving the state without an agent's permission, failure to notify an agent of a change of address, and consumption of alcoholic beverages. See e.g., State v. Garner, 54 Wis. 2d 100 (1972); State ex rel. Cressi v. Schmidt, 62 Wis. 2d 400 (1974); State ex rel. Solie v. Schmidt, 73 Wis. 2d 620 (1976); State ex rel. Prellwitz v. Schmidt, 73 Wis. 2d 35 (1976); State v. Evans, 77 Wis. 2d 225 (1977); State ex rel. Shock v. DDOC, 77 Wis. 2d 362 (1977); State ex rel. Flowers v. DDOC, 81 Wis. 2d 376 (1978); State v. Gerard, 57 Wis. 2d 611 (1973), appeal dismissed, 414 U.S. 804 (1973); State ex rel. Mulligan v. DDOC, 86 Wis. 2d 5 17 (1979).

Subsection (2) provides for an agent's investigation after an alleged violation. The investigation should be thorough since the information uncovered may form the basis of a decision to revoke a client's probation or parole. It should also be performed as soon as possible after the alleged violation so as not to cause undue interruption of a client's supervision. This is consistent with existing practice.

Subsection (3) states that an agent may recommend revocation or resolve minor alleged violations by alternatives to revocation. Experience teaches that the latter provision is necessary since minor, often excusable or unintended violations may occur that a are handled best by immediate action by the agent. For example, a client may fail to report at the prescribed time, but after investigation the agent may conclude that the failure was reasonable because the client was ill or misunderstood the reporting rule. Some criminal law violations, such as some motor vehicle offenses, also may not require revocation. Revocation may not be appropriate, but a review of the rules, counseling, or a warning may be desirable. Of course, if investigation proves the allegation groundless, that fact should be recorded and no action should be taken against the client. The alternatives noted under sub. (3) are derived from State ex rel. Plotkin v. DDOC, 63 Wis. 2d 535 (1973). The alternatives noted under sub. (3) (b) allow a decision-maker to exercise discretion on a case by case basis which is necessary to provide fairness and satisfy the goals under this chapter.

Subsection (4) requires an agent to report all alleged violations to his or her supervisor. Alleged violations, with any action taken under sub. (3) may be appropriately reported in a chronological log summary. However, if revocation is recommended, the agent should submit a report directly to the agent's supervisor. All of the information required under this subsection need not be included in a single written report.

Note: DOC 331.04. Section DOC 33 1.04 specifies the steps to be taken in a preliminary hearing. If the client waives the preliminary hearing, the final hearing should be held as soon as practicable.

Subsection (1) states that the only purpose of a preliminary hearing is to determine whether there is probable cause to believe the client committed the alleged violation. This narrow focus complies

with constitutional requirements while ensuring that the preliminary hearing will not duplicate the final hearing.

Subsection (2) specifies the times when it is not necessary to hold a preliminary hearing because there is no necessity to determine probable cause. Courts applying Morrissey and Scarpelli have concluded that the right to a preliminary hearing is not absolute. There is no right to a preliminary hearing when there has been no loss of conditional liberty. Therefore, there is no right to a preliminary hearing when the department has not detained the client pending the final revocation hearing (United States v. Scuito, 53 1 F.2d 842, 846 (7th Cir. 1976)). Other circumstances in which there has been no loss of conditional liberty, and therefore no right to a preliminary hearing, include those in which the client is already incarcerated pursuant to a valid conviction on another charge, United States v. Langford, 369 F. Supp. 1107, 1108 (N. D. Ill. E.D. 1973); Moody v. Daggett, 429 U.S. 78, 86, note 7 (1976). One court has found that a preliminary hearing is not required when the client is detained only briefly, United States v. Basso, 632 F.2d 1007, 1012-13 (2d Cir. 1980), cert. denied 450 U.S. 965 (198 1).

There is no right to a preliminary hearing when some other body already has determined that there is probable cause to believe that the person has committed the violation complained of. The Supreme Court stated in Morrissey that a parolee "obviously . . . cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." Morrissey, 408 U.S. at 490, 92 S. Ct. at 2605. Courts have interpreted this language to mean that a preliminary hearing is not required where the person has been convicted of a crime upon which the probation or parole revocation is based because conviction conclusively establishes the fact of violation, Jones v. Johnston, 534 F.2d 353,357 (D.C. Cir. 1976), Moody v. Daggett, 429 U.S. 78 (1976), United States ex rel. Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1977); where another authorized body has determined that probable cause exists, United States v. Strada, 503 F.2d 108 1, 1084 (8th Cir. 1974); where the facts conclusively establish that probable cause exists, as, for example, in the situation where the client is arrested in another state for violating a condition that the client not leave the client's own state without the agent's permission, Stidham v. Wyrick, 567 F.2d 836, 837-38 (8th Cir. 1977), Barton v. Malley, 626 F.2d 15 1, 159 (10th Cir. 1980), but see U.S. v. Companion, 454 F.2d 308 (2d Cir. 1976) in which a preliminary hearing was required even where a probationer was arrested in a distant state and a condition of parole was that he not travel; where the person pleads guilty to the crime underlying a revocation, Reese v. United States Board of Parole, 530 F.2d 23 1,234 (9th Cir. 1976); and where the person admits the violation in a signed statement, suggested in Morrissey v. Brewer, supra, 408 U.S. at 476-77, 92 S. Ct. at 2598, and State ex rel. Beougher v. Lotter, 91 Wis. 2d 321, 328, 283 N.W.2d 588 (Ct. App. 1979).

Subsection (4) provides for notice of the preliminary hearing. Where applicable, the division's bureau of adult institutions should notify the state public defender's office of the hearing as soon as possible. If the supervisor reviews the report submitted by an agent and concludes that a hearing is necessary, notice of the hearing should be sent to the client, the client's attorney, if any, and agent. The notice must state the rights that the client has at the hearing. The notice and list of rights are in substantial accord with existing practice and Morrissey.

The preliminary hearing provides only a qualified right to an attorney. If an attorney fails to appear at the hearing, the hearing examiner may either proceed with the hearing or postpone the hearing upon determining that the client is entitled to an attorney. Criteria for that decision are taken from Gagnon v. Scarpelli, 411 U.S. 778 (1973). This requirement attempts to accommodate both the need for an attorney and the need to hold the preliminary hearing quickly. Past practice has shown that many preliminary hearings are delayed because counsel fails to appear. Any delays due to client's counsel's failure to appear will not be counted against the department. See Barker v. Wingo, 407 U.S. 514 (1972).

Subsection (5) explains when taking a client into custody pending final revocation is appropriate. A client may not be detained without limit. In State ex rel. Sims v. Sielaff, 563 F.2d 821 (7th Cir.

1972), the court held that a client's right to release pending revocation should be determined according to the speedy trial standards of Barker v. Wingo, 407 U.S. 5 14 (1972). The relevant but not exclusive factors are:

1. The length of the delay;

2. The reasons for the delay (e.g., whether attributable to the revokee or the state);

3. The assertion of the right to a speedy hearing; and

4. Possible prejudice.

The court recognized the difficult balancing test required. The state must justify the delay, except where the delay is due to the client's own actions. Even then, the state has the duty to proceed expeditiously. A client in custody elsewhere on other convictions or unrelated cases suffers no deprivation of protected liberty sufficient to invoke the due process right to an immediate hearing on the issue of revocation. "The linchpin of & [Moody v. Daggett, 429 U.S. 79 (1976)] is that no process is due a parolee facing revocation until his life, liberty, or property interests are impaired by the revocation proceedings." Sims at 826.

The criteria under this subsection for taking a client into custody and detaining the client, along with the reasonable time limits imposed for the revocation process, should not unfairly deprive a client of conditional liberty under supervision. When, through the actions of the client, his or her attorney, or the department, the time periods are exceeded, the Barker factors to consider the reasonableness of the delay and further detention must be taken into account.

Subsection (6) sets the time limits for initiating the preliminary hearing. Timeliness is important to ensure the prompt gathering and preservation of evidence and to ensure the speedy resolution of the allegations which may enable the client to continue with supervision without undue interruption. These limits are consistent with the requirement under Morrissey. This subsection also requires a review in an area of the state close to the arrest or alleged violation to permit the client to prepare a defense and to put it on the record before memories have dimmed and before he or she is removed to a distant part of the state. State ex rel. Flowers v. DDOC, 8 1 Wis. 2d 376 (1978). However, where an alleged violation has occurred at a distant location, there are acceptable alternatives to holding the review at the place of the alleged violation. For example, transporting witnesses to the hearing or, where appropriate, conventional substitutes for live testimony including affidavits, depositions, and documentary evidence, may be resorted to, consistent with the requirement of due process. State ex rel. Harris v. Schmidt, 69 Wis. 2d 668 (1975).

Subsection (8) allows the department to reissue a notice when there are mistakes in the notice that do not affect the substance of the preliminary hearing but cause the notice to be dismissed. It also allows the department to reissue a dismissed notice if the department discovers relevant new information about the alleged violation. This information must not have been known to the department prior to issuance of the first notice. It may not be information that was known but not used.

Note: DOC 331.06. This section provides the procedure for revocation when the client has waived the right to a preliminary hearing, or a preliminary hearing and final hearing. A supervisory staff member should assemble all relevant information and documents and forward them for review by the secretary. Experience teaches that the secretary's decision usually results in revocation. The department is encouraged to ask a client to have the assistance of legal counsel before accepting such waivers. Sometimes, however, this is not possible and uncounseled waivers are permitted.

Note: DOC 331.07. This section provides the supervisor with the authority to terminate revocation proceedings without revocation. For example, if clear evidence arises that the client did not commit the alleged violation, proceedings should be halted.

Note: DOC 331.08. This section provides for concurrent revocation and prosecution proceedings. **See 65** Op. Atty. Gen. 20 (1976).

Delays in the revocation process may cause undue anxiety for the client, and may cause severe interruptions in supervision. It is in the client's interests to obtain a speedy informed decision regarding revocation.

The few court cases found on the subject of acquittals have taken the position that an acquittal in a criminal proceeding does not preclude revocation of supervision on the same charge because of the differences in nature of the 2 proceedings and to the different levels of proof involved therein. See, e.g., Johnson v. State, 240 Ga. 526,242 S.E. 2d 53 (1978), Bemal-Zazueta v. U.S., 225 F.2d 60 **(1955).**

Note: DOC 331.09. This section provides for accurate recordkeeping of revocation actions.

For further information regarding client transport under s. DOC 33 1.10, see DOC 328.23.

Note: DOC 331.11. This section provides the procedures for revocation for those clients on probation or parole committed under ss. 161.47 and 971.17, Stats., and ss. 54.04 and 54.07, Stats. (1975). Special revocation procedures for these clients are provided for under ss. 161.47 (l), 97 1.17 (2) and (3), Stats., and ss. 54.05 and 54.11, Stats. (1975). This section is consistent with these statutory provisions and the goals and objectives under this chapter.

This chapter is in substantial accord with the American Correctional Association's Manual of Standards for Adult Probation and Parole Field Services (1977), standards 3 141-3 144 and 3 146; the American Correctional Association's Manual of Standards for Adult Parole Authorities (1976), standards 1098- 1104; the American Bar Association's Standards Relating to Probation (Approved Draft, 1970) standards 5.1 and 5.4; and 15 Cal. Adm. Code, 2616-2618,2635,2636(a) and (b), 2643, **2645-2646,2665-2667,2668(a),** (b), and (c).

Note: DOC 331.13. This section applies to clients who are not subject to 1983 Wisconsin Act 528 because they committed crimes before June 1, 1984, and did not choose to have the act apply to them. Clients on discretionary or mandatory release parole who are not subject to Act 528 and who have their supervision revoked under this chapter are entitled to a forfeiture hearing under this section. The hearing is held to determine the amount of good time credit a client should forfeit, if any, and whether good time may be earned on the amount forfeited as a result of a violation.

To ensure a fair, effective, and reasonably speedy revocation and forfeiture process which does not hinder the correctional process, several important features have been incorporated into this section.

First, an agent must contact the registrar from the institution which has the client's record prior to the preliminary hearing to determine the amount of time available for forfeiture. The amount of time may significantly affect the client's decision to waive his or her rights to a final revocation hearing under this chapter, the client's interest in proposing alternatives to revocation, as well as the supervisory staff member's and hearing examiner's decision to pursue revocation. Hence, the amount of good time available for forfeiture must be included in the notice of the hearing.

Second, the agent must recommend that a specific amount of time be forfeited and whether good time may be earned in the future on the amount forfeited. For the reasons stated above, this should be included in the notice of the final revocation hearing and the forfeiture hearing and in the client's record.

Third, unless it is waived by the parolee, a good time forfeiture hearing must be held during or immediately after a final revocation hearing, or within a reasonable time after a secretary's decision to revoke a client's parole. Since the factual basis for loss of good time credit has been adequately and fairly explored at the final revocation hearing or by the secretary, and since a final written

decision to revoke must exist prior to an effective forfeiture decision, additional procedures are unnecessary. Sillman v. Schmidt, 394 F. Supp. 1370 (W.D. Wis. 1975).

Fourth, the department must exercise good judgment in determining how much good time, if any, the parolee will forfeit and whether good time may be earned in the future on the amount forfeited. Putnam v. McCauley, 70 Wis. 2d 256 (1975). (The decision in Putnam is not retroactive. State ex. rel. Renner v. DDOC, 71 Wis. 2d 112 (1976).) Only that much time should be forfeited as will achieve the goals and purposes of revocation.

See DOC 33 1.15 for a discussion of tolled time.

Note: DOC **331.14.** This section applies to clients who are subject to 1983 Wisconsin Act 528 because they committed crimes on or after June 1, 1984, or because they chose to have the act apply to them. Clients on discretionary or mandatory release parole who are subject to the act and who have their supervision revoked under this chapter are entitled to a reincarceration hearing. The hearing is held to determine how much, if any, of the remainder of a client's sentence he or she should serve in prison. The remainder of a client's sentence is the entire sentence, less time served in custody prior to release. To ensure a fair, effective, and reasonably speedy revocation and reincarceration decision which does not impede the correctional process, features similar to the forfeiture hearing procedures described in s. DOC 33 1.13 have been incorporated into this section.

[fc note DOC 33 1.15. Time is only "tolled" for clients whom the department decides have violated terms of their probation or parole sufficiently to warrant revocation. A client who commits a violation loses credit for having served time on his or her sentence for the days between the date of the violation, as determined by the agent, and the date of a decision to reinstate or revoke. For example, a client who absconds for 6 months, and is returned to custody for an additional 3 months before a decision on revocation is rendered, is tolled 9 months. However, the time the client is in custody between the violation and the reinstatement decision is credited back to the client. The client in the example would get back 3 months of the 9 months tolled, for an effective tolled time of 6 months. This effective tolled time is then added to the end of the client's period of commitment to the department. The client in the example would remain under the department's custody for 6 months longer than the court initially ordered. See ss. 57.072 and 973.155, Stats., for further explanation.

Section 57.072, Stats., provides for a tolling of time on a client's probation or parole during the period of time between the effective date of a client's violation and the date that the client's supervision was reinstated or revoked subject to credit for time spent in custody in accordance with s. 973.155 (1), Stats.

Note: DOC 331.16. Reinstatement is an alternative to revocation of a client's supervision after a finding or admission that the client violated the rules or conditions of supervision.

Subsections (3) and (4) provide the only procedures for reinstatement. A client who has been given notice of revocation proceedings under this chapter may be reinstated by the hearing examiner or secretary. Reinstatement in lieu of any pending revocation proceedings is also possible. But here, it is important to provide the client wishing to admit he or she committed the violation with complete information regarding the consequences of such an action, e.g., the exact period of time that will be tolled and the amount of good time that may be forfeited or the period of reincarceration that may be ordered if reinstatement is ordered. It is only when the client is aware of the consequences of an admission and request for reinstatement that it may be knowingly and intelligently given. In addition, an admission and request must not be coerced. Only voluntary admissions and requests for reinstatement may be accepted.

The secretary may make the final decision about reinstatement to provide for uniformity and fairness in decisionmaking.

See s. DOC 33 1.15 regarding tolled time.

PROPOSED CHANGES TO HA 2.05 REVOCATION HEARING

HA 2.05 Revocation hearing

(7) DECISION. (a) The administrative law judge shall consider only the evidence presented in making the decision.

(b) The administrative law judge shall:

1. Decide whether the client committed the conduct underlying the alleged violation;

2. Decide, if the client committed the conduct, whether the conduct constitutes a violation of the rules or conditions of supervision;

3. Decide, if the client violated the rules or conditions of supervision, whether revocation should result or whether there are appropriate alternatives to revocation. Violation of a rule or condition is both a necessary and a sufficient ground for revocation of supervision. Revocation may ~~not~~ be ordered ~~the disposition, however, if~~ ~~unless~~ the administrative law judge finds on the basis of the original offense, the offender's criminal history and/or juvenile contacts, and the intervening conduct of the client that:

   a. Confinement is necessary to protect the public from further criminal activity by the client; or
   b. The client is in need of correctional treatment which can most effectively be provided if confined; or
   c. It would unduly depreciate the seriousness of the violation if supervision were not revoked.

4. Decide, if the client violated the rules or conditions of supervision, whether or not the department should toll all or any part of the period of time between the date of the violation and the date an order is entered, subject to credit according to s. 973.155, Stats.

5. Decide, if supervision is revoked, whether the client is entitled to any sentence credits under s. 973.155, Stats.

(c) If the administrative law judge finds that the client did not violate the rules or conditions of supervision, revocation shall not result and the client shall continue with supervision under the established rules and conditions.

(d) The administrative law judge shall issue a written decision based upon the evidence with findings of fact and conclusions of law stating the reasons to revoke or not revoke the client's probation or parole. The administrative law judge may, but is not required to, announce the decision at the hearing.

(a) If an administrative law judge decides to revoke the client's parole, the decision shall apply the criteria established in s. HA 2.06 (6)(b) and shall include a determination **of**

1. Good time forfeited, if any, under ss. DOC 302.23 and 302.24 and, for mandatory release parolees, whether the client may earn additional good time; or
2. The period of reincarceration, if any, under s. DOC 302.25.

(b) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing to the client, the client's attorney, if any, and the department's representative. An extension of 5 days is permitted if there is cause for the extension and the administrative law judge notifies the parties of the reasons for it.

(c) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the client's attorney, if any, or the department's representative files an appeal under sub. (8).

Chapter HA 2

PROCEDURE AND PRACTICE FOR CORRECTIONS HEARINGS

Note: For a further explanation of the provisions in ch. HA 2, see the appendtx following the last section of this chapter.

HA 2.01 Application of rules. (1) AUTHORITY. These rules are promulgated under the authority of s. 301.035 (5), Stats., and interpret ss. 48.357 (5), 302.11 (7), 973.09, 973.10, 973.155, 975.10 (2) and ch. 304 Stats.

(2) SCOPE. This chapter applies to corrections hearings under ss. 302.11 (7), 973.10, 975.10 (2) and ch. 304 Stats. The procedural rules of general application contained in this chapter also apply to youth aftercare revocation proceedings in any situation not specifically dealt with in ch. HSS 343.

History: Cr. Register, December. 1991, No. 432, eff. l-1-92.

HA 2.02 Definitions. For purposes of this chapter:

(1) "Administrative law judge" means an administrative hearing examiner employed by the division of hearings and appeals.

(2) "Administrator" means the administrator of the division of hearings and appeals.

(3) "Client" means the person who is committed to the custody of the department of corrections and is the subject of the corrections hearing.

(4) "Conditions" means specific regulations imposed on the client **by** the court or department.

(5) "Day" means any working day, Monday through Friday, excluding legal holidays, except as specifically provided otherwise in s. HA 2.05 (4) (a).

(6) "Department" means the department of corrections.

(7) "Division" means the division of hearings and appeals.

(8) "Revocation" means the removal of a client from probation or parole or youth aftercare supervision.

(9) "Rules" means those written department regulations applicable to a specific client under supervision.

(10) "Supervision" means the control and supervision of clients exercised by the department of corrections.

History: Cr. Register, December, 1991, No. 432, eff. l-l-92.

HA 2.03 Service of documents. (1) BY THE DIVISION The division may serve decisions, orders, notices and other documents by first class mail, inter-departmental mail or by facsimile transmission.

(2) BY A PARTY. Materials filed by a party with the division may be served personally or by first class, certified or registered mail, inter-departmental mail or by facsimile transmission. All correspondence, papers or other materials submitted by a party shall be served on the same date by that party on all other parties to the proceeding. No affidavit of mailing, certification, or admission of service need be filed with the division.

(3) FILING DATE. Materials mailed to the division shall be considered filed with the division on the date of the postmark. Materials submitted personally or by inter-departmental mail shall be considered filed on the date they are received by the division. Materials transmitted by facsimile shall be considered filed on the date they are received **by** the division as recorded on the division facsimile machine.

History: Cr. Register, December, 1991, No 432, eff. l-l-92.

HA 2.04 Witnesses and subpoenas. An attorney may issue a subpoena to compel the attendance of witnesses under the same procedure as provided by s. 805.07 (I), Stats. If a party IS not represented by an attorney, the division or the administrative law judge may issue subpoenas as provided in ch. 885, Stats.

History: Cr. Register, December, 1991, No. 432, eff. l-1-92.

HA 2.05 Revocation hearing. (1) NOTICE. Notice of a final revocation hearing shall be sent by the division within 5 days of receipt of a hearing request from the department to the client, the client's attorney, if any, and the department's representative. The notice shall include:

(a) The date, time, and place of the hearing;

(b) The conduct that the client is alleged **to** have committed and the rule or condition that the client is alleged to have violated;

(c) A statement of the rights established under sub. (2);

(d) Unless otherwise confidential or disclosure would threaten the safety of a witness or another, a list of the evidence and witnesses to be considered at the hearing which may include reference to:

I. Any documents;

2. Any physical or chemical evidence;

3. Results of a breathalyzer test;

4. Any incriminating statements by the client;

5. Police reports regarding the allegation;

6. Warrants issued; and

7. Photographs;

(e) A statement that whatever information or evidence is in the possession of the department is available from the department for inspection unless otherwise confidential;

(f) In parole revocation cases:

1. The department's recommendation for forfeiture of good time under ss. DOC 302.23 and 302.24 and any sentence credit in accordance with s. 973.155, Stats.; or

2. The department's recommendation for a period of reincarceration under s. DOC 302.25 and any sentence credit in accordance with s. 973.155, Stats.

(2) AMENDMENTS. Any notice information required under s. HA 2.05 (1) may be amended and additional allegations may **be** added by the department if the client and the attorney, if any, are given written notice of the amendment at least 5 days prior to the hearing and the amendment does not materially prejudice the client's right to a fair hearing.

(3) CLIENT'S RIGHTS. The client's rights at the hearing include:

(a) The right to be present;

(b) The right to **deny** the allegation;

(c) The right to be heard and to present witnesses;

(d) The right to present documentary evidence;

(e) The right to question witnesses;

(f) The right to the assistance of counsel;

(g) The right to waive the hearing;

(h) The right to receive a written decision stating the reasons for it **based** upon the evidence presented; and

(i) The right to appeal the decision in accordance with sub. (8).

(4) TIME. (a) If a client is detained in a county jail or other county facility pending disposition of the hearing, the division shall begin a hearing within 50 calendar days after the person is detained by the department in the county jail or county facility. If not so detained, the hearing shall begin within a reasonable time from the date the hearing request is received.

(b) A hearing may be rescheduled or adjourned for good cause taking into consideration the following factors:

1. The timeliness of the request;
2. The reason for the change;
3. Whether the client is detained;
4. Where the client is detained;
5. Why the client is detained;
6. How long the client has been detained;
7. Whether any party objects;
8. The length of any resulting delay;
9. The convenience or inconvenience to the parties, witnesses and the division; and
10. Whether the client and the client's attorney, if any, have had adequate notice and time to prepare for the hearing.

(c) Any party requesting that a hearing be rescheduled shall give notice of such request to the opposing party.

(5) PROTECTION **OF A WITNESS.** (a) The identity of a witness may be withheld from the client if disclosure of the identity would threaten the safety of the witness or another.

(b) Testimony of a witness may be taken outside the presence of the client when there is substantial likelihood that the witness will suffer significant psychological or emotional trauma if the witness testifies in the presence of the client or when there is substantial likelihood that the witness will not be able to give effective, truthful testimony in the presence of the client at hearing. The administrative law judge shall indicate in the record that such testimony has been taken and the reasons for it and must give the client an opportunity to submit questions to be asked of the witness.

(c) The hearing examiner [administrative law judge] shall give the client and the client's attorney an opportunity on the record to oppose protection of a witness before any such action is taken.

(6) PROCEDURE (a) The hearing may be closed to the public and shall be conducted in accordance with this chapter. The alleged violation shall be read aloud, and all witnesses for and against the client, including the client, shall have achance to speak and respond to questions.

(b) The administrative law judge shall weigh the credibility of the witnesses.

(c) Evidence to support or rebut the allegation may be offered. Evidence gathered by means not consistent with ch. DOC 328 or in violation of the law may be admitted as evidence at the hearing.

(d) The administrative law judge may accept hearsay evidence.

(e) The rules of evidence other than ch. 905, Stats., with respect to privileges do not apply except that unduly repetitious or irrelevant questions may be excluded.

(f) The department has the burden of proof to establish, by a preponderance of the evidence, that the client violated the rules or conditions of supervision. A violation is proven by a judgment of conviction arising from conduct underlying an allegation.

(g) The administrative law judge may take an active role to elicit facts not raised by the client or the client's attorney, if any, or the department's representative.

(h) Alternatives to revocation and any alibi defense offered by the client or the client's attorney, if any, shall be considered only if the administrative law judge and the department's representative have received notice of them at least 5 days before the hearing, unless the admmistrative law judge allows a shorter notice for cause.

(i) The admmistrative law judge may issue any necessary recommendation to give the department's representative and the client reasonable opportunity to present a full and fair record.

(7) DECISION. (a) The administrative law judge shall consider only the evidence presented in making the decision.

(b) The administrative law judge shall:

1. Decide whether the client committed the conduct underlying the alleged violation;

2. Decide, if the client committed the conduct, whether the conduct constitutes a violation of the rules or conditions of supervision;

3. Decide, if the client violated the rules or conditions of supervision, whether revocation should result or whether there are appropriate alternatives to revocation. Violation of a rule or condition is both a necessary and a sufficient ground for revocation of supervision. Revocation may not be the disposition, however, unless the administrative law judge finds on the basis of the original offense and the intervening conduct of the client that:

a. Confinement is necessary to protect the public from further criminal activity by the client; or

b. The client is in need of correctional treatment which can most effectively be provided if confined; or

c. It would unduly depreciate the seriousness of the violation if supervision were not revoked.

4. Decide, if the client violated the rules or conditions of supervision, whether or not the department should toll all or any part of the period of time between the date of the violation and the date an order is entered, subject to credit according to s. 973.155, Stats.

5. Decide, if supervision is revoked, whether the client is entitled to any sentence credits under s. 973.155, Stats.

(c) If the administrative law judge finds that the client did not violate the rules or conditions of supervision, revocation shall not result and the client shall continue with supervision under the established rules and conditions.

(d) The administrative law judge shall issue a written decision based upon the evidence with findings of fact and conclusions of law stating the reasons to revoke or not revoke the client's probation or parole. The administrative law judge may, but is not required to, announce the decision at the hearing.

(e) If an administrative law judge decides to revoke the client's parole, the decision shall apply the criteria established in s. HA 2.06 (6) (b) and shall include a determination of:

1. Good time forfeited, if any, under ss. DOC 302.23 and 302.24 and, for mandatory release parolees, whether the client may earn additional good time; or

2. The period of reincarceration, if any, under s. DOC 302.25.

(f) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing to the client, the client's attorney, if any, and the department's representative. An extension of 5 days is permitted if there is cause for the extension and the administrative law judge notifies the parties of the reasons for it.

(g) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the client's attorney, if any, or the department's representative files an appeal under sub. (8).

(8) **APPEAL** (a) The client, the client's attorney, if any, or the department representative may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision.

(b) The appellant shall submit a copy of the appeal to the other party who has 7 days to respond.

(9) **ADMINISTRATOR'S DECISION.** (a) The administrator may modify, sustain, reverse, or remand the administrative law judge's

decision based upon the evidence presented at the hearing and the materials submitted for review.

(b) The administrator shall forward a written appeal decision to the client, the client's attorney, if any, and the department's representative within 21 days after receipt of the appeal, unless the time is extended by the administrator.

History: Cr. Register, December, 1991. No. 432. eff. l-l-92: am. (8) (a), Register, August, 1995, No. 476, eff. 9-l-95.

HA 2.06 Good time forfeiture and reincarceration hearings. (1) APPLICABILITY. This section applies to good time forfeiture hearings under ss. DOC 302.23 and 302.24 and reincarceration hearings under s. DOC 302.25 when the client has waived his or her right to a final revocation hearing.

(2) HEARING Following receipt of a request from the department for a good time forfeiture or reincarceration hearing, the division shall conduct a hearing at the client's assigned correctional institution to determine the amount of good time to be forfeited or the period of reincarceration. In the case of good time forfeitures for mandatory release parolees, the division shall also determine whether or not good time may be earned on the forfeited good time.

(3) **NOTICE.** (a) Notice of the hearing shall be sent to the client, the client's agent and the correctional institution.

(b) The notice shall include:

1. The date, time, place of the hearing and the amount of time available for forfeiture or reincarceration, and;

2. A statement of the client's rights as established under sub. (4).

(4) **CLIENT'S RIGHTS.** client has the following rights at the hearing:

(a) To be present at the hearing;

(b) To speak and respond to questions from the administrative law judge, and;

(c) To present written or documentary evidence.

(5) PROCEDURE. (a) The hearing shall be closed to the public.

(b) The administrative law judge shall read aloud the department's recommendation and may admit into evidence the client's institutional conduct record, any documents submitted by the department and any written, oral or documentary evidence presented by. the client.

(6) DECISION. (a) The administrative law judge shall consider only the evidence presented at the hearing in making the decision.

(b) The following criteria shall be considered by the administrative law judge in determining the amount of good time forfeited or the period of reincarceration:

1. The nature and severity of the original offense;

2. The client's institutional conduct record;

3. The client's conduct and behavior while on parole;

4. The amount of good time forfeiture or the period of reincarceration that is necessary to protect the public from the risk of further criminal activity, to prevent the undue depreciation of the seriousness of the violation or to provide confined correctional treatment.

(c) The administrative law judge shall decide:

1. In the case of good time forfeiture hearings under ss. DOC 302.23 and 302.24, whether good time should be forfeited, the amount of such forfeiture and, for mandatory release parolees, whether or not good time may be earned on the amount forfeited, or;

2. In the case of reincarceration hearings under s. DOC 302.25, the period of reincarceration.

3. In either case, sentence credit in accordance with s. 973.155 (1), Stats.

(d) The administrative law judge's decision shall be written and forwarded within 10 days after the hearing to the client, the department's representative and the correctional institution.

(e) The administrative law judge's decision shall take effect and be final 10 days after the date it is issued unless the client or the department files an appeal under sub. (7).

(7) APPEAL The client or the department may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision. If an appeal is filed, the administrative law judge shall prepare a synopsis of the testimony and forward it to the administrator for review. The synopsis may be either written or electronically recorded. The appellant shall submit a copy of the appeal to the other party who has 7 days to respond.

(8) ADMINISTRATOR'S DECISION. (a) The administrator may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review.

(b) The administrator shall forward a written appeal decision to the client and the department's representative within 21 days after receipt of the appeal, unless the time is extended by the administrator.

History: Cr. Register, December. 1991, No. 432, eff l-l-92.

HA 2.07 Transcripts. Hearings shall be recorded electronically. The division shall prepare a transcript of the testimony only at the request of a judge who has granted a petition for certiorari review of a revocation decision or upon prepayment of the cost of transcription of the record billed at $2.50 for each page of transcribed material. Any party may also record the hearing at his or her own expense.

History: Cr. Register, December, 1991, No. 432, eff. l-l-92; am. Register, August, 1995, No. 476, eff. 9-l-95.

HA 2.06 Harmless error. If any requirement of this chapter or ch. DOC 328 or 33 1 is not met, the administrative law judge or administrator may deem it harmless and disregard it if the error does not affect the client's substantive rights. Substantive rights are affected when a variance tends to prejudice a fair proceeding or disposition.

History: Cr. Register, December, 1991, No. 432, eff l-l-92

Chapter HA 2

APPENDIX

1989 Wis. Act 107 transferred responsibihty for corrections related hearings from the department of health and social services to the division of hearings and appeals on January 1, 1990. These rules fulfill the legislative mandate of 1989 Wis. Act 107 and recreate procedural rules to govern corrections hearings. They replace ss. HSS 3 1.05, 3 1.13 (4) and 3 1.14 (4),Wis. Adm. Code. Although these rules are largely taken from the HSS rules, some revisions are made and some new provisions are created to address subjects not covered by the previous rules. Unless otherwise noted, the changes are intended to simplify and clarify the rules and are not meant to change the original intent. The remaining portions of ch. HSS 3 1 dealing with substantive probation and parole issues have been separately promulgated by the department of corrections in ch. DOC 33 1.

Note: HA 2.01 APPLICATION OF RULES. Section 227.03 (4), Stats., provides that the contested case provisions of ch. 227 do not apply to proceedings involving the revocation of parole or probation. Accordingly, it is intended that the provisions of ch. HA 1 not apply in corrections proceedings.

Note: HA 2.02 DEFINITIONS. The definitions come from ch. DOC 328. The definition of has been clarified to mean actual working days in conformity with practice and its usage in s. HSS 31.05. The term is new.

Note: HA 2.03 SERVICE OF DOCUMENTS. This section is new and will permit the parties to file documents by regular first class mail,inter–departmental mail and by facsimile transmission in addition to the more formal methods of personal service, registered or certified mail. The changes are intended to reduce administrative costs associated with the hearing process and to give the parties the convenience of filing documents by facsimile transmission. The mailing address of the division is: 5005University Ave., Suite 201, Madison, WI 53705-5400. The facsimile transmission number of the division is: (608) 267-2744.

Note: HA 2.04 WITNESSES AND SUBPOENAS. These rules will allow attorneys to issue subpoenas under the same procedure as provided by s. 805.07 (1), Stats. Although the division reserves the right to issue subpoenas directly, the attorneys are in a better position to issue the necessary subpoenas and the division's responsibility should be limited to cases where a party is not represented by an attorney or where the division is asked to modify or cancel a subpoena.

Note: HA 2.05 REVOCATION HEARINGS. This section replaces s. HSS 31.05 which was developed in 1981 from the broad outlines of the revocation process drawn by the U.S. Supreme Court in Morrissey v .Brewer, 411U.S. 778 (1973). Like the prior rules, these rules reflect an attempt to provide a fair hearmg procedure that is also efficient and speedy.

Subsection (1) is patterned after s. HSS 3 1.05 (1) and requires the notice of hearing to be issued within 5 working days of receipt of the hearing request. Subsection (1) (b) has been revised to clarify that the notice must contain a statement of the alleged violation in addition to the rule or condition violated. Subsection (1) (d) reflects actual practice and clarifies that only a listing of evidence and witnesses is required. It also allows the department to withhold disclosure of such information if it IS confidential or if disclosure would threaten the safety of a witness or another. Subsection(1) (e) clarifies that prehearing disclosure of evidence should come from the department rather than from the division. The former provision which required identification of unavailable witnesses in the notice has been eliminated because: such information is rarely, if ever, known to the department at the time the notice is issued; these issues can be better addressed at the hearing, and; witnesses are otherwise identified under sub. (1) (d).

State ex rel. Flowers v. DHSS, 81 Wis. 2d 376 (1978).

Subsection (3) is taken from s. HSS 3 1.05 (1) (h).

Subsection (4) replaces s. HSS 31.05 (3) and recognizes the requirement that hearings for persons confined in a county facility must begin within 50 calendar days of detention as mandated by s. 302.335, Stats. Subsection (4) (b) replaces the former rule of s. HSS 3 1.05 (3)(b), incorporates factors necessary to determine compliance with s. 302.335,Stats., and incorporates postponement criteria used by courts as summarized in rule is unworkable because many valid reasons for postponements arise more than 5days after the notice is issued. The division does not interpret s. 302.335,Stats., or s. HA 2.05 (4) as a jurisdictional time limit.

Subsection (5) replaces s. HSS 31.05 (4) and creates new special protective procedures for witnesses in light of the decision in 150 Wis. 2d 374 (1989). Although the confrontation rights applicable in a revocation hearing are not the same as those in a criminal proceeding,the standards and criteria for special protective procedures described in are informative and have provided the basis for these revised procedures. This section is broader than Thomas,however, in that it applies to all witnesses whenever the requisite need is established. This subsection is intended to permit use of protective procedures such as a screen, one-way mirror, televised or video taped testimony and, if necessary, exclusion of a client from the hearing room when such action is necessary to protect a witness from the substantial likelihood of significant psychological or emotional trauma or to enable a witness to give effective, truthful testimony at the hearing.

Subsection (6) presents a description of what is to occur at the hearing. The provision that the hearings are not open to the public reflects the historical fact that the hearings most often occur in a jail or other secure detention facility and the belief that such hearings are not a as those terms are used in s. 19.82,Stats. The rule on the inapplicability of the rules of evidence comes from s. 911 .01 (4) (c), Stats. The rule that a judgment of conviction conclusively proves a violation comes from State ex rel. Flowers v. H&SS Department, Morrissey v. Brewer, 408 U.S. 471, 484 (1972)and reflects a belief that a parolee or probationer should not be allowed to relitigate issues determined in other forums, as in the situation presented when the revocation is based on conviction of another crime. No distinction is made between judgements resulting from trial and those resulting from a plea.

Subsection (7) replaces s. HSS 3 1.05 (6). The revocation criteria of sub. (7) (b) 3 come from the holding in State ex rel. Plotkin v. H&SS Department, 63 Wis. 2d 535 (1974) and replace the former language found at s. HSS 31.05 (6) (b) 4. The changes are appropriate to clarify the criteria and to clarify that revocation may occur if the administrative law judge finds that any one of the criteria is met and that there are no appropriate alternatives to revocation. The former provision of s. HSS 3 1.05 (6) (c), citing the goals and objectives of supervision under ch. DOC 328, has been eliminated because it was not in complete harmony with the criteria and generated confusion over the revocation standard. Tolled time is permitted by s. 304.072, Stats. Sentence credit is required under s. 973.155, Stats.

Subsection (8) replaces s. HSS 3 1.05 (9) and (10). Prior to January 1, 1990, revocation appeals were reviewed by the secretary of the department of health and social services. These rules direct that such appeals be reviewed by the division administrator as provided in s. 301.035 (4), Stats. The administrator's decision is the final decision and is not subject to further administrative review. The appeal, including all supporting materials and arguments, must be filed by the appellant within 10 working days of the decision. The opposing party then has 7 working days to respond. The parties are not responsible for assembling the record.

Subsection (9) replaces s. HSS 3 1.05 (1 I). In the past, the secretary of the department of health and social services had 7 working days to decide the appeal from the date the secretary received the record and synopsis from the department's office of administrative hearings. Since assembly of the record and preparation of the synopsis often took several weeks, the secretary's final decision was similarly delayed. These rules recognize the time required for assembly of the record and provide that the division has only 21 working days from the date the appeal is received to issue the final decision.

Judicial review of a revocation decision is by certiorari in the county in which the client was last convicted of an offense for which the client was on parole or probation. See: State ex rel. Johnson v. Cady, 50 Wis. 2d 540 (1971) and s. 801.50 (5), Stats.

Note: HA 2.06 GOOD TIME FORFEITURE AND REINCARCERATION HEARINGS. This section combines the former provisions of ss. HSS 3 1.13 and 3 1.14 in one combined hearing section. These procedures are used only when the client waives a revocation hearing but does not waive a good time forfeiture or reincarceration hearing. The appeal procedures are clarified in conformity with the appeal procedures created in s. HA 2.05 (7).

Note: HA 2.07 TRANSCRIPTS. Under this section, production of a transcript requires a writ of certiorari or prepayment of the transcription costs. A transcript is not prepared until the writ or prepayment is received and will require several weeks to complete. A party may also taperecord the hearing at their own expense.

Note: HA 2.08 HARMLESS ERROR. This section broadens the harmless error provisions of the former rules to include variance from procedural requirements as well as variance from time limits. As in the past, an error can be found harmless only if it does not affect the client's substantive rights.

IV. TRUTH IN SENTENCING

In May of this year, the state Assembly passed "truth-in-sentencing" legislation (Assembly Bill 35 1).

Under AB 35 1, a criminal has a bifurcated sentence structure. At the time of sentencing, the judge must order a period of confinement and a period of extended supervision. An offender will be eligible to enter the community only after he/she has served the entire period of confinement. The period of extended supervision must last not less than 25% of the period of incarceration. For example: If a judge issues a 20-year period of confinement there must be at least five years of extended supervision; however, the percentage of extended supervision can exceed 25%.

In addition, the definition of prison under AB 351 does not include the intensive sanctions program. AB 351 would eliminate intensive sanctions as a Type II prison. A Type I prison will be a traditional correctional facility, This means the Department may not move' inmates into Intensive Sanctions during the inmate's term of confinement in prison, and the court may not sentence a criminal to intensive sanctions consecutive to any other sentence or concurrent with a sentence imposing imprisonment.

Truth in Sentencing, as passed by the state Assembly, eliminates Intensive Sanctions as a third sentencing option for judges; however, judges will continue to have probation and incarceration as options. When placing offenders on probation, courts will still be free to recommend conditions of probation,

It is critical, therefore, **that the "truth in sentencing"** proposal current before the Wisconsin Legislature address the following for the development and operation of any period of post-release supervision:

- No offender should be released into the community without some level of supervision and appropriate support services for the offender.
- The level of supervisory services must recognize both the criminal history and current behavior of an individual who has been convicted of a crime.
- That agents who provide supervision to inmates released into the community have a "weighted caseload" which recognizes the nature of the offender and severity of the offense, and, is directly related to measurable contact and supervisory standards.
- Provide clear instructions to the Department and its supervision agents concerning revocation thresholds.
- Promote an active supervision model which incorporates local law enforcement in supervising released offenders.

V. IMPLICATIONS OF THE BIENNIAL BUDGET AND LEGISLATIVE INTENT

The 1997-99 Biennial Budget Bill provides $4,900,000 to support approximately 490 contact prison beds in fiscal year 1997-98 and $10, 100,000 to support approximately 1,000 prison beds in fiscal year 1998-99. The budget bill further assumes that the Department would reallocate any additional funds necessary to support the prison contracts from the existing Intensive Sanctions Program. To fully fund these additional beds, there would need to be a reallocation of $4.0 million in 1997-98 and $8.2 million in 1998-99 from the Intensive Sanctions Program to the appropriation for prison contract beds. This reallocation of funding would reduce the number of Intensive Sanctions slots from the current level of 1700 to an estimated 900 in 1997-98 and 350 in 1998-99.

After funds are reallocated for prison contract beds, unless additional funding is approved by the Legislature, there would be $11,011,300 remaining in 1997-98 and $6,835,600 in 1998-99 to fund a strict supervision program.

VI. STRICT SUPERVISION MODEL

Although the Intensive Sanctions program may have reflected the intent of the Legislature at the time it was created, it came to be viewed by some courts and the general public as being lax on serious criminal offenders who should be serving time behind prison wails. Too often it appeared that sentenced felons were back on the streets as a threat to community safety shortly after being sentenced to prison by a court.

Many of the criticisms of Intensive Sanctions would be addressed simply by enactment of "truth-in-sentencing." Under such a system-which would end parole, and severely limit the Department's discretion to release, many of the gateways to Intensive Sanctions would be closed.

Mindful that the elimination of parole under a "truth-in-sentencing" system seems imminent, the Department submitted a proposal to the Panel, which is fundamentally different from the present program.

Under the various versions of "truth-in-sentencing" that we examined, offenders will serve an initial period of confinement set by a court, to be followed by a supervision of at least one quarter of the prison sentence.

The current program would be modified as follows:

	Current Intensive Sanctions	Strict Supervision Model
Primary Goal	Cost-effective option to incarceration	Enhance public safety by strict supervision of high-risk probationers and mandatory releases from prison
Population	Felons, not serving a life sentence, non-assaultive, and non-drug trafficking offenders	Offenders transitioning from prison to parole and high-risk probationers
Supervision Standard	• Phased system • Mandatory electronic monitoring • Manage offenders funds in phase 2 • Non-traditional hours • Immediate alert to staff/1 hour issuance of apprehension for violations of electronic monitoring • Mandatory employment/education/ treatment/community service	Outcome-based Supervision
Staff Caseload	25 community offenders per agent, not including those in confinement status	20 offenders for each agent
Purchase of Services/ Resources	$2,400/offender • Halfway houses • Transitional living beds • Alcohol and other drug abuse programming • Employment progmmming	$3,500 offender • Halfway houses • Confinement beds • Alcohol and other drug abuse programming • Sex offender programming • Day reporting centers • Employment programming • Community services coordinator Psychological services

Other Resources Other Resources (continued)	• Computers • Caged vehicle, restraints, bullet proof vests • Radio, cell phones • Electronic monitoring units/ scanners	• Computers for each agent, program assistant and supervisor • Program evaluation database which allows for all staff to have access to offender information ability to run reports on violation/re-offending patterns • Safety equipment--additional caged vehicles, radios, cell phones, restraints, pepper spray • Electronic monitoring units/ scanners • Geographic Information System (GIS) • Computer statistics

The Strict Supervision Model would not be a placement option for offenders who otherwise would be in prison, Instead, the program would supervise high-risk offenders who have completed their prison sentence and are entitled to mandatory release. The program would also supervise identified high-risk probationers.

The Strict Supervision Model would include the following enhancements over the Intensive Sanctions Program:

- Reduced caseloads from 25 to 20 offenders per agent
- Outcome-based supervision, offenders would earn less restrictive levels of supervision only as a result of positive, measurable, performance
- Increased frequency of contact with offenders and individuals associated with offenders
- Electronic monitoring for the highest at-risk offenders as a consequence of violations of supervision
- Mandatory employment/education/treatment/community services for offenders
- Consistency in consequences for violations of the rules of supervision
- Streamlined due process procedures for confinement of offenders for violations of supervision
- Actively search, apprehend and process absconders
- Increase financial resources by $3,000 per offender to support stricter supervision
- Extend program operating hours to 24 hours per day, 7 days a week

- Increase use of computer technology for more efficient and effective supervision
- Implement data collection for ongoing evaluation of the program to measure improvements in community safety

VII. RECOMMENDATIONS

Assuming truth-in-sentencing is enacted, **it is our hope that such a program would incorporate the following:**

That a Strict Supervision Model be developed. The Strict Supervision Model would not be a placement option for offenders who otherwise would be in prison. Instead, the program would supervise high-risk offenders who have completed their prison sentence and are entitled to mandatory release. The program would also supervise identified high-risk probationers.

The Strict Supervision Model would include the following enhancements over the intensive Sanctions Program:

- √ Reduced caseloads.
- √ Outcome-based supervision, that is, offenders would earn less restrictive levels of supervision only as a result of positive, measurable performance.
- √ Increased frequency of contact with offenders and individuals associated with offenders.
- √ Electronic monitoring for the highest at-risk offenders as a consequence of violations of supervision, and treating non-machine errors seriously.
- √ Mandatory employment/education/treatment/community services for offenders.
- √ Streamlined due process procedures for confinement of offenders for violations supervision.
- √ Actively search, apprehend and process absconders (Note: On December 18, 1997, the Legislature's Joint Committee on Finance authorized the release of funds to implement a 20-agent absconder unit in Milwaukee. This initiative was originally developed in the Governor's Biennial Budget Request. The new program will begin in March, 1998).
- √ Increase financial resources to support stricter supervision, which requires the availability of prison jail beds for long and short term sanctions.
- √ Extend program operating hours to 24 hours per day, 7 days a week.

- √ Increase use of computer technology for more efficient and effective supervision.
- √ Implement data collection for ongoing evaluation of the program to measure improvements in community safety.

Even if "truth-in-sentencing" is not enacted, the Department should take immediate steps to address the criticisms in this report. First, there will be many offenders on the program for a number of years; these are the offenders who entered Intensive Sanctions in past years. Second, if "truth-in-sentencing" is not enacted, judges as well as the Parole Commission will remain free to sentence offenders to Intensive Sanctions.

We believe that if "truth-in-sentencing" is not enacted, there are serious questions as to whether the Department should place felons on Intensive Sanctions. The shortage of prison beds creates such a powerful pressure on the Department to make room for incoming inmates that its placement decisions would remain suspect. This is true of placement either by administrative transfer, and of the use of Intensive Sanctions as an alternative to revocation.

The impiementation of these changes should enhance not only the successful re-integration of offenders into the community, but, even more importantly, the safety and well-being of all the people of Wisconsin.

State of Wisconsin/DIVISION OF HEARINGS **AND APPEALS**

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January 14, 1999

Honorable Patrick Fiedler
Circuit Court, Branch 8
Dane County Circuit Court
2 10 Martin Luther King Jr. Blvd.
Madison, WI 53709-0001

RE: Criminal Penalties Study Committee
Extended Supervision Revocation Subcommittee

Dear Judge Fiedler:

I am writing as a follow-up to my appearance at the Task Force meeting on December 4, 1998, and your subsequent request that I submit written comments on any items that I would like to see included in the task force recommendations. I appreciate this opportunity to follow-up on the information that was presented on December 4, 1998 concerning the parole revocation hearing process.

There are basic&y two issues that I believe should be given some thought prior to the implementation of any new **rules and** procedures affecting **the** parole revocation hearing process. The first concerns the fiscal impact of hearing time limits. The second **concerns** problems related to the location of the hearing and the location of the parole offender. I use the term "parole" to include both traditional parole as well as the proposed "extended supervision" concept **created** under the new Truth-in Sentencing legislation.

Fiscal Impact of Hearing Time Limits - Setting a Caseload Benchmark

The current 50-day' **time** limit for conducting revocation hearings is found in statute sec. 302.335 and is implemented in rule HA 2.05 (4), Wis. Admin. Code. This time limit applies to any probation or parole case where the offender is confined in a county jail. The limit applies even if there are other reasons for the detention (serving a sentence, unable to post bail).

At the present time, we are not meeting this time limit *in* a significant number of cases. Our inability to meet the time limit stems from a number of factors but is principally related to **the** fact that the size **of our** work force has not kept pace with the rapid growth of the corrections caseload. As an example, I would note that the average annual **caseload** for corrections hearing examiners was under 400 cases per year in 1991. That average has climbed to almost 600 cases in 1998. Any further increase in the caseload will compound this problem. Since it is ourexperience that shorter time limits generate more case referrals, a shorter time limit will also increase the number of cases submitted and further compound our problem of meeting the time limit.

I realize that shortening the time limit for parole cases is one item under consideration. I also realize that the Task Force is not in a position to directly address agency budget initiatives. I feel compelled to point out, however, that any reduction in the time limit will have a corresponding budget implication on this division. To address this issue, it would be helpful if the Task Force could emphasize the priority of providing sufficient staff resources to enable us to meet any new time limit. One way to do this would be to express our staff needs as a function of the size of the corrections caseload. After looking at our experience over the last ten years, I would suggest that our per-capita annual caseload be targeted at the 1991 level of 400 **cases.** Such a benchmark would give us the ability to request additional staff resources as the corrections caseload increases.

If such a benchmark Were in place now, it would justify the addition of 3.5 positions **at** an annual cost'of approximately $200,000 to fully meet the current 50-day time limit. It would also give us a basis to request additional staff in the future if a shorter time limit generates additional cases.

I would also like to suggest that the Task Force consider limiting the applicability of any time limit to cases where a prompt hearing has some significance. In my opinion, it is counter-productive to try and meet the time limit in all cases. For example, cases with high bail or where an offender is currently serving a sentence are prime examples of situations where a short time limit will not significantly effect an offender's length of custody. In those cases, a parole offender will remain in custody even if the parole revocation action is dismissed. *One* might also argue that the exception should be extended to all cases where there is a new pending felony prosecution. Giving the criminal prosecution priority will hit the number of times that witnesses must appear and would simplify the hearing process since the revocation action could be based on the ***new*** criminal conviction. Providing an exception for one or more of these situations would allow us to focus our resources more effectively on the cases where a prompt hearing will have some real impact on the offender and on jail over-crowding.

Hearing Location - Regional Detention Facilities

The second issue concerns problems related to the selection of a hearing location. This, in turn, involves consideration of the site of the violations, the current location of the offender and' related concerns about whether the offender is readily accessible to his attorney and to his parole officer.

The Division of Hearings and Appeals has historically held these hearings in a county jail. The department designates the hearing site. The department frequently chooses to use the jail in the county where the offender was last being supervised, but often substitutes the jail where the offender **is** actually confined (for a new crime or sentence). This choice is further complicated by the fact that many jails move offenders to other "contract" locations due to jail over-crowding. As a result, hearings are often held at a site other than where the offender is actually confined. This can cause problems for the parole officer as well as for any assigned attorney if they are unable to obtain ready access to the offender prior to the hearing. It also requires that the offender be transported from one location to another for the hearing.

Because of the increasing problem with jail over-crowding, we are seeing more and more cases where the offender is actually confined in a jail that is some distance from the actual hearing site. While it is tempting to suggest that the hearing sire simply be moved to the offender's location, that would raise problems with the assignment of counsel (usually a public defender). It might also interfere with an offender's right to have the hearing at a site that is reasonably near to the place of the violations. Holding the hearing at the site of the offender's location would also require that witnesses travel a great distance to the hearing or that the jails make available video and tele-conferencing equipment.

One solution to these problems would be the creation of regional detention facilities for probation and parole detentions. This is what is currently being developed in the greater Milwaukee area. The creation of regional detention facilities would add stability to the hearing process, minimize the impact of the process on county facilities and would allow us to build in suitable hearing space which includes new technologies for video and tele-conferencing. It would also give the department a resource to use in trcatmenr situations and would provide a location for limited-term confinement that could be used as an alternative to full revocation. Finally, these facilities would provide some advantage LO my office by allowing us to schedule "clusters" of revocation hearings rather than being required to travel to isolated locations for just one hearing.

I am not in a position to project the cost of this recommendation, or even to predict the total number of new facilities that will be required. In many instances, the local county jails will remain the most viable site for revocation hearings. In some situations, the state may *want* to "lease" regional detention facilities from interested counties. in other situations, the department may be able to convert part of an existing corrections facility as a regional detention facility. The final configuration of such facilities should. however, take into account the need to keep the offender and the hearing reasonably close to the site of the violations.

I hope that this memorandum meets the needs of your Task Force in addressing the very substantial issues in the existing parole process as well as "extended supervision" under the new sentencing law. As in the past, if I can be of any further assistance feel free to contact me.

Sincerely,

David H. Schwarz
Administrator

Cc: Mark Bugher

Code Classification Schemes

Current

Class	Confinement (first release)	(M.R.)	Parole (from M.R.)	Max.
A				Life
B	10	26.8	13.2	40
BC	5	13.3	6.7	20
C	2.5	6.7	3.3	10
D	1.25	3.35	1.65	5
E	6 m.	16m.	8 m.	2

New - 1997 Wis. Act 283

Class	Max. confinement	Max. E.S.	Max.
A			Life
B	40	20	60
BC	20	10	30
C	10	5	15
D	5	5	10
E	2	3	5

Proposal

Class	Max. confinement	Max. E.S.	Max.
A (same as new law A)			Life
B (same as new law B)	40	20	60
C	25	15	40
D	15	10	25
E (same as new law C)	10	5	15
F	7.5	5	12.5
G (same as new law D)	5	5	10
H (same as new law E)	2	3	5

Proposal:

1. Adds 3 classes; no match to new law BC; # of categories increases from 6 to 8.
2. Proposed A and B match new law A and B.
3. Creates a proposed C with 10 y. more confinement, 5 y . more ES, and 10 y . longer maximum than new law BC. [Proposed C would include lower new law B's and higher new law BC's.]
4. Creates a proposed D with 5 y. less confinement, same ES, and 5 y. less maximum than new law BC; and with 5 y. more confinement, 5 y. more ES, and 10 y. longer maximum than new law C. [Proposed D would include lower new law BC's and higher new law C's.]
5. Proposed E matches new law C.
6. Creates a proposed F with 7.5 y. confinement, 5 y. ES, and 12.5 y. maximum. [Proposed F would include lower new law C's and higher new law D's.]
6. Proposed G matches new law D.
7. Proposed H matches new law E.

Proposal attempts to retain relative decreasing periods of confinement, E.S., and maximums.

Statute	Offense	Current Penalty	After Act 283	[illegible]	[illegible]	Median	Coeff. of Variation	Maximum	[illegible]	[illegible]	[illegible]	[illegible]
943.32(2)	Armed Robbery	Class B - Maximum imprisonment of 40 years; M.R. Of 26.8 years; F.R.E. of 10 years	Class B - 40 years initial maximum imprisonment; 20 year ES; no more than 60 years	1311	15	96.0	86.78	480	Class B (maximum initial imprisonment 40 years)	Class C (maximum initial imprisonment 10 year.51	Class c (maximum initial imprisonment 25 years)	Class (max imp.
940.225(1)	1st Deg. sex. Asslt.	Class B -- Maximum imprisonment of 40 years; M.R. of 26.8 years; F.R.E. of 10 years	Class B - 40 years initial maximum imprisonment; 20 year ES; no more than 60 years	283	24	(a) & (c) 180.0; (b) 240.0	(a) 65.87 (b) 53.24 (Cl 61.27	480	Class B (maximum initial imprisonment 40 years)	Class c (maximum initial imprisonment 10 years)	Class c (maximum initial imprisonment 25 years)	Class (max. imp.
948.02(1)	1st Deg. Sex. Asslt. of a child	Class B -- Maximum imprisonment of 40 years; M.R. of 26.8 years; F.R.E. of 10 years	Class B - 40 years initial maximum imprisonment; 20 year ES; no more than 60 years	1419	18	120.0	71.87	480	Class B (maximum initial imprisonment 40 years)	Class C (maximum initial imprisonment 10 years1	Class c (maximum initial imprisonment 25 years)	Class (max. imp.
943.10(1)(a)	Burglary ("Any building or dwelling")	Class C - Maximum imprisonment of 10 years; M.R. date of 6.67 years and F.R.E. of 2.5 years	Class c - 10 years initial maximum imprisonment; 5 years ES; no more than 15 years	4647	3	48.0	45.29	120	Class C (maximum initial imprisonment 10 years)	Class D (maximum initial imprisonment 5 years)	Class F (maximum initial imprisonment 7.5 years1	Class (max. imp. 5 or Cl (2 y.)
940.19(5)	Aggravated Battery ("causes great bodily harm with intent to cause either substantial bodily harm or great bodily harm")	Class C - Maximum imprisonment of 10 years; M.R. date of 6.67 years and F.R.E. of 2.5 years	Class c - 10 years initial maximum imprisonment; 5 years ES; no more than 15 years	75	14	48.0	42.42	120	Class c (maximum initial imprisonment 10 years)	Class D (maximum initial imprisonment 5 years)	Class F (maximum initial imprisonment 1.5 years)	Class (max. imp. 5 or Cl (2 y.)

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On July 9, 1996, by 1995 Act 448, the Uniform Controlled Substance Act, Ch. 161, Stats., was renumbered Ch. 961. The figures above include both chapters.

The coeffkient of variation is the standard deviation/mean, on a l-100 scale. The higher the coefficient of variation, the flatter the bell curve and the greater the distribution of sentences along the minimum to maximum spectrum.

The maximum sentence is the highest sentence given per count per offender. Life and consecutive sentences have been eliminated.

Statute	Offense	Current Penalty	After Act 283	# Conv. (1/90-10/98 in Division of Adult Institutions)	Sentence Min. (mos.)	Median	Coeff. of Var. of Sentence	Maximum	Corrections M.R. under Act 283 Classes	Corrective Action Plan Ruling M.R. (80) Classes	Corrective Action Plan Ruling Proposed M.R. Classes	Corrective Action Plan Ruling M.R. (80) Classes
941.20(3)(a)	Drive-By-Shooting	Class C - Maximum imprisonment of 10 years; M.R. date of 6.67 years and F.R.E. of 2.5 years	Class c - 10 years initial maximum imprisonment; 5 years ES; no more than 15 years	17	30	60.0	38.80	120	Class C (maximum initial imprisonment 10 years)	Class D (maximum initial imprisonment 5 years)	Class F (maximum initial imprisonment 7.5 years1	Class G (max. i imp. 5 or Cl. (2 y.)
961.41(1m)	Possession with intent to manufacture, distribute or deliver any other controlled substance included in schedule I, II or III, or a controlled substance analog of a controlled substance included in schedule I or II	Unclassified - Maximum imprisonment of 5 years; M.R. of 3.35 years; F.R.E. of 1.25 years	Maximum imprisonment of 7 years end 6 months	Hallucinogen: 446 Narcotic: 36 Other: 2342 Total: 2826	6 12 2	36.0 42.0 36.0	53.88 61.82 65.33	60 60 60	Class D (maximum initial imprisonment 5 years)	Class E (maximum initial imprisonment 2 years)	Class G (maximum initial imprisonment 5 years)	Class H (max. i imp. 2
940.25(1)	Injury by intoxicated use of a vehicle	Class D - Maximum imprisonment of 5 years; mandatory release ("M.R.) date of 3.35 years; first release eligibility ("F.R.E.") date of 1.25 years	Class D felony - 5 years initial maximum imprisonment and 5 years extended supervision ("ES"); no more than 10 years	150	12	24.0	46.32	60	Class D (maximum initial imprisonment 5 years)	Class E (maximum initial imprisonment 2 years)	Class G (maximum initial imprisonment 5 years)	Class H (max. in. imp 2 y.)

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Statute	Offense	Current Penalty	After Act 283	# Conv. (1/90-10/98 fr. Division of Adult Insec.)	Sentence Mnf (mos.)	Median	Coeff. of Vaff. ation	Maximum	Corr. Col. MR using Act 283 classes	Corr. to M.R. using Act 283 classes	Corr. to M.R. using proposed A.g classes	Corr. to M.R. with classes
940.43	Intimidating Witnesses	Class D - Maximum imprisonment of 5 years; mandatory release ("M.R.) date of 3.35 years; first release eligibility ("F.R.E.") date of 1.25 years	Class D felony - 5 years initial maximum imprisonment and 5 years extended supervision ("ES"): no more than 10 years	35		36.0	47.20	60	Class D . (maximum initial imprisonment 5 years)	Class E (maximum initial imprisonment 2 years)	Class G (maximum initial imprisonment. 5 years)	Class I (max. in. imp 2 y.)
943.23(2)	'rakes and Drives, 'Vehicle Without Owner's consent a	Class D - Maximum imprisonment of 5 years; mandatory release ("M.R.) date of 3.35 years; first release eligibility ("F.R.E.") date of 1.25 years	Class D felony - 5 years initial maximum imprisonment and 5 years extended supervision ("ES") ; no more than 10 years	1189		36.0	40.40	60	Class D (maximum initial imprisonment 5 years)	Class E (maximum initial imprisonment 2 years)	Class G (maximum initial imprisonment 5 years)	Class I (max. in. imp 2 y.)
943.23(3)	Driving or operating any vehicle without owner's consent	Class E - Maximum imprisonment of 2 years; M.R. of 16 months; F.R.E. of 6 months	Class E felony- 2 years initial maximum imprisonment and 3 years ES; no more than 5 years	1178		24.0	22.08	24	Class E (maximum initial imprisonment 2 years)	A misdemeanor (maximum 1 year in jail)	Class H (maximum initial imprisonment 2 years	Class A misd. (1 yr. jail)
940.30	False Imprisonment	Class E - Maximum imprisonment of 2 years; M.R. of 16 months; F.R.E. of 6 months	Class E felony- 2 years initial maximum imprisonment and 3 years ES; no more than 5 years	224		24.0	22.17	24	Class E (maximum initial imprisonment 2 years1	A misdemeanor (maximum 1 year in jail)	Class H (maximum initial imprisonment 2 years	Class A misd. (1 yr. jail)

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Statute	Offense	Current Penalty	After Act 283	# Conv. (1790 10/98 in Division of Adult Inst.)	Sentence Min. (mos.)	Median	Coeff. of Variation	Maximum	Corr. to M.R. using Act 283 classes	Corr. to M.R. using Act 283 classes	Corr. to M.R. using proposed Act 28 classes	Corr. to M.R. using proposed Act 28 classes
941.30(2)	2nd Degree Recklessly Endangering Safety	Class E - Maximum imprisonment of 2 years; M.R. of 16 months; F.R.E. of 6 months	Class E felony- 2 years initial maximum imprisonment and 3 years ES; no more than 5 years	502	1	24.0	16.49	24	Class E (maximum initial imprisonment 2 years)	A misdemeanor (maximum 1 year in jail)	Class H (maximum initial imprisonment 2 years	Class A misd. (1 yr. jail)

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M E M O R A N D U M

TO: Sentencing Guidelines Subcommittee Members

FROM: Walter Dickey
Mike Smith
Mike Brennan
Elsa Lamelas

DATE: Tuesday, January 19, 1999

RE: Sentencing Guidance Options

Described below are (a) a proposal that the committee may wish to recommend for any sentencing guidance option chosen - a conversion table; as well as (b) 4 options for sentencing guidance for the committee's consideration.

Conversion Table

Regardless of the option chosen for sentencing guidance, a **conversion table** to aid judges in translating sentences under the current law into new Truth-In-Sentencing ("Truth") sentences, could be recommended. That table would include a series of **columns** listing, in months:

a. pre-Truth sentence **b.** Time served to first release eligibility on that pre-Truth sentence c. Time served to mandatory release on that pre-Truth sentence

This would be a purely numerical representation: column **a.** would increase l-1440 (or whatever highest sentence in months is), and column **b.** and column c. would be arithmetic calculations of the first release and mandatory release of the corresponding number in column **a.**

In the first few years of transition to Truth-In-Sentencing, a judge reading along these columns would know the range length of an "old" sentence. This information would be important to understand where the "new" law sentence the judge would be pronouncing would fit in that range.

Introduction

Today's smorgasbord of sentencing guideline systems ranges from mandatory prison terms to statutes or case law listing "factors the sentencing court may consider." Roughly a dozen states now use "presumptive" sentencing guideline grids (and another handful promulgate similar grids as advisory only). These grids

specify presumptively correct sentences, and/or ranges of presumptively correct sentences--to definite or indeterminate prison terms--for offenders falling into pre-determined categories.

Few of the mandatory sentencing statutes and few of the presumptive guideline grids guide the court's discretion in setting the duration or conditions of probation or post-confinement supervision. (Listing the factors a court may consider at sentencing, as most of these jurisdictions do, does little to guide or control individual courts in deciding which factors are relevant or what effect they should have on the length of prison terms, or on conditions to be imposed during periods of community supervision.)

This memo describes briefly four types of sentencing guidance: (1) presumptive grid guidelines of the common variety; (2) narrative guidelines (more familiar in Europe than here), which aim to guide courts' consideration of relevant factors rather than to specify sentencing outcomes by pre-defined categories; (3) a modified version of Ohio's recent attempt to meld grid guidelines with "factors to be considered"; and (4) an advocacy model.

Option A -- Presumptive Guideline Grids

While every jurisdiction with a numerical grid-guideline system properly claims it to be unique, these systems share important features of design and purpose. Most of the grids show "current offense" along one axis, and some measure of "prior criminal record" along the other and set forth, in the resulting cells of the grid, numbers representing months of confinement.

Purpose. We know of no system in which departure from the numbers (of months) arrayed in the grid is absolutely prohibited. But systems that secure higher rates of trial court compliance with the presumptions are best suited to the purpose of predicting demand for correctional resources (particularly prisons), because future sentences can be predicted accurately-so long as departures are few, the range of presumptively correct sentences is narrow, and the volume of offenders sentenced in each category holds steady from year to year.

Reduction of "unwarranted disparity" is almost always said to be a major objective of guideline systems of this design, and most jurisdictions having them regularly report success in this regard. But for presumptively correct sentences to be arrayed in grid format, every offender is defined by only two variables-usually current offense and prior record. Consistency is achieved by making legally irrelevant many factors ordinarily considered central to a determination of just desert or public safety. The before-and-after comparisons purporting to show that implementation of a grid system reduced disparity in a jurisdiction are

similarly faulted, because many more defining facts were legally relevant at sentencing in the "before" than in the "after" period. A different but potent caveat is that the more these systems reduce judicial discretion, the more they increase the (even less visible) discretion of prosecutors to fix the sentence by exercise of charging discretion and by plea policy.

Form. Most guideline grids are in fact built up from placement of a single number in each cell of the grid. The durations of tnese presumptively correct sentences are sometimes derived by averaging the lengths of prison sentences imposed in the past (presenting special difficulties in the many cells where a substantial portion of historical sentences are probationary), and sometimes they are policy statements of the guideline-promulgating authority. Few grid systems are content to place a single numbers in each cell-particularly if departure from the presumptively correct sentence is made at all difficult for the trial court. Some grids show only a presumptively correct range around that number (e.g., 0 to 14 months, 30 to 48 months, Probation to 6 months). Some show a "normal" sentence within each range; some systems use the calculated mean of the high and low end for each range, but others (in recognition that the typical cases often cluster at the high or low end of a proper range) explicitly show not the mid- point but the number of months of prison presumptively correct for a "typical" case (e.g., Minnesota, as described to you by Kay Knapp). A system of this last kind uses historical data, but relies on experienced practitioners to define the characteristics of the "typical" case in each category.

Some grids are made up of relatively few cells with quite broad ranges (e.g., Pennsylvania) and others have tight ranges and more categories (e.g., North Carolina, and particularly the Federal system). The fewer the cells and the broader the ranges, the greater the discretion of the sentencing court when choosing among presumptively correct sentences.

Method of Construction. Grid guideline systems are characterized as "prescriptive" or "descriptive"-a distinction intended to surface the extent to which the numbers in the grid are derived by mathematical manipulation of routinely collected historical data, or are chosen to reflect the policy choices of the guideline-setting authority. In fact, all guideline systems are both descriptive and prescriptive, but some (e.g., North Carolina) claim to be much more prescriptive than others. Some (e.g., the Federal system) claim a descriptive derivation that is widely doubted by those using them. If there is a trend, it may be toward prescriptive, if only because the guidelines constructed principally by mathematical manipulation of historical data are thereafter open to amendment-a fundamentally political rather than mathematical process. And the grid format lends itself to manipulation both to express "toughness" and to limit expenditures on prison.

Option B -- Narrative Guidance for Fact-finding and Reasoning by Sentencing Courts

The few (non-US) systems of this kind are anchored by legislative specification of the purposes for which sentences may be imposed, the means available to sentencing courts to advance sentencing purposes, and the principles by which a sentencing court is to select among them. The purpose or purposes might be set by statute or rule, or selected by the trial judge from the statutorily permissible purposes. As such a system aims to guide and structure fact-finding and reasoning in individual cases, it encourages sentences that vary according to facts relevant to sentencing purpose (facts beyond current offense and prior record). The court is guided, not as to outcome, but as to its fact-finding and reasoning process.

Such a system might be illustrated (however incompletely) as follows:

1. The purposes to be served by sentence are "public safety" and "just punishment." (In such a scheme, public safety is likely to be defined in terms that direct the court's attention not only to the future harm this offender might cause, but also to the places where persons or property are vulnerable to this offender or to offenders whose conduct might be influenced by the court's sentence in this case.)

2. The questions to be addressed by the court might be:

Public Safety. Absent intervention, this offender in his circumstances presents what risk, of what harm, to whom, where? (What ought the court and the Department of Corrections be worried about?)

To answer such a question, the court might want case-specific data about:

a. This offender's relation to people who are vulnerable to him (as he might offend again), and people who have influence over him (who can encourage or discourage his future offending, such as peers, spouse, family, priest, gang, rap partners).

b. The places the offender lives, and recreates (which might be vulnerable to or controlling of him, such as home, job, park, street corner).

c. Life circumstances (stable or unstable home, job, community, neighborhood).

d. Clinical information.

e. What this offender has done in the past (this offense, other offenses, other antisocial behavior).

f. What sentence or combination of correctional measures (legal authority and available resources) exist which would most plausibly and effectively reduce the specified public safety risks? What ought be their duration, intensity and sequence? (What can be done by this sentence to protect prisons and property vulnerable to this [or other] offender[s]?)

In addressing the public safety sentencing concerns, the court will need information about the legal authority available for sentencing this offender for this offense, the correctional resources actually available to the jurisdiction, and how authority ought to be exercised and resources arrayed to reduce the risk for as long as it can be reduced.

g. What ought to be done if a condition of a non-prison portion of the sentence is violated? For example, an addict who relapses in use of a controlled substance might have probation or extended supervision revoked, might be jailed for a period of time, might be enrolled in a residential treatment program. The consequence might be specified in advance, left to the discretion of the correctional authority, or be expressly retained as a decision for the sentencing court in the event of violation.

Just Punishment. In light of the public safety findings above, what sentence or combination of correctional measures would be “not undeserved” (i.e., not too little and not too much)?

A court would likely want to consider historical data on this question, though the most useful presentation of it would not be a grid showing historical averages or ranges around historical averages, but a graphic showing the distribution of sentences in a recent past period, from which the trial court could readily see the actual patterns, for cases varying along variables associated with culpability or risk to public safety among offenders in the relevant category. By showing the "outliers" in the range, a court could determine whether the sentence constructed with public safety in mind falls within a “not undeserved” range (as to its duration and intensity),

One type of data frequently cited by sentencing judges and others as relevant to determinations of just punishment is public expectation. What would be viewed as “not undeserved” by the relevant public? This question might be framed in a trial court as something like this:

If the public were properly informed about this offense, the harm it caused, the life circumstances of the offender, the offender’s likely subjective experience of the sentence, and the availability of correctional measures in this case, would the sentence be viewed as “undeserved’‘--i.e., too great or too small a punishment.

Option C - Modified Ohio approach

1. This option presumes that 80% of criminal offenses occur under 20% of the statutory crimes. Therefore, the goal is to provide guidance per category for the most "used" crimes. The goal is not to provide guidance per felony classification, or for all felony crimes.

2. The 20% of crimes which occur most often would be assigned guidance by general category. One approach could be the general categories from p. 4 of the Governor's Task Force on Sentencing and Corrections:

Assaults	Homicides
Burglaries	Public Order
Drug Offenses	Sex Offenses
Frauds	Theft Offenses

That report also lists 3 subcategories for each category. Guidance could be promulgated per category, or per subcategory, and the subcategories in the Task Force report could be adopted, or revised, either in number, or in substance.

3. A laminated card would be produced for each category.

4. The **first step** for the judge could be to consider **seriousness of crime** factors. Ohio's **more** or **less serious factors** on p. 1 of its quick reference guide would be the starting point. Such factors could be **revised** to include questions **particular** to that category of crime. (For example, under **theft offenses,** the list of questions might elucidate amount taken, whether force was used, and whether the offender held a position of trust, while under **assault offenses,** the questions might inquire as to the victim's participation in the offense.) The different categories could have common questions, however; for example, both theft and assault lists would ask whether force was used, and how much. (Ohio's questions are a good starting point for those common questions.)

5. The **second step** for the judge could be to consider **recidivism** factors. Ohio's **more likely** or **less likely recidivistic factors** on p. 1 of its quick reference guide would be the starting point. These factors could include questions to determine the defendant's **dangerousness.** They also could include questions about the offender's **criminal history.** As in the first step, the questions could particularize any such recidivism factors to the crime category. For example, with sex offenses, different, more detailed questions could be asked.

6. In the **third step,** the judge could consider a **chart** similar in form to the one on the back of the Ohio quick reference guide. In the **first column;** crimes in higher classes could have a presumption of prison; crimes in lower classes could have a presumption of probation; and there may be middle classes without either presumption. Based upon the answers to the questions in the first two steps, the

judge could be guided to **remain in** or **move out of** the presumption. In the lower categories, if a certain number of the questions (or a particularly important question) were answered to the offender's disadvantage, the probation presumption could be rebutted and the guidance would be for prison. Conversely, if in the lower categories none of the questions were answered to the offender's disadvantage, the guidance would be for probation or other community corrections options. (Note: Ohio denominates mandatory prison terms for certain crimes. Given the advisory nature of these guidelines, they would not.)

7. In the **second column,** prison term ranges could be listed next to each class of crime. In the **third column,** fine ranges could be listed next to each class (or by groups of classes). The judge could consider the **answers to the questions in the first step about the offense, and in the second step about the offender,** to choose where within these ranges the offender's case fell. The prison term ranges could be based on the period of time incarcerated of the middle 50%' (or a different figure, if preferred) of sentences over the previous X# of years. For example, if over the last 5 years, sentences for a certain class of burglary ranged from 10 to 100 months, the high and low sentences would be disregarded, and the middle 50% of sentences would become the range. The judge would **not** be bound to sentence within these ranges for prison time or for fine.

7. A **fourth column** could give suggested ranges for extended supervision ("ES") given the class of crime (or group of classes). Again, the judge would **not** be bound to give an ES period within this range. A **fifth column** would list whether or not the initial portion of that offender's ES would be "strict." This is pursuant to a possible recommendation from the extended supervision revocation subcommittee that **for certain crime classes, the initial portion of the offender's ES be under strict supervision.** See pp. 13-l 9 of the Intensive Sanctions Review Panel Final Report.

Option D - Advocacy Model

The new Wisconsin Sentencing Guidance, or Truth-In-Sentencing, Commission, would be responsible for publishing a pamphlet with statistics showing the distribution patterns over the previous 5 years of incarceration and probation time-served for the most common offenses. These statistics would be both statewide, and within selected geographic regions, e.g., Milwaukee, Dane-Rock Counties, the Fox Valley, Racine-Kenosha Counties, and the rest of the state.

These statistics would include, at the least, the percentage of prison time those convicted offenders served in the form of a linear graph (and/or other graphs if desired), the percentage of those convicted placed on probation, whether or not prison or jail time was imposed and stayed as a condition of probation, and how much such time, whether

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[1] This concept is from Virginia's model.

any incarceration was ordered as a condition of probation, and what the most common conditions of probation were for sentences on that crime.

The statistics would be grouped by crime, e.g., the most common 25 crimes. The statistics for each crime would contain footnotes with pertinent data, such as legislative changes, recent reclassification of the crimes, date of enactment, etc.

During the sentencing hearing, the judge would consider these statistics, to determine where on the spectrum of recent sentences this case, and this offender, would fall.

Consideration of these statistics would either be followed by, or if the committee prefers, preceded by, consideration by the judge, and an opportunity for advocacy by the lawyers, a series of **offense** and **offender** characteristics. This part of this model would give judges guidance concerning **offense** and **offender** characteristics, including criminal history, and offer numerous opportunities to **advocate** for a certain sentence based upon those characteristics.

1. **Offender** characteristics would apply to all crimes:
   - a. criminal history
   - b. age
   - c. educational and vocational skills
   - d. mental and emotional conditions
   - e. physical condition, including drug or alcohol dependence or abuse
   - f. employment record
   - g. family ties and responsibilities, and community ties
   - h. role in the offense
   - i. dependence upon criminal activity for a livelihood

2. **Offense** characteristics would be crime-specific per category; e.g.:
   - Homicide
   - Assault
   - Battery
   - Sexual Assault
   - Public Order
   - Theft
   - Burglary
   - Robbery
   - Vehicle-Related
   - Unlawful Manufacturing, Trafficking, or Possession with intent to Deliver Drugs
   - Possession of Drugs

Offense characteristics would include impact on the **victim.** For example, offense characteristics for a battery case could include “offender acted under strong provocation”, or “injury exacerbated by physical/mental condition or age of victim.”

The judge should consult the **conversion table** discussed above to clearly understand how this "new law" sentence would compare to and contrast with an "old law" sentence.

The judge should also address **sentencing goals.** At present, a court in Wisconsin is to consider the (a) gravity of the offense, (b) character of the defendant, and (c) need to protect the public. Should this committee recommend to the legislature that this philosophy be changed? To what? That the primary goals are: (1) public safety; and (2) just deserts/punishment? Should deterrence, rehabilitation, and restitution be stated factors, to give judges the flexibility to consider them, but secondary to the two primary goals of (1) public safety and (2) just punishment?

No matter what the sentence pronounced, the judge would have to state **reasons** why the offender's sentence fell where it does on the graph. This would set up a presumption that most sentences would fall within the most commonly distributed sentences, and force the judge to think whether, and why, this case deviates from the norm.

Criminal Penalties Study Committee
Sentencing Guidelines Subcommittee
Proposed Format for Wisconsin Sentencing Guidance Commission

Name: The commission could be named the Wisconsin Sentencing Guidance Commission, or the Wisconsin Truth-In-Sentencing Commission, to differentiate it from the former Wisconsin Sentencing Commission.

1. Commission membership:
a-Number of commissioners

The commission would have 9 members. This is in line with most states. The factors of cost, given the commission's "permanent" status, and best deliberative number, counsel this smaller size.

b-Appointing bodies

Three members would be permanent and serve by virtue of their office: the secretary of corrections, the attorney general or the AG's designee, and the state public defender or the SPD's designee. Six members would be appointed by the governor. (The chief justice of the supreme court would not have appointing authority, but the court would get to review the guidelines before the legislature. See below 3.c.) The parole commissioner would serve in an ex officio, non-voting capacity. (Eventually, the commissioner's office, and thus spot on the commission, would cease to exist.) The governor would choose the commission's chair.

Of the six gubernatorially-appointed members, four would be circuit court judges, and at least one would be a non-government employed individual. Of the states about which we have information, the governor usually appoints the commission. If we use the former commission as a guide, beyond the four stated positions of secretary of corrections, parole commissioner, attorney general, and public defender, the governor appointed the remaining members.

c-Length of terms

The commissioners would serve four-year terms. This is close to the national average of 3.35, and long enough for the commissioner to become educated and effective, but not too long.

The four-year terms would be staggered. Purposes: (a) expedite turnover of commission membership, with new members with new ideas joining the commission quicker than would otherwise be the case, and (b) members with longer terms could educate new members. Of the original 6 gubernatorial appointments, 3 would serve two-year terms; and 3 would serve four-year terms. Each commissioner appointed after the first 3 would serve four-year terms.

Should members be limited to serving 1 term on the commission?

2. Commission resources:

a-Budget

A projection would have to be made based upon needs. Sufficient funds should be allocated to maintaining a microsimulation computer model to assess guideline impact. (Each state we studied stressed the need for such a model.)

b-Staff

An executive director, who must be a lawyer or have a law degree, and at least two staff people, one of whom must be a lawyer, the other of whom must be a technical statistical expert. (This picks up where the old staff size left off. It is less than the national average of six, and can be changed based upon the complexity of the sentencing system and guidelines in future budgets.) The executive director would be hired by the commission, as was the last one. The executive director would serve for renewable two-year terms.

3-Role and authority of the commission

a-Temporary or permanent commission?

The commission would be permanent (as 17 of the 18 states we know about do), in that its initial run would be for four years. Then, the commission would expire, unless the legislature affirmatively renews it. It would then renew for four-year periods, under the same mechanism. (This would give the commission some permanence, but also a built-in legislative review mechanism and motivation to work well.)

b-Character of commission-agency of which branch of government, or independent agency?

The Sentencing Guidance Commission would be proposed as an agency of the Wisconsin supreme court. This would give the sentencing guidance the commission produced some preliminary credibility. (Judge Wells has pointed out that the Wisconsin supreme court may be amenable to having the commission in the judicial branch, as Virginia does.)

If the Wisconsin supreme court declined this arrangement, based on past practice in Wisconsin, the commission could be set up as our committee is, and the former commission was -- as an agency under DOA, ostensibly in the executive branch.

c-Enactment and modification of guidelines-subject to legislative veto? Require approval by legislature? Or by the supreme court?

The commission would submit proposed new guidelines or revisions on an annual basis to the supreme court by March 1. The court can add any commentary to them it prefers, and reject them by a majority vote. If the guidelines or revisions are rejected, the commission would have to promulgate a new proposal per the court's order. If a majority

not needed if it is info. Clearinghouse only ...

of the court approves them, the guidelines, and any subsequent modifications, are sent to the legislature. The court would have until May 1 to act. The guidelines would take effect on July 1 unless the legislature acted to the contrary.

* sep of powers?

This would retain judicial and legislative approval, while attempting to keep the process moving. The supreme court can comment on the guidelines or modifications to them, while not necessarily disapproving of them. It also allows for legislative oversight of the guidelines promulgated, but the assumption would be that the commission would be able to defend its guideline choices based upon population projection and cost estimates produced by its microsimulation computer model. (This is modeled on the process used to promulgate the federal rules of civil, criminal, appellate, and bankruptcy procedure.)

4-Scope of responsibility

a-Should the commission monitor sentencing practices?

Yes, to (1) modify guidelines according to public safety needs and changes in sentencing practices, (2) preserve the integrity of the system, and (3) compile data regarding anticipated needs,

b-Should the commission report to the legislature so that corrections budget needs are anticipated?

Yes, to (1) gain public support and public understanding of sentencing practices, and (2) inform the legislature and other agencies of anticipated needs in corrections.

The commission would use a computer microsimulation model to do this.

The commission would be mandated to work with the state legislature's budget office to cost out the impact of any proposed new criminal laws and changes such that the legislature make an informed decision on same.

c-Should the commission have parole-type responsibilities.

No, although our committee may offer a "geriatric clause," which would be within a trial judge's discretion, and appealable only for abuse of discretion.

Need to amend statute? KLumb

d-Should the commission be in charge of teaching about the guidelines?

Yes, at least on a limited basis, it would aid in, if not take the lead role in, educating judges, prosecutors, public defenders, and the private bar concerning sentencing guidance.

e-Other commission aspects:

The commission would issue statistics, updated semi-annually, or even quarterly if possible, publishing what sentences offenders received, on which crimes, both statewide,

and by geographic area: Milwaukee County, Dane-Rock Counties, the Fox Valley, Racine-Kenosha Counties, and the rest of the state. These reports would be distributed to all judges.

As referenced above, the commission would issue a public annual report, as does Virginia, with any proposed sentencing guidance revisions, and do so by March 1 to the supreme court.

The commission would meet at the discretion of the chair.

DOCUMENTS IN CPSC FILES

WI Statute - Chapter 939 - criminal code

WI criminal code: Class A misdemeanors

WI Statute - 1997 Wisconsin Act 283

New law relating to truth in sentencing: sentence structure for felony offenses, extended supervision, criminal penalties study committee and increased penalties for felony offenses (1997 WI act 283)

Wisconsin sentencing guidelines system fact sheet

Faith-based approaches to crime prevention &justice - WI legislative committee

Observations on the drug code - WI public defender

Intensive sanctions review panel final report to the Governor

Governor's task force on sentencing corrections - final report

Sentencing memorandum - Judge Michael Walters

Sentencing policy for drug dealers - Milwaukee County

Planning, development, & implementation of successful correctional options - US DOJ

Correction Information Systems - USDOJ

Bureau of Justice Statistics - Prisoners in 1997

National Association of Sentencing Commission conference report

Sentencing commission profile: state sentencing policy and practice research in action partnership - National Center for State Courts

Intermediate sanctions in sentencing guidelines - National Institute of Justice

U.S. Sentencing Policy: Past trends, current issues and future prospects - National Symposium on Sentencing

Delaware sentencing

Minnesota sentencing guidelines and commentary

North Carolina structured sentencing

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Virginia structured sentencing

Drug case admissions - WI DOC

Drug offender admissions and releases 1 1/96 - 10/98 - WI DOC

1 st Admissions for drug offense - drug traffickers and non-drug traffickers- by population of regions of WI 11/96 - 1 0/98

Felony drug prosecutions 1994 - 1998 - Milw. Co. DA

Probation & parole 1/1/93 to 10/1/98

Department of Corrections Statistics:

First Admitted Offenders

- Offenses by statute for offenders first admitted to the WI adult correctional institutions '93 - 98
- Offenses by statute and average sentence length for offenders first admitted to the WI adult correctional institutions '93 - '98
- Number of offenders by statute and governing offense and the average (mean) length of sentence in months for offenders first admitted to the WI adult correctional institutions '93 - '98

Readmitted Offenders

- Offenses by statute for offenders re-admitted to the WI adult correctional institutions '93 - 98
- Offenses by statute and average sentence length for offenders first re-admitted to the WI adult correctional institutions '93 - '98
- Number of offenders by statute and governing offense and the average (mean) length of sentence in months for offenders re-admitted to the WI adult correctional institutions '93 - '98

Admitted for Probation Violations

- Offenses by statute for offenders admitted for probation violations to the WI adult correctional institutions '93 - 98
- Offenses by statute and average sentence length for offenders admitted for probation violations to the WI adult correctional institutions '93 - '98
- Number of offenders by statute and governing offense and the average (mean) length of sentence in months for offenders admitted for a probation violation to the WI adult correctional institutions '93 - '98

Guideline Grids by Michael E. Smith

Prison time, space running out - WI State Journal

Connecticut's Alternative Sanctions Program - USDOJ

Truth in Sentencing in State Prisons - USDOJ

More time, less crime - the Weekly Standard

Study contrasts N.Y. prison, education priorities - The Washington Post

Current sentencing issues and policies

The prison-industrial complex - the Atlantic Monthly