

For: 3420/P1

Please complete the following:

99-0590/P5

99-2889/P3

99-3265/P1

99-3266/P1

99-3361/P2

99-3370/P2

1999 DRAFTING REQUEST

Bill

Received: 04/12/99

Received By: olsenje

Wanted: Soon

Identical to LRB:

For: Legislative Reference Bureau

By/Representing: JEO

This file may be shown to any legislator: NO

Drafter: olsenje

May Contact:

Alt. Drafters: nelsorpl

Subject: Correctional System - misc  
Courts - miscellaneous

Extra Copies: MGD

Pre Topic:

No specific pre topic given

Topic:

Revocation of extended supervision

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Reauired</u>
1?	olsenje	1/1-4-13-99 Kmg	Jm 4/13	Ch 4 Xm 13	<div style="border: 1px solid black; border-radius: 50%; padding: 5px; display: inline-block;">Submitted</div> ↳ P " - just send <sup>(drafts)</sup> to hold 1 per JEO		
FE Sent For:		1/2-6-2-99 Kmg	Xm 6/2	1/2-6-2-99 Xm 6/2 <END>			
		1/3-8-2-99 Kmg	Jb 8/3	Jmc 8/3			

44

**Olsen, Jefren**

---

**From:** Brennan, Mike  
**Sent:** Monday, March 29, 1999 9:50 AM  
**To:** Olsen, Jefren  
**Subject:** ESR Working Paper -- Any other statutes implicated by proposed changes?

Jefren --

Good talking with you this a.m.

Attached is the most recent draft of the Extended Supervision Revocation subcommittee's working paper. The section to focus on is III.; specifically, III.C. & D. (As we discussed previously, III.A. & B. are administrative rule changes which probably don't involve the LRB.)

Could you please take a look at the proposed statutory changes to 801 .50(5) and 302.113(9), as we are proposing, and let us know if there any other statutes thereby implicated which the subcommittee should also consider? I examined s. 753.04 ["writs, how issued, certiorari"], and ch. 781 ["extraordinary remedies"], but concluded they were not implicated.

Also, as we discussed, if you could work up a preliminary draft of the changes to that legislation, we would much appreciate it. No rush -- our next meeting is not until Fri. 4/16, in the State Capitol, in the GAR room.

Hope you get a break from the budget work sometime soon!

Mike



ESR . Working  
Paper doc

84 W2 707

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**CRIMINAL PENALTIES STUDY COMMITTEE  
Extended Supervision Revocation Subcommittee**

**Working Paper**

Outline:

- I. Extended Supervision ("ES") procedure
- II. ES revocation process, including proposed timeline
- III. Recommended statutory and administrative law changes

I. Extended Supervision procedure

A. Presumptions regarding initial level of supervision:

1. DOC reviews to determine offender's proper initial level of supervision; DOC to administer LSI and CMC assessments and consider results as part of these decisions.

or

2. DOC to start all offenders entering ES at strict supervision; offenders earn their way to lesser degrees of supervision.

B. Considerations for appropriate level of supervision:

1. Length of ES
2. Dangerousness of offender
3. Movement between levels
4. Treatment needs
5. Community environment/support network

C. Lamelas Committee Strict Supervision Model should be adopted; less restrictive stages added to it.

See Tab 11 of Jan. 21-22, 1999 briefing book for a description of the strict supervision model.



Purpose of adoption of strict supervision model: to increase the panoply of sanctions open to DOC to match the spectrum of possible ES violations.

Note that at Tab 11, p. 16, the recommendation will be for a sufficient number of confinement beds to assure that offenders will be held accountable immediately. The subcommittee notes that sufficient funding must be allocated to properly effectuate this recommendation.

Further, at Tab 11, p. 16, the recommendation regarding *staff caseload* could be 20 offenders per agent.

D. Resources/Cost for I.C.

1. Bill Grosshans gathered estimates from DOC; these found at Tab 12 of Jan. 21-22, 1999 briefing book
2. Dave Schwarz gathered estimates from DOA-Div. of Hrgs. & Appls.; these found at Tab 13 of Jan. 21-22, 1999 briefing book

II. ES revocation process, including proposed timeline

A. Decisionmaker

1. ALJ would continue to conduct revocation hearing, would prepare a report containing specific findings of fact, and would make revocation decision. If ALJ decides to revoke, ALJ would also recommend the period of prison time offender should receive.

**(Passed by committee vote of 15-2 on Jan. 21, 1999)**

2. Appeal from ALJ decision to administrator of Division of Hearings and Appeals would remain unchanged. This allows for errors to be caught before circuit court review.

**DOA-Division of Hearings and Appeals will propose legislation to make administrative review of the ALJ's decision discretionary rather than mandatory. DOC to review and sign-off on that legislation.**

3. The ALJ's report (and administrator's written decision, if appealed) would be forwarded to the circuit judge who originally sentenced the offender, or that judge's successor. The circuit judge would determine an appropriate time period for resentencing.

*(Passed by committee vote Of 16-1 on Jan. 21.1999)*

4. This would leave the current writ of certiorari path for circuit court review of revocation decision unchanged. The offender would retain certiorari remedy.

5. The committee would propose specific statutory and/or administrative rule revisions for DOC to seek certiorari review of the ALJ's decision not to revoke. E.g., see III. C. below.

B. Possible sanctions for ES violation:

1. Revocation and return to prison (WI Admin. Code 331)
2. Alternatives to revocation (ATR's):
  - a. modify rules of supervision (e.g. no contact provision)
  - b. increase level of supervision
  - c. complete a program (e.g. anger management)
  - d. community service
  - e. detention for disciplinary purposes (requires supervisory approval and cannot exceed 5 working days; WI Admin. Code DOC328.22(c)(3))
  - f. halfway house placement
  - g. electronic monitoring
  - h. formal alternative to revocation in a state correctional center (felons only)
  - i. curfews/home confinement
  - j. confinement (see 3/15/99 Pultz memorandum regarding this alternative; **this memo to be updated and resubmitted**)
  - k. return offender to court to modify rules of supervision



- C. Time period for revocation decision:
1. Currently 84 days from alleged revokable conduct to decision on administrative appeal - need to reduce.
  2. Proposed modification to expedite revocation decision and decrease it to 66 days:

DAY (actual, not work)

0	<b>Hold for alleged ES violation</b>
10	<b>Violation report completed and DOC reaches decision on revocation</b>
13	<b>Hearing request</b>
15	<b>Hearing notice*</b>
20	<b>Revocation packet to be prepared</b>
35	<b>Hearing</b>
42	<b>AL J written decision</b>
52	<b>Appeal due - if no appeal, trial court notified</b>
59	<b>Response due</b>
66	<b>Administrator's decision - trial court notified</b>

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\* Preliminary hearing, if necessary, pursuant to DOC Admin. Rule 33 1.04(2). An exception would be added at 331.04(f): "A [full] hearing can be tendered within 35 days of the hold. "

### III. Recommended Administrative Law Changes:

#### A. Criteria for revocation referral by DOC:

1. Nature of violation(s)
2. Prior criminal history, including juvenile contacts ~~and/or correctional history~~\*
3. Consideration of possible alternatives to revocation is required, but not dispositive

Wis. Admin. Code DOC 33 1.03(3) would be revised as follows:

**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) ~~Except as provided in par. c~~ 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.~~ ~~Nothing in par. b. prevents the agent from recommending revocation when the behavior of the offender precludes implementation of alternatives. Neither is the agent obligated to implement every alternative available.~~

(d) ~~Recommend revocation for an alleged violation~~

**(Passed by full committee on Jan. 21, 1999)**

#### B. Criteria for revocation decision by DOA - Div. of Hrgs. and Appls. ALJ:

1. Whether a violation(s) occurred
2. Whether DOC considered the criteria above in 1II.A.

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\* This shaded portion not yet voted on by full committee.

3. Whether confinement is necessary for public protection (including consideration of offender's prior criminal history, including juvenile contacts ~~and/or correctional history~~), treatment, or not to unduly depreciate the nature of the violation(s)
4. ~~Whether an alternative-to-revocation is appropriate [The subcommittee would like to see this provision removed, if the Attorney General's office concludes due process, as interpreted in Plotkin, is not violated.]~~

Wis. Admin. Code HA 2.05(7) would be revised as follows:

#### **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 DOC considered alternatives to revocation and whether revocation should result.~~ ~~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, juvenile delinquency referrals, and/or correctional history~~, 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.

**(Passed, as modified to read "delinquency referrals," by full committee on Jan. 21, 1999)**

\* This shaded portion not yet voted on by full committee.

\* This shaded portion not yet voted on by full committee.

\* Underlined portion not yet voted on by full committee.

- C. DOC would be allowed to seek certiorari review of the ALJ's decision not to revoke

Wis. Stat. s. 801.50(5) would be revised as follows:

(5) Venue of an action to review a probation, a decision to revoke or not to revoke extended supervision, or parole revocation or a refusal of parole by certiorari, and ~~for all decisions by an administrative law judge if adverse to the Department of Corrections,~~ shall be the county in which the relator was last convicted of an offense for which the relator was on probation, extended supervision or parole or for which the relator is currently incarcerated.

~~[DOC requests an attorney position to administer such actions.]~~

- D. The circuit court would specify the time period of revocation of extended supervision.

Wis. Stat. s. 302.113(9) to be revised as follows:

(9)(a) If a person released to extended supervision under this section violates a condition of extended supervision, the division of hearings and appeals in the department of administration, upon proper notice and hearing, or the department of corrections, if the person on extended supervision waives a hearing, may revoke the extended supervision of the person and return the person to ~~prison~~ **the court for disposition of the violation.** ~~The court shall return the person to extended supervision order that if the person is returned to prison, he or she shall be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in custody before release to extended supervision. The revocation court order shall provide the person on extended supervision with credit in accordance with ss. 304.072 and 973.155.~~

(b) A person who is returned to prison after revocation of extended supervision' shall be incarcerated for the entire period of time specified by the ~~department of corrections in the case of a waiver or by the division of hearings and appeals in the department of administration in the case of a hearing under par. (a) court.~~ The period of time specified under par. (a) may be extended in accordance with sub. (3).

(c) A person who is subsequently released to extended supervision after service of the period of time specified by the ~~department of corrections in the case of a waiver or by the division of hearings and appeals in the department of administration in the case of a hearing court~~ under par. (a) is subject to all conditions and rules under sub. (7) until the expiration of the term of extended supervision portion of the bifurcated sentence.

[ESR subcommittee to recommend that at the time of resentencing, the trial court has authority to specify a new bifurcated sentence which may not be longer than but may be equal to or less than the ES period in the offender's original sentence.]

E. Criteria for DOC resentencing recommendation:

1. To include "boot camp" as a recommendation
2. To be studied further at future ESR subcommittee meeting

[DOC to review and revise resentencing grid, and seek input from criminal justice system concerning that grid.]

F. Criteria for ALJ resentencing recommendation:

1. To include "boot camp" as a recommendation
2. To be studied further at future ESR subcommittee meeting



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-2889/P1

JEO&RPN: King

D-Note

by Weeb 4/14 4:30 pm

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

Sen. Cof.

1 **AN ACT**...; **relating to:** revocation of extended supervision.

***Analysis by the Legislative Reference Bureau***

This is a preliminary draft prepared for the Criminal Penalties Study Committee's extended supervision revocation subcommittee. An analysis will be provided in a later draft.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

2 **SECTION 1.** 302.113 (9) of the statutes is amended to read:

3 302.113 (9) (a) If a person released to extended supervision under this section  
4 violates a condition of extended supervision, the division of hearings and appeals in  
5 the department of administration, upon proper notice and hearing, or the  
6 department of corrections, if the person on extended supervision waives a hearing,  
7 may revoke the extended supervision of the person and ~~return~~ ~~the person to prison.~~  
8 If extended supervision is revoked, the person is shall be returned to prison, he or  
9 she the court that sentenced the nerson and the court shall order the nerson to be

1 returned to prison for any specified period of time that does not exceed the time  
2 remaining on the bifurcated sentence. The time remaining on the bifurcated  
3 sentence is the total length of the bifurcated sentence, less time served by the person  
4 in custody before release to extended supervision. ~~The revocation~~ A court order  
5 returning a person to prison under this paragraph shall provide the person in whose  
6 extended supervision was revoked with credit in accordance with ss. 304.072 and  
7 973.155.

8 (b) A person who is returned to prison after revocation of extended supervision  
9 shall be incarcerated for the entire period of time specified by the ~~department of~~  
10 ~~corrections in the case of a waiver or by the division of hearings and appeals in the~~  
11 ~~department of administration in the case of a hearing court~~ under par. (a). The period  
12 of time specified under par. (a) may be extended in accordance with sub. (3).

13 (c) A person who is subsequently released to extended supervision after service  
14 of the period of time specified by the ~~department of corrections in the case of a waiver~~  
15 ~~or by the division of hearings and appeals in the department of administration in the~~  
16 ~~case of a hearing court~~ under par. (a) is subject to all conditions and rules under sub.  
17 (7) until the expiration of the term of extended supervision portion of the bifurcated  
18 sentence.

19 History: 1997 a. 283.

**SECTION 2.** 801.50 (5) of the statutes is amended to read:

20 801.50 (5) Venue of an action for certiorari to review a probation, ~~extended~~  
21 ~~supervision~~ or parole revocation, a decision to revoke or not revoke extended  
22 supervision or a refusal of parole ~~by certiorari~~ shall be the county in which the relator

1 was last convicted of an offense for which the relator was on probation, extended  
2 supervision or parole or for which the relator is currently incarcerated.

History: 1983 a. 204, 228, 389, 538; 1985 a. 234,291; 1987 a. 208; 1993 a. 318,319; 1997 a. 283.

3 (END)



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2889/P1dn

JEO&PRM: /:.....  
MAG

Mike Brennan:

1. With respect to the changes ins. 302.113 (9), stats., is it the subcommittee's intent to *require* a person to be returned to court after extended supervision is revoked? Or will DOC or the ALJ have the discretion to do something short of returning the person to court even though they order revocation? This draft takes the former approach, and to avoid ambiguity the draft explicitly says that the person *must* be returned to court after revocation (lest the "may revoke . . . and return the person to court" language be read as giving DOC or the ALJ two discretionary acts, the first being revocation, the second being the decision whether or not to return the person to court).

2. The March 29, 1999, draft of the ESR subcommittee's working paper showed two revisions to s. 801.50 (5), stats., one of which was highlighted (in grey) and the other of which was not highlighted. The highlighted revision refers to "all decisions by an administrative law judge if adverse to the department of corrections". This language is much broader than the issue being dealt with by the subcommittee and would apply to decisions having nothing to do with extended supervision revocation, such as decisions to not revoke probation or parole, prison disciplinary proceedings and conditions of confinement cases.

Accordingly, this draft incorporates only the revision that was not highlighted, which refers to a decision to revoke or not revoke extended supervision. Does this effect the subcommittee's intent? If the subcommittee intends to cover decisions not to revoke probation or parole, that can be done by saying something like "Venue of an action for certiorari to review a decision to revoke or not revoke probation, extended supervision or parole or a refusal of parole shall be the county etc."

I assume that there is no need to give DOC the *ability* to seek certiorari review of an adverse decision by DOA division of hearings and appeals because it seems to me that they already have that under the rule that where there are no statutory provisions for judicial review, an administrative action may be reviewed by way of certiorari. See *State ex rel. Iushewitz v. Milwaukee Personnel Review Board*, 176 Wis. 2d 706, 710 (1993), citing *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50 (1971) and *State ex rel. Kaczowski v. Fire & Police Commission*, 33 Wis. 2d 488, 501 (1967). If there is a need to give DOC the ability to seek certiorari review, the place to do so would be in ss. 302.113 and 302.114, stats., not s. 801.50 (5), stats.

Finally, note that for grammatical reasons I moved the placement of the language in s. 801.50 (5), stats., and for readability I moved the reference to certiorari to the beginning of the sentence.

6:

Please let me know if you have any questions or changes.

**Jefren E. Olsen**  
Legislative Attorney  
Phone: (608) 2664906  
E-mail: [Jefren.Olsen@legis.state.wi.us](mailto:Jefren.Olsen@legis.state.wi.us)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2889/P1dn  
JEO:kmg:km

April 13, 1999

Mike Brennan:

1. With respect to the changes in s. 302.113 (9), stats., is it the subcommittee's intent to require a person to be returned to court after extended supervision is revoked? Or will DOC or the AW have the discretion to do something short of returning the person to court even though they order revocation? This draft takes the former approach, and to avoid ambiguity the draft explicitly says that the person *must* be returned to court after revocation (lest the "may revoke. . . and return the person to court" language be read as giving DOC or the ALJ two discretionary acts, the first being revocation, the second being the decision whether or not to return the person to court).

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Finally, note that for grammatical reasons I moved the placement of the language in s. 801.50 (5), stats., and for readability I moved the reference to certiorari to the beginning of the sentence.

Please let me know if you have any questions or changes.

Jefren E. Olsen  
Legislative Attorney  
Phone: (608) 26643906  
E-mail: [Jefren.Olsen@legis.state.wi.us](mailto:Jefren.Olsen@legis.state.wi.us)

## Olsen, Jefren

---

**From:** Brennan, Mike  
**Sent:** Friday, May 07, 1999 12:33 PM  
**To:** Olsen, Jefren  
**cc:** 'judge fiedler'; 'prayewQdoj.state.wi.us'; Pultz, Robert  
**Subject:** Revisions to

Jefren --

Good talking with you today.

As we discussed, last Friday, 4/30, the ESR subcommittee met and discussed the preliminary draft of statutory changes which you prepared around 4/13/99. There were 2 specific requests for additional language:

1. Specific statutory language authorizing a bifurcated "sentence" upon resentencing. We discussed a couple of e.g.'s of this, and you grasped what I understand the subcommittee is seeking on this front. (The advantages to be working with the original drafter of Act 283!) You also made the good point that to avoid double jeopardy concerns, perhaps the term "sentence" would not be used when referring to this 2nd (or subsequent) bifurcated "penalty" which the judge would mete out at the time of ES revocation.
2. Specific statutory language authorizing the Department of Corrections to seek the writ of certiorari. This would be in addition to the venue statutory changes to s. 801 .50

As we discussed, our full committee, and the ESR subcommittee, will be meeting next Thursday & Friday, 5/13-14. Any proposals can be e-mailed to me before that time for dissemination to the subcommittee before those dates.

Please do not hesitate to contact me with any ?'s.

Thanks as always for your great work Jefren --

Mike

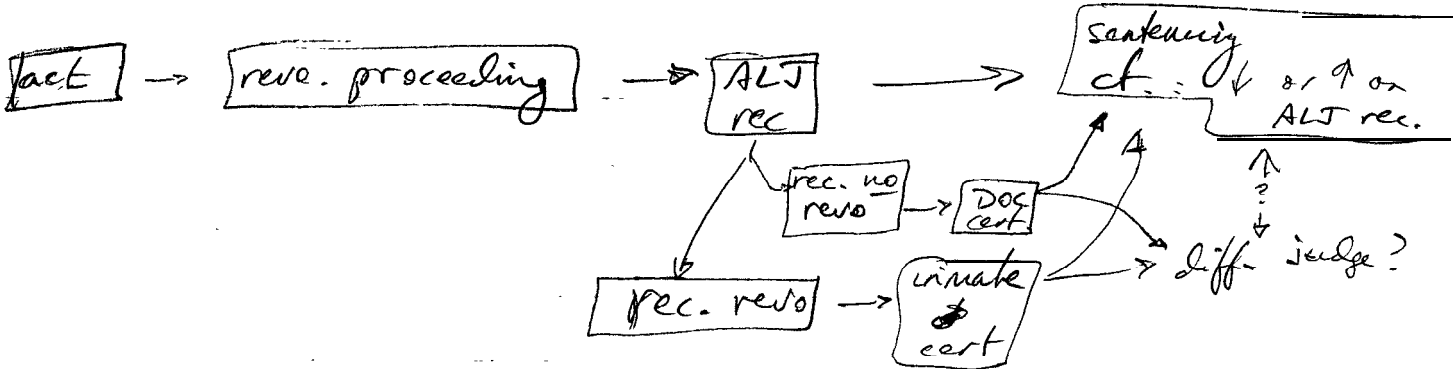
Mike Brennan  
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8 19 North 6th Street  
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Milwaukee, WI 53203  
(W)(4 14) 227-5 102  
(F)(414) 227-5104  
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2009

1. Explicitly say DoC has unit of cert. authority
2. Ct. may specify time in prison + e:s.  
Total can't exceed remaining E.S.

ALJ makes recommendation.

~~Ct. may decide not to revoke~~  
Spell this out!



Cert can be used to review judicial act to determine whether it is within ct's jurisdiction ....

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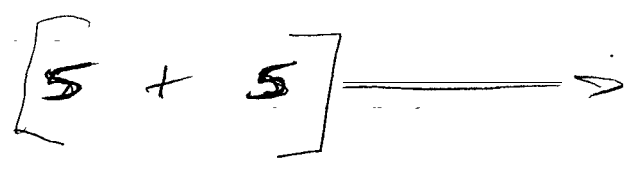
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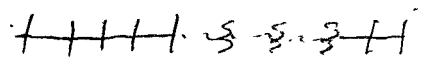
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~~XXX~~



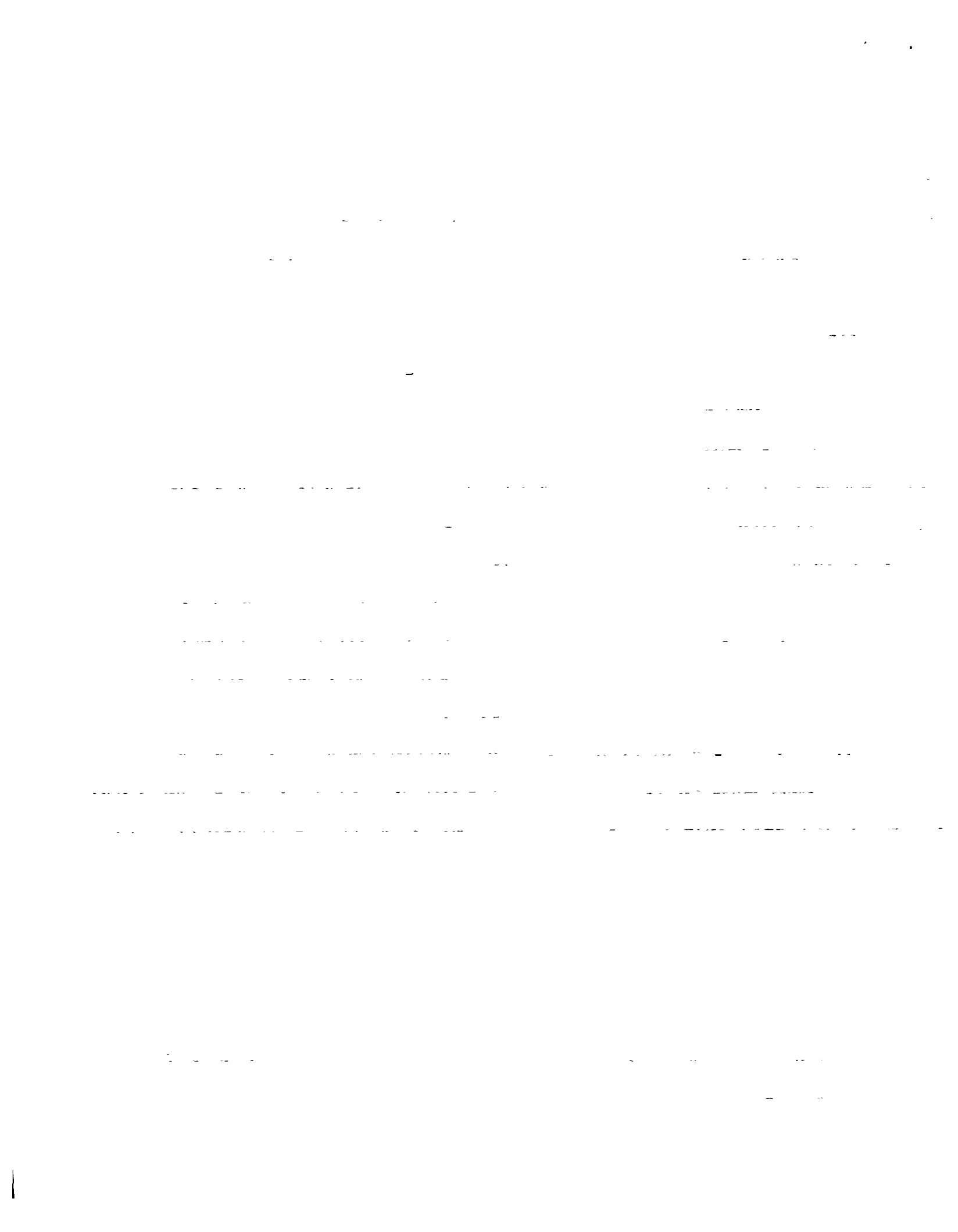
upon revoc must specify  
same time in prison?  
 → ATR by revoc.



X  
 ↓  
 Revoc  
 2 yrs. "resentence"  
 3 yrs remaining e.s.

Current par. (c) doesn't make it clear  
 that time in prison after revoc  
~~is taken so~~ reduces remaining  
 e.s. by same amount.

Cf. that sentenced person



# WISBAR

WISCONSIN SUPREME COURT CASELAW

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## SUPREME COURT OF WISCONSIN

Case No.: 97-1867

Complete Title

of Case:

Daniel D. Drow,

Petitioner-Appellant,

v.

David H. Schwarz and Division of Hearings

and Appeals, State of Wisconsin,

Respondents-Respondents-Petitioners.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS

Reported at: 220 Wis.2d 415, 583 N.W.2d 655

(Ct. App. 1998, Published)

Opinion Filed: May 5 , 1999

Submitted on Briefs:

Oral Argument: March 4, 1999

Source of APPEAL

COURT: Circuit

COUNTY: Marathon

JUDGE: Vincent K. Howard

JUSTICES:

Concurred:

Dissented:

Not Participating:

ATTORNEYS: For the respondents-respondents-petitioners the cause was argued by *Pamela Magee, assistant attorney general*, with whom on the briefs was *James E. Doyle, attorney general*.

For the petitioner-appellant there was a brief by *Amy K. McDavid* and *Frank J. Remington, University of WI Law School, Madison* and oral argument by *Amy K. McDavid*.

**NOTICE**

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

**IN SUPREME COURT**

**FILED**

**MAY 5, 1999**

**Marilyn L. Graves**

**Clerk of Supreme Court**

**Madison, WI**

**No. 97-1867**

**STATE OF WISCONSIN :**

Daniel D. Drow,

Petitioner-Appellant,

**v.**

David H. Schwarz and Division of Hearings

and Appeals, State of Wisconsin,

Respondents-Respondents-

Petitioners.

REVIEW of a decision of the Court of Appeals. *Reversed.*

¶1. SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE. This is a review of a published decision of the court of appeals, *DROW v. Schwartz*, 220 Wis.2d 415, 583 N.W.2d 655 (Ct. App. 1998), which reversed an order of the Circuit Court for Marathon County, Vincent K. Howard, Judge. The circuit court order denied Daniel D. Drow's petition for a writ of certiorari to review revocation of his probation.

¶2. Relying on State ex. rel Johnson v. Cadv, 50 Wis.2d 540, 550, 185 N.W.2d 360 (1971), which concluded that "petitioner's right of review of a revocation hearing is by certiorari to the court of conviction," the court of appeals held that "court of conviction," means "the same branch of the circuit court in which he was convicted" rather than in a branch of the "circuit court in the county of conviction."<sup>1</sup> Because Drow was convicted in Branch 2 of the Circuit Court for Marathon County, the court of appeals held that Branch 3 of the Circuit Court for Marathon County had no jurisdiction to review Drow's certiorari petition.

¶3. The only issue presented for our review is whether a certiorari proceeding to review a probation revocation must be heard by the same branch of the circuit court in the county in which the probationer was convicted of the offense for which he was on probation. We hold that a certiorari proceeding to review a probation revocation need not be heard by the same branch of the circuit court in the county in which the probationer was convicted of the offense for which he was on probation; a certiorari proceeding to review a probation revocation may be heard in any branch of the circuit court in the county in which the probationer was last convicted of an offense for which he or she was on probation. See Wis. Stat. §801.50(5) (1997-98).<sup>2</sup> Accordingly, we reverse the decision of the court of appeals.

¶4. The facts necessary to this review are undisputed. On October 8, 1993, Daniel D. Drow entered pleas of no contest to charges of sexual assault of a child in the second degree in violation of Wis. Stat. §948.02(2) (1991-92), exposing a child to harmful materials in violation of Wis. Stat. §948.11(2) (a) (1991-92) and two counts of bail jumping in violation of Wis. Stat. §946.49(1)(b) (1991-92). Branch 2 of the Circuit Court for Marathon County withheld Drow's sentence and ordered 25 years of supervised probation. Branch 2 of the Circuit Court for Marathon County imposed the requirement that Drow participate in a sex offender treatment program as one of the conditions of probation. On March 20, 1996, the Department of Corrections charged Drow with violating this condition of probation. After a hearing by the Division of Hearings and Appeals, Drow's probation was revoked. Subsequently, Drow filed a petition for a writ of certiorari with the Circuit Court for Marathon County, the county in which he was convicted of the offense for which he was on probation, seeking judicial review of his probation revocation. The certiorari review was assigned to Branch 3 of the Circuit Court for Marathon County.

¶5. The issue presented is whether a certiorari proceeding to review a probation revocation must be heard by the same branch of circuit court in the county in which the probationer was convicted of the offense for which he was on probation. This court decides this question of law independent of the circuit court and court of appeals, benefiting from their analyses.

¶6. We begin by examining the statutory powers of each branch of a circuit court in a county and the statutory venue provision for review of probation revocation. Wisconsin Stat. §753.061(1) states that "[e]ach branch constitutes a circuit court with all the powers and jurisdiction possessed by circuit courts in circuits having one judge only." Drow argues that this statute means that all references to "circuit court" are to be interpreted as meaning a "branch of a circuit court." Section §753.061(1) simply provides no support for such an interpretation. We read §753.061(1) as stating that each branch of a circuit court is endowed with the full powers of a circuit court and that each branch of a circuit court has the same powers as every other branch of the circuit court. Thus, any branch of the Circuit Court for Marathon County has the power to review a probation revocation.

¶7. The only statutory provision referring to the venue of probation revocation proceedings is Wis. Stat. §801.50(5) providing that "venue of an action to review a probation...revocation...shall be the county in which the relator was last convicted of an offense for which the relator was on probation...."<sup>3</sup> This provision mandates, for example, that the venue of a certiorari review of a probation revocation is the county in which the probationer was convicted of the offense for which he or she was on probation; the provision does not require that certiorari review of a probation revocation be conducted by any particular branch of the circuit court in the county of conviction.<sup>4</sup> Thus this statute establishes that in the present case, venue is in the Circuit Court for Marathon County, not in any particular branch of the Circuit Court for Marathon County.

¶8. Examining only Wis. Stat. §§753.061 and 801.50(5) would lead us to conclude that any branch of the Circuit Court for Marathon County could hear Drow's certiorari petition for review of probation revocation.

¶9. The court of appeals, however, looked beyond these statutes to Johnson, a 1971 case, which it reads as requiring that a petition to review probation revocation is to be heard "in the same branch of circuit court in which the petitioner was convicted." Drow, 220 Wis.2d at 417-18.

¶10. We do not read Johnson in this manner. The issue presented in Johnson was whether a probationer had a right to a hearing at the administrative agency before probation was revoked. The Johnson court concluded that a probationer had the right to an administrative hearing and further concluded that it is "well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari." Johnson, 50 Wis.2d at 550. The Johnson court went on to hold that "judicial review of probation revocation was "by certiorari directed to the court of conviction."

Johnson, 50 Wis.2d at 550 (emphasis added). Reading the words "court of conviction" to mean the branch of the circuit court in the county in which the probationer was convicted of the offense for which he or she was on probation, as the court of appeals did, is not supported by Johnson because Johnson makes no mention of a branch of circuit court.

¶11. We conclude that Johnson should be read with §801.50(5) to mean that certiorari review is to be directed to a circuit court in the county of conviction of the offense for which he was on probation. In Bartus v. Wisconsin DHSS, 176 Wis.2d 1063, 1079, 501 N.W.2d 419 (1993), this court cited both the venue provision of Wis. Stat. §801.50(5) and Johnson, stating the following rule: "A probationer whose term has been revoked may seek review of the Administrator's determination by certiorari in the county in which the probationer was convicted of the offense for which the now revoked probation was imposed." In other words, we view Johnson's phrase "court of conviction" as being the same as the statutory phrase "county of conviction" in the context of the judicial review of a probation revocation.

¶12. We therefore hold that the phrase "court of conviction" as used in Johnson does not refer to the exact branch in the county in which the probationer was convicted of the offense for which he was on probation, but instead refers more generally to the circuit court in the county in which the probationer was convicted of the offense for which he was on probation.

¶13. Drow advances two reasons to support his thesis that the same branch of the Circuit Court for Marathon County in which he was convicted and placed on probation should also review the revocation of his probation. First, he argues that allowing review by a different branch deprives the sentencing branch of the opportunity to ensure that its intentions in imposing the relevant conditions of probation were followed. Second, Drow contends that the sentencing branch is in the best position to determine whether the violation of probation found by the department was reasonably supported by the evidence.

¶14. Both arguments are based on a misconception of the scope of certiorari review. The well-settled rule in Wisconsin is that on review by certiorari, the reviewing court examines the record of the administrative agency and is limited to determining: (1) whether the board kept within its jurisdiction, (2) whether the board acted according to law, (3) whether the board's action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that the board might reasonably make the order or determination in question. State v. Goulette, 65 Wis.2d 207, 215, 222 N.W.2d 622 (1974).<sup>5</sup> Because of the limited judicial review based on the administrative record, the branch of the circuit court that imposed sentence has no greater expertise in a certiorari proceeding than any other

branch of the circuit court for that county.

¶15. Finally, Drow claims that he is entitled to certiorari review by Branch 3 of the Circuit Court for Marathon County under Rule 1.12 of the Marathon County Circuit Court Rules. Rule 1.12 provides that writs "are to be assigned to the designated Intake Court" except that "certiorari in criminal matters [are] to be heard by the sentencing court."<sup>6</sup> We agree with the State that this rule is ambiguous. A probation revocation proceeding "is a civil proceeding in Wisconsin" and "not, as a constitutional matter, a stage of criminal prosecution." Thus the certiorari proceeding in the present case does not unambiguously fall within Rule 1.12. Even assuming that Rule 1.12 requires that Drow's certiorari petition be assigned to the branch of circuit court in which Drow was convicted of the offense for which he was on probation, violation of a local administrative rule of the Circuit Court for Marathon County regarding assignment of cases to the branches would not ordinarily render the proceedings null and void.

¶16. Our holding does not restrict circuit courts from developing and implementing local rules relating to the assignment of certiorari petitions for review of probation revocations as long as the rules are consistent with law and this court's rules of judicial administration. See SCR 70.34. We merely hold that certiorari review of probation revocations need not be conducted by the same branch of circuit court in the county in which the probationer was convicted of the offense for which he or she was on probation.

¶17. In sum, we hold that a certiorari proceeding to review a probation revocation need not be heard by the same branch of circuit court in the county in which the probationer was convicted of the offense for which he or she was on probation; a certiorari proceeding to review a probation revocation may be heard in any branch of the circuit court in the county in which the probationer was last convicted of an offense for which he or she was on probation. See Wis. Stat. §801.50(5). Accordingly we reverse the decision of the court of appeals.

*By the court.* -The decision of the court of appeals is reversed.

<sup>1</sup>The court of appeals did not suggest that State ex. rel Johnson v. Cady, 50 Wis.2d 540, 550, 185 N.W.2d 360 (1971), requires that the judge who presided at the conviction proceeding need be the same judge who hears the certiorari proceeding.

<sup>2</sup>All subsequent references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

<sup>3</sup>Wis. Stat. §801.02(5) provides:

Venue of an action to review a probation or parole



revocation or a refusal of parole by certiorari shall be the county in which the relator was last convicted of an offense for which the relator was on probation or parole or for which the relator is currently incarcerated.

4The administrative agency has interpreted the statute similarly. The form letter sent to Drow from the Division of Hearings and Appeals along with a copy of its decision set forth the following procedure for seeking judicial review:

Judicial review of a revocation decision may be obtained by Writ of Certiorari in the county in which you were last convicted of an offense for which you were on supervision. See *sec. 801.50(5)*.

5 See also *Coleman v. Percy* 96 Wis.2d 578, 588, 292 N.W.2d 615 (1980); *Van Ermen v. Wisconsin DHSS*, 84 Wis.2d 57, 63, 267 N.W.2d 17 (1978); *Snajder v. State*, 74 Wis.2d 303, 310, 246 N.W.2d 665 (1976); *Von Arx v. Schwartz*, 185 Wis.2d 645, 655-56, 517 N.W.2d 540, 544 (Ct. App. 1994).

6 Wisconsin Circuit Court Rules, Marathon County Rules 2 (Wis. Jury Verdict, Inc. 1999).

7 *State ex rel. Vanderbeke v. Endicott*, 210 Wis.2d 502, 513, 563 N.W.2d 883 (1997).

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State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-2889/P1  
JEO&RPN:kmg:km

Weds: 6/2  
by 4:00 pm

Double

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

2  
redraft  
make  
run

regenerate

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**AN ACT** to amend 302.113 (9) and 801.50 (5) of the statutes; relating to:  
revocation of extended supervision.

**Analysis by the Legislative Reference Bureau**

This is a preliminary draft prepared for the Criminal Penalties Study Committee's extended supervision revocation subcommittee. An analysis will be provided in a later draft.

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

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~~SECTION 1. 302.113 (9) of the statutes is amended to read:  
302.113 (9) (a) If a person released to extended supervision under this section violates a condition of extended supervision, the division of hearings and appeals in the department of administration, upon proper notice and hearing, or the department of corrections, if the person on extended supervision waives a hearing, may revoke the extended supervision of the person and return the person to prison. If extended supervision is revoked, the person is shall be returned to prison, he or~~

1 she the court that sentenced the person and the court shall order the person to be  
 2 returned to prison for any specified period of time that does not exceed the time  
 3 remaining on the bifurcated sentence. The time remaining on the bifurcated  
 4 sentence is the total length of the bifurcated sentence, less time served by the person  
 5 in custody before release to extended supervision. ~~The revocation~~ A court order  
 6 returning a person to prison under this paragraph shall provide the person on whose  
 7 extended supervision was revoked with credit in accordance with ss. 304.072 and  
 8 973.155.

9 (b) A person who is returned to prison after revocation of extended supervision  
 10 shall be incarcerated for the entire period of time specified by the ~~department of~~  
 11 ~~corrections in the case of a waiver or by the division of hearings and appeals in the~~  
 12 ~~department of administration in the case of a hearing~~ court under par. (a). The period  
 13 of time specified under par. (a) may be extended in accordance with sub. (3).

14 (c) A person who is subsequently released to extended supervision after service  
 15 of the period of time specified by the ~~department of corrections in the case of a waiver~~  
 16 ~~or by the division of hearings and appeals in the department of administration in the~~  
 17 ~~case of a hearing~~ court under par. (a) is subject to all conditions and rules under sub.

18 (7) until the expiration of the term of extended supervision portion of the bifurcated  
 19 sentence.

20 SECTION 2. 801.50 (5) of the statutes is amended to read:

21 801.50 (5) Venue of an action for certiorari to review a probation, ~~extended~~  
 22 ~~supervision~~ or parole revocation, a <sup>recommendation</sup> ~~decision~~ to revoke ~~or not revoke~~ extended  
 23 ~~supervision~~ or a refusal of parole by certiorari shall be the county in which the relator

1 was last convicted of an offense for which the relator was on probation, extended  
2 supervision or parole or for which the relator is currently incarcerated.

INS ✓  
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(END)

~~venue of an action for certiorari brought  
by the department of corrections to  
review a recommendation to not revoke  
extended supervision shall be in the  
county in which the person <sup>on extended supervision</sup> was con-  
victed of the offense for which he  
or she is on extended supervision.~~

1 **INSERT 1-3:**

2 SECTION 1. 302.113 (9) of the statutes is amended to read:

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4 violates a condition of extended supervision, the division of hearings and appeals in  
5 the department of administration, upon proper notice and hearing, or the  
6 department of corrections, if the person on extended supervision waives a hearing,  
7 may return the nerson to the court that sentenced the nerson with a recommendation  
8 that the court revoke the extended supervision of the person and return the person  
9 to prison. The court may accept or reject a recommendation to revoke the extended  
10 sunervision of the nerson. If the court accents the recommendation and revokes the  
11 person's extended sunervision, the court shall order the person is returned to prison,  
12 he or she shall be returned to prison for any specified period of time that does not  
13 exceed the time remaining on the bifurcated sentence. The time remaining on the  
14 bifurcated sentence is the total length of the bifurcated sentence, less time served by  
15 the person in custody before release to extended supervision under sub. (2) and less  
16 time served in custody for a nrevious revocation of extended sunervision. The  
17 revocation court order returning a person to prison under this paragraph shall  
18 provide the person ~~on~~ whose extended supervision <sup>✓</sup> was revoked with credit in  
19 accordance with ss. 304.072 and 973.155.

20 (b) A person who is returned to prison after revocation of extended supervision  
21 shall be incarcerated for the entire period of time specified by the ~~department of~~  
22 ~~corrections in the case of a waiver or by the division of hearings and appeals in the~~  
23 ~~department of ad~~ in the case of a hearing court under par. (a). The period

1 of time specified under par. (a) may be extended in accordance with sub. ( 3 ) . If  
 2 person is returned to prison under par. (a) for a oeriod of time that is less than the  
 3 time remaining on the bifurcated sentence, the nerson shall be released to extended  
 4 sunervision after he or she has served the neriod of time specified by the court under  
 5 par. (a), including anv periods of extension imposed in accordance with sub. (3).

6 (c) A person who is subsequently released to extended supervision after service  
 7 of the period of time specified by the ~~department of corrections in the case of a waiver~~  
 8 ~~or by the division of hearings and appeals in the department of administration in the~~  
 9 ~~case of a hearing court~~ under par. (a) is subject to all conditions and rules under sub.  
 10 ( 7 ) until the expiration of the ~~term of remaining~~ extended supervision portion of the  
 11 bifurcated sentence. The remaining extended supervision portion of the bifurcated  
 12 sentence is the total length of the bifurcated sentence, less the time served by the  
 13 person in custody before release to extended sunervision under sub. (2) and less the  
 14 period of time snecified by the court under nar. (a), including anv period of extension  
 15 imnosed in accordance with sub. (3).

History: 1997a, 283.

**SECTION 2.** 302.113 (9) (d) of the statutes is created to read:

17 302.113 (9) (d) In any case in which there is a hearing before the division of  
 18 hearings and appeals in the department of administration concerning whether to  
 19 recommend revocation of a person's extended supervision, the person on extended  
 20 supervision may seek review of a recommendation to revoke extended supervision  
 21 and the department of corrections may seek review of a recommendation to not  
 22 revoke extended supervision. Review of a recommendation under this paragraph  
 23 may be sought only by an action for certiorari.

**INSERT 3-2:**

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**SECTION 3. 801.50 (5c)** of the statutes is created to read:

801.50 **(5c)** Venue of an action for certiorari brought by the department of corrections under s. 302.113 (9) (d) to review a recommendation to not revoke extended supervision shall be in the county in which the person on extended supervision was convicted of the offense for which he or she is on extended supervision.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2889/P2dn

JEO&RPN: *img*

Mike Brennan:

Please review this redraft carefully. When reviewing it, note the following:

1. The draft provides that a person who violates extended supervision (ES) **may** be returned to the sentencing court with a recommendation for revocation. Thus, a person may violate ES, but if the person and DOC agree on some alternative to revocation then there will be no hearing before an ALJ, no recommendation for revocation and no return of the person to court. Okay?

2. Under the draft, if an ALJ recommends after a revocation proceeding that a ~~person's~~ <sup>person's</sup> ES not be ~~revo~~ <sup>revo</sup>ked, the person will not be returned to court. However, DOC may seek certiorari review of the recommendation not to revoke. What will happen if the reviewing court agrees with DOC? Will there just be another hearing before the ALJ, or could the reviewing court order the ALJ to change his or her recommendation? Does the draft need to specify the remedies or will the existing corpus of law on certiorari review provide for the remedies?

3. Do you want the draft to provide more details about what happens when a person is returned to court with a recommendation that ES be revoked? For instance, do you want to require the court to hold a hearing or only authorize a hearing? If there is a hearing, may the parties call witnesses? Should the court have to act within a certain time?

4. As a practical matter, allowing certiorari review of the ALJ's recommendation may in some cases mean that the person's case is being reviewed more than once by a judge or even by different judges at different times. This may result in some duplication of effort and, perhaps, conflicting court orders.

For example, if, after an ES revocation proceeding, an ALJ recommends revocation, the case will be returned to the sentencing court. In the meantime, the person on ES could begin an action for certiorari review of the ALJ recommendation. If the certiorari action is heard first, both the judge deciding the certiorari action and the sentencing judge could be looking at some of the same issues (though for different purposes). If the certiorari action is not heard until after the sentencing court is done, the certiorari review would appear to be moot because the sentencing court will have made its own decision as to whether to accept the ALJ's recommendation.

Also, if the court hearing the certiorari action decides that the ALJ's recommendation was arbitrary or unreasonable, what happens to the proceeding in



review - 2 -

the sentencing court? Must that be stayed pending a new hearing before the ALJ? Or, if the sentencing court already accepted the recommendation and returned the person to prison, can the certiorari court vacate the revocation order of the sentencing judge?

Though it is probably less likely, there may also be some duplication of effort if DOC seeks certiorari of a recommendation not to revoke. If DOC prevails in its certiorari action and, after another hearing, the ALJ recommends revocation, the case will be returned to the sentencing court, which could decide to reject the recommendation. Also, it appears that the person on ES in this scenario could seek certiorari review of the new ALJ recommendation (though presumably the chance of success would be mighty slim).

In light of the above, would it make sense to have the ALJ's recommendation go to the sentencing court in all cases? The court could then review the recommendation, hold further hearings if needed (or perhaps order the ALJ to hold further hearings) and then issue a final order revoking or not revoking ES. Then you would have one proceeding with both parties essentially able to make their respective cases twice but without the duplicative or inconsistent results that might occur under this draft.

5. As changed by this draft, s. 302.113 (9) (a), stats., will allow the court to reject a recommendation for revocation made by DOC in cases in which the person on ES waives a hearing. I assume that in most cases in which the person has waived a hearing, he or she will not be objecting to revocation. However, even if the person on ES is not objecting to revocation, the draft will give the court the discretion to keep the person on ES. Is that your intent?

6. The draft clarifies the effect on a bifurcated sentence of revocation of ES and reincarceration. However, the draft does not refer to a court giving a person a sort of new bifurcated "sentence" after revoking ES. On reflection, it seems to me that such language is unnecessary because that is essentially what happens by operation of s. 302.113 (9), stats. After revoking ES, a court must return the person to prison for a specified period of time that does not exceed the time left on the person's sentence. After completing the period of time specified in the revocation order, the person is released again to ES. The new ES period is the time left on the sentence when the person was revoked minus the period of time in the revocation order, including any extensions for rule violations, if applicable. (The draft could require the judge to lay out in the revocation order both the period of imprisonment and the remaining period of ES. Compare s. 973.01 (8), stats.)

7. Finally, on further review of s. 801.50 (5), stats., I realized that we cannot simply refer in that statute to an action by DOC to seek review of a recommendation not to revoke. This is because venue under the statute depends on the county of conviction or incarceration of the *relator* (petitioner). Because it makes no sense to speak of the county of conviction or incarceration of DOC, this draft creates a new subsection (proposed s. 801.50 (5c)) that makes venue for certiorari sought by DOC the county in which the person was placed on ES. Okay?

convicted of the offense for which the person was

i;

Please let me know if you have any questions or changes.

**Jefren E. Olsen**  
Legislative Attorney  
Phone: (608) 2664906  
E-mail: [Jefren.Olsen@legis.state.wi.us](mailto:Jefren.Olsen@legis.state.wi.us)



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2889/P2dn  
JEO&RPN:kmg:km

June 2, 1999

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Please let me know if you have any questions or changes.

Jefren E. Olsen  
Legislative Attorney  
Phone: (608) 2664906  
E-mail: [Jefren.Olsen@legis.state.wi.us](mailto:Jefren.Olsen@legis.state.wi.us)

**CRIMINAL PENALTIES STUDY COMMITTEE  
Extended Supervision Revocation Subcommittee**

**Working Paper**

**Short outline:**

- I. Extended Supervision (“ES”) procedure**
- II. Possible sanctions for violation of an ES condition:**
  - A. Alternatives-to-revocation**
  - B. “Time-out”**
  - C. Revocation**
- III. Recommended statutory and administrative law changes**

**I. Extended Supervision procedure**

- A. Presumption regarding initial level of supervision:**

DOC to start all offenders entering ES at strict supervision; offenders may earn their way to lesser degrees of supervision.

- B. Considerations for appropriate level of supervision should include:**

- 1. Length of ES
- 2. Dangerousness of offender
- 3. Movement between levels
- 4. Treatment needs
- 5. Community environment/support network

- C. Lamelas Committee Strict Supervision Model should be considered; less restrictive stages should be added to it.**

See Tab 11 of Jan. 2 1-22, 1999 briefing book for a description of the strict supervision model.



Note: per the Attorney General’s office, supervisees entering strict supervision cannot be placed in a Phase I (incarcerative) supervision; supervision cannot = confinement as currently defined.

First phase of strict supervision cannot be in DOC-CCC facility, as this is supervision component of bifurcated sentence, not prison component.

Purpose of adopting strict supervision model: to increase the panoply of sanctions open to DOC to match the spectrum of possible ES violations.

Note that at Tab 11, p. 16, the recommendation will be for a sufficient number of confinement beds to assure that offenders will be held accountable immediately. The subcommittee notes that sufficient funding must be allocated to properly effectuate this recommendation.

Further, at Tab 11, p. 16, the recommendation regarding *staff caseload* could be 20 offenders per agent.

-- Bill Grosshans is developing the justification for the supervisee-to-agent ratio of 20- 1.

D. Resources/Cost for I.C.

1. Bill Grosshans gathered estimates from DOC; these found at Tab 12 of Jan. 2 1-22, 1999 briefing book
2. Dave Schwarz gathered estimates from DOA-Div. of Hrgs. & Appls.; these found at Tab 13 of Jan. 2 1-22, 1999 briefing book

II. Possible sanctions for violation of an ES condition

A. Alternatives to revocation (ATR's):

1. modify rules of supervision (e.g. no contact provision)
2. increase level of supervision
3. complete a program (e.g. anger management)
4. community service
5. detention for disciplinary purposes (requires supervisory approval and cannot exceed 5 working days; WI Admin. Code DOC 328.22(c)(3))  
(This sanction would be eliminated in favor of 1I.B. below)
6. halfway house placement
7. electronic monitoring



8. formal alternative to revocation in a state correctional facility (felons only)
9. curfews/home confinement
10. return offender to court to modify rules of supervision

B. "Time out" -- confinement for an amount of time not to exceed 90 days in an ES regional detention facility if available, or if not available, a county jail.

- a. If violations are alleged, and
- b. There is a signed admission of same, then
- c. The agent can either:
  - (a) invoke an ATR (see 1I.A. above); or
  - \* (b) impose up to a 90 day hold; or
  - (c) begin the revocation process (see 1I.C below)

Reasoning: Corrections officials desire a punishment mechanism shorter than full revocation, and more proper than a disciplinary hold without an actual intent to revoke.

Requirements:

- (1) Sufficient funds must be allocated for ES regional detention facilities to alleviate potential overcrowding at county jails.
- (2) If the offender is placed in "time out" in a county jail, sheriffs must (a) have the option to refuse the placement, and (b) be fully reimbursed.
- (3) As per discussion in the full committee, absent disciplinary circumstances counseling to the contrary, Huber privileges should be presumed for ES supervisees in "time out."

"Time out" lasting 0-45 days must be approved by a DOC supervisor.

"Time out" lasting 46-90 days must be approved by a regional DOC chief.

Due Process: Because confinement is involuntary, some due process is required. General agreement this procedure would comport with due process because (a) supervisee has signed

admission of violation(s), and (b) the “time out” is in lieu of revocation. The AG’s office has confirmed it can defend a basic disciplinary model such as this.

C. Revocation and return to prison (WI Administrative Code Ch. 331)

1. Decisionmaker

a. ALJ would continue to conduct revocation hearing, would prepare a report containing specific findings of fact, and would make revocation decision. If ALJ decides to revoke, ALJ would also recommend the period of prison time offender should receive.

*(Passed by committee vote of 15-2 on Jan. 21, 1999)*

b. Appeal from ALJ decision to administrator of Division of Hearings and Appeals would remain unchanged. This allows for errors to be caught before circuit court review.

DOA-Division of Hearings and Appeals has drafted proposed legislation to make administrative review of the ALJ’s decision directory and not mandatory.

c. The ALJ’s report (and administrator’s written decision, if appealed) would be forwarded to the circuit judge who originally sentenced the offender, or that judge’s successor. The circuit judge would determine an appropriate time period for resentencing.

*(Passed by committee vote of 16-1 on Jan. 21, 1999)*

d. This would leave the current writ of certiorari path for circuit court review of revocation decision unchanged. The offender would retain certiorari remedy.

e. The committee would propose specific statutory and/or administrative rule revisions for DOC to seek certiorari review of the ALJ’s decision not to revoke.

E.g., see III. C. below.

f. Internal DOC process would not change by which agent initiates ATR or revocation procedure.

2. Time period for revocation decision:

a. Currently 84 days from alleged revokable conduct to decision on administrative appeal - need to reduce.

b. Proposed modification to expedite revocation decision and decrease it to 71 days

c. Per AG's office: ensure rules are directory and not mandatory; deadlines should not be strict, but remain in DOC/DOA's discretion; use current parole rules as examples

\* Who decides to revoke may be subject to Horn and Drow cases. Drow case decided 5/5/99.

DAY (actual, not work)

- 0**                                    **Hold for alleged ES violation and SPD notified**
- 10**                                   **Notice of violation and violation report completed and DOC reaches decision on revocation - copies given to offender and SPD**
- 13**                                   **Hearing request and violation report forwarded to ALJ and copied to SPD**
- 13-15**                              **Preliminary hearing, per current practice, held before P&P supervisor not in chain of command for that ES supervisee**
- 16**                                   **Notice of full hearing**
- 20**                                   **Revocation packet to be prepared**
- 40**                                   **Full hearing**
- 47**                                   **ALJ written decision**
- 57**                                   **Appeal due - if no appeal, trial court notified**
- 64**                                   **Response due**
- 71**                                   **Administrator's decision - trial court notified**

III. Recommended Administrative Law Changes:

A. Criteria for revocation referral by DOC:

1. Nature of violation(s)
2. Prior criminal history, including juvenile contacts and/or correctional history\*
3. Consideration of possible alternatives to revocation is required, but not dispositive

Wis. Admin. Code DOC 33 1.03(3) would be revised as follows:

**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) Except as provided in par. c, 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.~~ Nothing in par.b. prevents the agent from recommending revocation when the behavior of the offender precludes implementation of alternatives. Neither is the agent obligated to implement every alternative available.

(d) Recommend revocation for an alleged violation.

**(Passed by full committee on Jan. 21, 1999)**

B. Criteria for revocation decision by DOA - Div. of Hrgs. and Appls. ALJ:

1. Whether violation(s) occurred
2. Whether confinement is necessary for public protection (including consideration of offender's prior criminal

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\* This shaded portion not yet voted on by full committee.

history, including juvenile contacts and/or correctional history\*), treatment, or not to unduly depreciate the nature of the violation(s)

3. Whether revocation should result or whether an alternative-to-revocation may be appropriate

Wis. Admin. Code HA 2.05(7) would be revised as follows:

### **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, within the administrative law judge's discretion, revocation should result or whether an alternative to revocation may be appropriate.\* ~~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, juvenile delinquency referrals and/or correctional history\*, 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.

*(Passed, as modified to read "delinquency referrals," by full committee on Jan. 21, 1999)*

- C. DOC would be allowed to seek certiorari review of the ALJ's decision not to revoke
  1. Substantive language to accomplish this to be drafted by Legislative Reference Bureau attorney.
  2. Wis. Stat. s. 801.50(5) would be revised as follows:

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\* This shaded portion not yet voted on by full committee.

\* This shaded portion not yet voted on by full committee.

\* Underlined portion not yet voted on by full committee.

(5) Venue of an action to review a probation, a decision to revoke or not to revoke extended supervision, or parole revocation or a refusal of parole by certiorari, and for all decisions by an administrative law judge if adverse to the Department of Corrections, shall be the county in which the relator was last convicted of an offense for which the relator was on probation, extended supervision or parole or for which the relator is currently incarcerated.

3. DOC requests an attorney position to administer such actions.

D. The circuit court would specify the time period of revocation of extended supervision.

The subcommittee recommends that at the time of resentencing, the trial court has authority to specify a new bifurcated sentence which may not be longer than but may be equal to or less than the ES period in the offender's original sentence.

Wis. Stat. s. 302.113(9) to be revised as follows:

(9)(a) If a person released to extended supervision under this section violates a condition of extended supervision, the division of hearings and appeals in the department of administration, upon proper notice and hearing, or the department of corrections, if the person on extended supervision waives a hearing, may revoke the extended supervision of the person and return the person to prison the court for disposition of the violation. The court shall ~~return the person to extended supervision order~~ that if the person is returned to prison, ~~he or she shall be returned to prison~~ for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in custody before release to extended supervision. The ~~revocation~~ court order shall provide the person on extended supervision with credit in accordance with ss. 304.072 and 973.155.

(b) A person who is returned to prison after revocation of extended supervision shall be incarcerated for the entire period of time specified by the ~~department of corrections in the case of a waiver or by the division of hearings and appeals in the department of administration in the case of a hearing under par. (a)~~ court. The period of time specified under par. (a) may be extended in accordance with sub. (3).

(c) A person who is subsequently released to extended supervision after service of the period of time specified by the ~~department of corrections in the case of a waiver or by the division of hearings and appeals in the department of administration in the case of a~~

hearing court under par. (a) is subject to all conditions and rules under sub. (7) until the expiration of the term of extended supervision portion of the bifurcated sentence.

E. Criteria for DOC resentencing recommendation:

1. To include “boot camp” as a recommendation
2. To be studied further at future ESR subcommittee meeting

DOC to review and revise resentencing grid, and seek input from criminal justice system concerning that grid.

The subcommittee recommends that the permanent sentencing commission review the utility of these resentencing guidelines, including that it “fine tune” such guidelines to set the proper parameters for ES revocation periods.

F. Criteria for ALJ resentencing recommendation:

1. To include “boot camp” as a recommendation
2. To be studied further at future ESR subcommittee meeting





State of Wisconsin  
1999 - 2000 LEGISLATURE

DUE

LRB-2889/P7-3

JEO&RPN:kmg:km

D-Note

by end of 8/3  
day tries  
if possible

V.M.F.

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

① AN ACT <sup>regenerate</sup> to amend 302.113 (9) and 801.50 (5); and to create 302.113 (9) (d) and  
2 801.50 (5c) of the statutes; relating to: revocation of extended supervision.

**Analysis by the Legislative Reference Bureau**

This is a preliminary draft prepared for the Criminal Penalties Study Committee's extended supervision revocation subcommittee. An analysis will be provided in a later draft.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

INS 1-3

INS 1-4

3 SECTION 1. 302.113 (9) of the statutes is amended to read:

④ 302.113 (9) (a) If a person released to extended supervision under this section  
5 violates a condition of extended supervision, the division of ~~hearings~~ <sup>A</sup> and appeals in  
6 the department of administration, upon proper notice and hearing, or the  
7 department of corrections, if the person on extended supervision waives a hearing,  
8 may return the person to the court that sentenced the person with a recommendation  
9 that the court revoke the extended supervision of the person and return the person

1 to prison. The court may accept or reject a recommendation to revoke the extended  
2 supervision of the person. If the court accepts the recommendation and revokes the  
3 person's extended supervision, the court shall order the person is returned to prison,  
4 he or she shall be returned to prison for any specified period of time that does not  
5 exceed the time remaining on the bifurcated sentence. The time remaining on the  
6 bifurcated sentence is the total length of the bifurcated sentence, less time served by  
7 the person in custody before release to extended supervision under sub. (2) and less  
8 time served in custody for a previous revocation of extended supervision. The  
9 revocation court order returning a person to prison under this paragraph shall  
10 provide the person en whose extended supervision was revoked with credit in  
11 accordance with ss. 304.072 and 973.155.

12 (b) A person who is returned to prison after revocation of extended supervision  
13 shall be incarcerated for the entire period of time specified by the department of  
14 ~~corrections in the case of a waiver or by the division of hearings and appeals in the~~  
15 ~~department of administration in the case of a hearing court~~ under par. (a). r i o d  
16 of time specified under par. (a) may be extended in accordance with sub. (3). If  
17 person is returned to prison under nar. (a) for a period of time that is less than the  
18 time remaining on the bifurcated sentence, the person shall be released to extended  
19 supervision after he or she has served the period of time specified by the court under  
20 par. (a), including any periods of extension imposed in accordance with sub. (3).

21 (c) A person who is subsequently released to extended supervision after service  
22 of the period of time specified by the ~~department of corrections in the case of a waiver~~  
23 ~~or by the division of hearings and appeals in the department of administration in the~~  
24 ~~case of a hearing court~~ under par. (a) is subject to all conditions and rules under sub.  
25 (7) until the expiration of the term of remaining extended supervision portion of the

1 bifurcated sentence. The remaining extended supervision portion of the bifurcated  
2 sentence is the total length of the bifurcated sentence, less the time served by the  
3 person in custody before release to extended supervision under sub. (2) and less the  
4 period of time specified by the court under par. (a), including any period of extension  
5 imposed in accordance with sub. (3).

INS  
3-5

6 SECTION 2. 302.113 (9) (d) of the statutes is created to read:

7 302.113 (9) (d) In any case in which there is a hearing before the division of  
8 hearings and appeals in the department of administration concerning whether to  
9 ~~recommend revocation of~~ <sup>revoke</sup> a person's extended supervision, the person on extended  
10 supervision may seek review of a ~~recommendation~~ <sup>decision</sup> to revoke extended supervision  
11 and the department of corrections may seek review of a ~~recommendation~~ <sup>decision</sup> to not  
12 revoke extended supervision. Review of a ~~recommendation~~ <sup>decision</sup> under this paragraph  
13 may be sought only by an action for certiorari.

INS  
3-13

14 SECTION 3. 801.50 (5) of the statutes is amended to read:

15 801.50 (5) Venue of an action for certiorari to review a probation, ~~extended~~ <sup>plain</sup>  
16 ~~supervision~~ <sup>plain</sup> or parole revocation, ~~a recommendation to revoke extended supervision,~~  
17 or a refusal of parole by certiorari shall be the county in which the relator was last  
18 convicted of an offense for which the relator was on probation, extended supervision  
19 or parole or for which the relator is currently incarcerated.

20 SECTION 4. 801.50 (5c) of the statutes is created to read:

21 801.50 (5c) Venue of an action for certiorari brought by the department of  
22 corrections under s. ~~302.113 (9) (d)~~ <sup>or 302.114 (9) (d)</sup> to review a ~~recommendation~~ <sup>decision</sup> to not revoke  
23 extended supervision shall be in the county in which the person on extended

I

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1 supervision was convicted of the offense for which he or she is on extended  
2 supervision.

3 (END)

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2889/P3ins  
JEO:.....

1 **INSERT 1-3:** ✓

2 **SECTION 1.** 301.035 (2) of the statutes is amended to read:

3 301.035 (2) Assign hearing examiners from the division to preside over  
4 hearings under ss. 302.11 (7), 302.113 (9), 302.114 (9), 938.357 (5), 973.10 and 975.10  
5 (2) and ch. 304.

6 History: 1989 a. 31, 107; 1995 a. 77.

6 **SECTION 2.** 301.035 (4) of the statutes is amended to read:

7 301.035 (4) Supervise employes in the conduct of the activities of the division  
8 and be the administrative reviewing authority for decisions of the division under ss.  
9 302.11 (7), 302.113 (9), 302.114 (9), 938.357 (5), 973.10, 973.155 (2) and 975.10 (2) and  
10 ch. 304.

11 History: 1989 a. 31, 107; 1995 a. 77.

11 **INSERT 1-4:** ✓

12 302.113 (9) (a) If a person released to extended supervision under this section  
13 violates a condition of extended supervision, the division of hearings and appeals in  
14 the department of administration, upon proper notice and hearing, or the  
15 department of corrections, if the person on extended supervision waives a hearing,  
16 may revoke the extended supervision of the person ~~and return the person to prison.~~  
17 If the extended supervision of the person is revoked, the person shall be returned to  
18 the court that sentenced the person and the court shall order the person to be  
19 returned to prison, he or she shall be returned to prison for any specified period of  
20 time that does not exceed the time remaining on the bifurcated sentence. The time  
21 remaining on the bifurcated sentence is the total length of the bifurcated sentence,  
22 less time served by the person in custody before release to extended supervision  
23 under sub. (2) and less any time served in custody for a previous revocation of



1 extended supervision. The ~~revocation~~ court order returning: a person to nrison under  
2 this paragraph shall provide the person ~~on~~ <sup>✓</sup> whose extended supervision was revoked  
3 with credit in accordance with ss. 304.072 and 973.155.

4 History: 1997 a. 283. **INSERT 3-5:** ✓

5 SECTION 3. 302.113 (9) (am) of the statutes is created to read:

6 302.113 (9) (am) When a person is returned to the sentencing court under par.  
7 (a) <sup>✓</sup> after revocation of extended supervision, the division of hearings and appeals in  
8 the department of administration, in the case of a hearing, or the department of  
9 corrections, in the case of a waiver, shall make a recommendation to the sentencing  
10 court concerning the period of time for which the person should be returned to prison.  
11 The recommended time period may not exceed the time remaining on the bifurcated  
12 sentence, as calculated under par. (a) <sup>✓</sup>.

13 **INSERT 3-13:** ✓

14 SECTION 4. 302.114 (6) (b) of the statutes is amended to read:

15 302.114 (6) (b) If an inmate petitions a court under sub. (5) or (9) ~~(b)~~ (bm) for  
16 release to extended supervision under this section, the clerk of the circuit court in  
17 which the petition is filed shall send a copy of the petition and, if a hearing is  
18 scheduled, a notice of hearing to the victim of the crime committed by the inmate, if  
19 the victim has submitted a card under par. (e) requesting notification.

20 History: 1997 a. 283.

20 SECTION 5. 302.114 (6) (c) of the statutes is amended to read:

21 302.114 (6) (c) The notice under par. (b) shall inform the victim that he or she  
22 may appear at the hearing under sub. (5) or (9) ~~(b)~~ (bm), if a hearing is scheduled,

1 and shall inform the victim of the manner in which he or she may provide written  
2 statements concerning the inmate's petition for release to extended supervision.

3 History: 1997 a. 283.

**SECTION 6.** 302.114 (9) of the statutes is amended to read:

4 302.114 (9) (a) If a person released to extended supervision under this section  
5 violates a condition of extended supervision, the division of hearings and appeals in  
6 the department of administration, upon proper notice and hearing, or the  
7 department of corrections, if the person on extended supervision waives a hearing,  
8 may revoke the extended supervision of the person ~~and return the person to prison.~~  
9 If the extended supervision of the person is revoked, the person shall be returned to  
10 the court that sentenced the person and the court shall order the person to be  
11 returned to prison, he or she shall be returned to prison for a specified period of time,  
12 as provided under par. (b) before he or she is eligible for being released again to  
13 extended supervision. The period of time specified under this paragraph may not be  
14 less than 5 years and may be extended in accordance with sub. (3).

15 (b) ~~If~~ When a person is returned to ~~prison~~ the sentencing court under par. (a)  
16 after revocation of extended supervision, the department of corrections, in the case  
17 of a waiver, or the division of hearings and appeals in the department of  
18 administration, in the case of a hearing ~~under par. (a), shall specify a~~ make a  
19 recommendation to the sentencing court concerning the period of time for which the  
20 person shall ~~(should) be incarcerated~~ <sup>be</sup> returned to prison before being eligible for  
21 release to extended supervision. The period of time ~~specified~~ recommended under  
22 this paragraph may not be less than 5 years ~~and may be extended in accordance with~~  
23 sub. (3).



1 (bm) A person who is returned to prison under par. (a) after revocation of  
 2 extended supervision may, upon petition to the sentencing court, be released to  
 3 extended supervision after he or she has served the entire period of time specified  
 4 i-n by the court under par. ~~(b)~~ (a), including any periods of extension imposed under  
 5 sub. (3). A person may not file a petition under this paragraph earlier than 90 days  
 6 before the date on which he or she is eligible to be released to extended supervision.  
 7 If a person files a petition for release to extended supervision under this paragraph  
 8 at any time earlier than 90 days before the date on which he or she is eligible to be  
 9 released to extended supervision, the court shall deny the petition without a hearing.  
 10 The procedures specified in sub. (5) (am) to (f) apply to a petition filed under this  
 11 paragraph.

12 (c) A person who is subsequently released to extended supervision under par.  
 13 ~~(b)~~ (bm) is subject to all conditions and rules under sub. (8) until the expiration of the  
 14 sentence.

INS  
A

History: 1997 a. 283.

**SECTION 7.** 303.065 (1) (b) 1. of the statutes is amended to read:

16 393.065 (1) (b) 1. A person serving a life sentence, other than a life sentence  
 17 specified in subd. 2., may be considered for work release only **after** he or she has  
 18 reached parole eligibility under s. 304.06 (1) (b) or 973.014 (1) (a) or (b), whichever  
 19 is applicable, or he or she has reached his or her extended supervision eligibility date  
 20 under s. 302.114 (9) ~~(b)~~ (a) or 973.014 (lg) (a) 1. or 2., whichever is applicable.

History: 1981 c. 266 s. 5; 1983 a. 27; 1985 a. 332 s. 251 (3); 1987 a. 238; 1987 a. 244 s. 7; 1987 a. 412; 1989 a. 31 ss. 1686c, 1686m; Stats. 1989 s. 303.065; 1991 a. 39, 316; 1993 a. 16, 289; 1995 a. 27.48; 1997 a. 283, 326; s. 13.93 (2) (c).

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2889/P3dn  
JEO&RPN:.....  
KMG

① ✓

Please note the following when reviewing this draft:

1. Although the ES revocation subcommittee's draft does not specifically refer to the statute, this draft makes changes in s. 302.114 (9), stats. (revocation of ES for persons on life sentences) that parallel those made in s. 302.113 (9), stats. Okay? Note that the draft maintains the minimum period of 5 years' reincarceration -before being eligible again for ES. Do you still want that requirement, or should it be eliminated? It was meant to constrain the administrative agencies involved (DOC and DOA) and thus may be seen as less necessary (and less desirable) if the sentencing court is making the final decision as to the amount of time the person goes back to prison. *that*

2. The draft clarifies the effect on a bifurcated sentence of revocation of ES and reincarceration. However, the draft does not refer to a court giving a person a new bifurcated "sentence" after revoking ES. I think that such language is unnecessary because that is essentially what happens by operation of s. 302.113 (9), stats. However, the draft could require the judge to lay out in the revocation order both the period of imprisonment and the remaining period of ES. Compare s. 973.01 (8), stats.

3. The ES revocation subcommittee's 6/1/99 working paper has some discussion about administrative review of the ALJ's decision. (See page 4, item C. 1. b., of the 6/1/99 working paper.) Part of that discussion says that DOA's division of hearings and appeals (DHA) has a proposal to make administrative review "directory and not mandatory". I assume that this refers to a proposed rule change to HA 2.05 (9) (b), Wis. admin. code, which currently requires the administrator of DHA to issue a written appeal decision. Based on that assumption, this draft says nothing about administrative review of the ALJ's decision. Okay?

4. On further review of s. 801.50 (5), stats., I realized that we cannot simply refer in that statute to an action by DOC to seek review of a recommendation not to revoke. This is because venue under the statute depends on the county of conviction or incarceration of the *relator* (petitioner). Because it makes no sense to speak of the county of conviction or incarceration of DOC, this draft creates a new subsection (proposed s. 801.50 (5c)) that makes venue for certiorari sought by DOC the county in which the person was convicted of the offense for which the person was placed on ES.

5. As a technical matter, this draft adds references to the ES revocation statutes in s. 301.035 (2) and (4), stats. (something that should have been done in 1997 Wisconsin Act 283).

Jefren E. Olsen  
Legislative Attorney  
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INS (A)

SEC #. CR; 302.114 (9) (2)

302.114 (9) (2) In any case in

which there is a hearing before the  
division of hearings and appeals in the  
department of administration concerning  
whether to revoke a persons extended  
supervision, the person <sup>on</sup> extended  
supervision may seek <sup>k</sup> review of a  
decision to revoke extended supervision  
and the department of corrections may  
seek review of a decision to not revoke  
extended supervision. Review of a decision  
under this paragraph may be sought only  
by an action for certiorari.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2889/P3dn  
JEO&RPN:kmg:jf

August 3, 1999

Please note the following when reviewing this draft:

1. Although the ES revocation subcommittee's draft does not specifically refer to the statute, this draft makes changes in s. 302.114 (9), stats. (revocation of ES for persons on life sentences), that parallel those made in s. 302.113 (9), stats. Okay? Note that the draft maintains the minimum period of 5 years' reincarceration before being eligible again for ES. Do you still want that requirement, or should it be eliminated? It was meant to constrain the administrative agencies involved (DOC and DOA) and thus may be seen as less necessary (and less desirable) if the sentencing court is making the final decision as to the amount of time that the person goes back to prison.

2. The draft clarifies the effect of revocation of ES and reincarceration on a bifurcated sentence. However, the draft does not refer to a court giving a person a new bifurcated "sentence" after revoking ES. I think that such language is unnecessary because that is essentially what happens by operation of s. 302.113 (9), stats. However, the draft could require the judge to lay out in the revocation order both the period of imprisonment and the remaining period of ES. Compare s. 973.01 (8), stats.

3. The ES revocation subcommittee's 6/1/99 working paper has some discussion about administrative review of the ALJ's decision. (See page 4, item C. 1. b., of the 6/1/99 working paper.) Part of that discussion says that DOA's division of hearings and appeals (DHA) has a proposal to make administrative review "directory and not mandatory". I assume that this refers to a proposed rule change to HA 2.05 (9) (b), Wis. Admin. Code, which currently requires the administrator of DHA to issue a written appeal decision. Based on that assumption, this draft says nothing about administrative review of the ALJ's decision. Okay?

4. On further review of s. 801.50 (5), stats., I realized that we cannot simply refer in that statute to an action by DOC to seek review of a recommendation not to revoke. This is because venue under the statute depends on the county of conviction or incarceration of the *relator* (petitioner). Because it makes no sense to speak of the county of conviction or incarceration of DOC, this draft creates a new subsection (proposed s. 801.50 (5c)) that makes venue for certiorari sought by DOC the county in which the person was convicted of the offense for which the person was placed on ES.

5. As a technical matter, this draft adds references to the ES revocation statutes in s. 301.035 (2) and (4), stats. (something that should have been done in 1997 Wisconsin Act 283).

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**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1 **AN ACT to amend 301.035 (2), 301.035 (4), 302.113 (9), 302.114 (6) (b), 302.114**  
2 **(6) (c), 302.114 (Q), 303.065 (1) (b) 1. and 801.50 (5); and to create 302.113 (9)**  
3 **(am), 302.113 (9) (d), 302.114 (9) (d) and 801.50 (5c) of the statutes; relating to:**  
4 **revocation of extended supervision.**

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***Analysis by the Legislative Reference Bureau***

This is a preliminary draft prepared for the Criminal Penalties Study Committee's extended supervision revocation subcommittee. An analysis will be provided in a later draft.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

5 **SECTION 1.** 301.035 (2) of the statutes is amended to **read:**  
6 301.035 (2) Assign hearing examiners from the division to preside over  
7 hearings under ss. 302.11 (7), 302.113 (9), 302.114 (9), 938.357 (5), 973.10 and 975.10  
8 (2) and ch. 304.  
9 **SECTION 2.** 301.035 (4) of the statutes is amended to read:

1           301.035 (4) Supervise employes in the conduct of the activities of the division  
2 and be the administrative reviewing authority for decisions of the division under ss.  
3 302.11 (7), 302.113(9), 302.114(9), 938.357(5), 973.10, 973.155 (2) and 975.10 (2) and  
4 ch. 304.

5           **SECTION 3.** 302.113 (9) of the statutes is amended to read:

6           302.113 (9) (a) If a person released to extended supervision under this section  
7 violates a condition of extended supervision, the division of hearings and appeals in  
8 the department of administration, upon proper notice and hearing, or the  
9 department of corrections, if the person on extended supervision waives a hearing,  
10 may revoke the extended supervision of the person ~~and return the person to prison.~~  
11 If the extended supervision of the person is revoked, the person shall be returned to  
12 ph           ha  
13 returned to prison, he or she shall be returned to prison for any specified period of  
14 time that does not exceed the time remaining on the bifurcated sentence. The time  
15 remaining on the bifurcated sentence is the total length of the bifurcated sentence,  
16 less time served by the person in custody before release to extended supervision  
17 under sub. (2) and less any time served in custody for a previous revocation of  
18 extended supervision. The ~~revocation~~ court order returning a person to orison under  
19 this paragraph shall provide the person ~~on whose~~ extended supervision was revoked  
20 with credit in accordance with ss. 304.072 and 973.155.

21           (b) A person who is returned to prison after revocation of extended supervision  
22 shall be incarcerated for the entire period of time specified by the ~~department of~~  
23 ~~corrections in the case of a waiver or by the division of hearings and appeals in the~~  
24 ~~department of administration in the case of a hearing~~ Toult under par. (a). r i o d  
25 of time specified under par. (a) may be extended in accordance with sub. (3). If

1 ~~person is returned under par. (a) for a period of time that is less than the~~  
2 ~~time remaining on the bifurcated sentence, the person shall be released to extended~~  
3 ~~supervision after he or she has served the period of time specified by the court under~~  
4 ~~par. (a), including any periods of extension imposed in accordance with sub. (3).~~

5 (c) A person who is subsequently released to extended supervision after service  
6 of the period of time specified by the ~~department of corrections~~ ~~in the case of a waiver~~  
7 ~~or by the division of hearings and appeals in the department of administration in the~~  
8 ~~case of a hearing court~~ under par. (a) is subject to all conditions and rules under sub.  
9 (7) until the expiration of the term of remaining extended supervision portion of the  
10 bifurcated sentence. The remaining extended supervision portion of the bifurcated  
11 sentence is the total length of the bifurcated sentence, less the time served by the  
12 person in custody before release to extended supervision under sub. (2) and less the  
13 period of time specified by the court under par. (a), including any period of extension  
14 imposed in accordance with sub. (3).

15 **SECTION 4.** 302.113 (9) (am) of the statutes is created to read:

16 302.113 (9) (am) When a person is returned to the sentencing court under par.  
17 (a) after revocation of extended supervision, the division of hearings and appeals in  
18 the department of administration, in the case of a hearing, or the department of  
19 corrections, in the case of a waiver, shall make a recommendation to the sentencing  
20 court concerning the period of time for which the person should be returned to prison.  
21 The recommended time period may not exceed the time remaining on the bifurcated  
22 sentence, as calculated under par. (a).

23 **SECTION 5.** 302.113 (9) (d) of the statutes is created to read:

24 302.113 (9) (d) In any case in which there is a hearing before the division of  
25 hearings and appeals in the department of administration concerning whether to

1 revoke of a person's extended supervision, the person on extended supervision may  
2 seek review of a decision to revoke extended supervision and the department of  
3 corrections may seek review of a decision to not revoke extended supervision. Review  
4 of a decision under this paragraph may be sought only by an action for certiorari.

5 **SECTION 6.** 302.114 (6) (b) of the statutes is amended to read:

6 302.114 (6) (b) If an inmate petitions a court under sub. (5) or (9) ~~(b)~~ (bm) for  
7 release to extended supervision under this section, the clerk of the circuit court in  
8 which the petition is filed shall send a copy of the petition and, if a hearing is  
9 scheduled, a notice of hearing to the victim of the crime committed by the inmate, if  
10 the victim has submitted a card under par. (e) requesting notification.

11 **SECTION 7.** 302.114 (6) (c) of the statutes is amended to read:

12 302.114 (6) (c) The notice under par. (b) shall inform the victim that he or she  
13 may appear at the hearing under sub. (5) or (9) ~~(b)~~ (bm), if a hearing is scheduled,  
14 and shall inform the victim of the manner in which he or she may provide written  
15 statements concerning the inmate's petition for release to extended supervision.

16 **SECTION 8.** 302.114 (9) of the statutes is amended to read:

17 302.114 (9) (a) If a person released to extended supervision under this section  
18 violates a condition of extended supervision, the division of hearings and appeals in  
19 the department of administration, upon proper notice and hearing, or the  
20 department of corrections, if the person on extended supervision waives a hearing,  
21 may revoke the extended supervision of the person and ~~return the person to prison.~~  
22 If the extended supervision of the person is revoked, the person shall be returned to  
23 the court that sentenced the person and the court shall order the person to be  
24 returned to prison-1 be returned to prison for a specified period of time,  
25 as provided under par. (b) before he or she is eligible for being released again to



1 extended supervision. The period of time specified under this paragraph may not be  
2 less than 5 years and may be extended in accordance with sub. (3).

3 (b) ~~If~~ When a person is returned to ~~prison~~ the sentencing court under par. (a)  
4 after revocation of extended supervision, the department of corrections, in the case  
5 of a waiver, or the division of hearings and appeals in the department of  
6 administration, in the case of a hearing ~~under par. (a)~~, shall ~~specify a~~ make a  
7 recommendation to the sentencing court concerning the period of time for which the  
8 person shall be incarcerated should be returned to prison before being eligible for  
9 release to extended supervision. The period of time ~~specified~~ recommended e r  
10 this paragraph may not be less ~~than 5 years and may be extended in accordance with~~  
11 ~~sub. (3).~~

12 (bm) A person who is returned to prison under par. (a) after revocation of  
13 extended supervision may, upon petition to the sentencing court, be released to  
14 extended supervision after he or she has served the entire period of time specified  
15 ~~in~~ by the court under par. (b) (a), including any periods of extension imposed under  
16 sub. (3). A person may not file a petition under this paragraph earlier than 90 days  
17 before the date on which he or she is eligible to be released to extended supervision.  
18 If a person files a petition for release to extended supervision under this paragraph  
19 at any time earlier than 90 days before the date on which he or she is eligible to be  
20 released to extended supervision, the court shall deny the petition without a hearing.  
21 The procedures specified in sub. (5) (am) to (f) apply to a petition filed under this  
22 paragraph.

23 (c) A person who is subsequently released to extended supervision under par.  
24 (b) ~~(b)~~ (bm) is subject to all conditions and rules under sub. (8) until the expiration of the  
25 sentence.

1           **SECTION 9.** 302.114 (9) (d) of the statutes is created to read:

2           302.114 (9) (d) In any case in which there is a hearing before the division of  
3           hearings and appeals in the department of administration concerning whether to  
4           revoke a person's extended supervision, the person on extended supervision may  
5           seek review of a decision to revoke extended supervision and the department of  
6           corrections may seek review of a decision to not revoke extended supervision. Review  
7           of a decision under this paragraph may be sought only by an action for certiorari.

8           **SECTION 10.** 303.065 (1) (b) 1. of the statutes is amended to read:

9           303.065 (1) (b) 1. A person serving a life sentence, other than a life sentence  
10          specified in subd. 2., may be considered for work release only after he or she has  
11          reached parole eligibility under s. 304.06 (1) (b) or 973.014 (1) (a) or (b), whichever  
12          is applicable, or he or she has reached his or her extended supervision eligibility date  
13          under s. 302.114 (9) ~~(b)~~ (a) or 973.014 (lg) (a) 1. or 2., whichever is applicable.

14          **SECTION 11.** 801.50 (5) of the statutes is amended to read:

15          801.50 (5) Venue of an action for certiorari to review a probation, extended  
16          supervision or parole revocation or a refusal of parole ~~by certiorari~~ shall be the county  
17          in which the relator was last convicted of an offense for which the relator was on  
18          probation, extended supervision or parole or for which the relator is currently  
19          incarcerated.

20          **SECTION 12.** 801.50 (5c) of the statutes is created to read:

21          801.50 **(5c)** Venue of an action for certiorari brought by the department of  
22          corrections under s. 302.113 (9) (d) or 302.114 (9) (d) to review a decision to not revoke  
23          extended supervision shall be in the county in which the person on extended

1 supervision was convicted of the offense for which he or she is on extended  
2 supervision.

3 (END)