DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Andy:

1. This substitute amendment differs in a number of ways from the Senate's version, contained in 1999 Senate Bill 357 (SB–357), as amended, of the legislation recommended by the Criminal Penalties Study Committee (CPSC). First, using recommendations provided at the end of the 1999–2000 legislative session by Professor Thomas Hammer (the reporter for the CPSC and chair of its code reclassification subcommittee), this substitute amendment classifies felonies that were created during that session under the A–I classification scheme. (If you would like me to provide you a list of those crimes and a description of how they are treated in this substitute amendment, please let me know.) At the same time, the substitute amendment repeals certain provisions enacted in 1999 Wisconsin Act 48 relating to the controlled substance methamphetamine. As a result, methamphetamine will be treated in the same way that it would have been under reconciliation provisions contained in Act 48, had the Assembly's version of the CPSC legislation (AB–465) been enacted last session. (In all likelihood, if SB–357 had been enacted instead of AB–465, Act 48's reconciliation provisions would have been amended to produce the same result.)

Second, the substitute amendment makes minor changes in a few of the provisions in SB–357 to make them clearer or more workable. *See*, *e.g.*, ss. 302.11 (7) (ag), 302.113 (9) (ag), and 302.114 (9) (ag) (defining "reviewing authority" to simplify language in provisions relating to parole and extended supervision (ES) revocation hearings). Third, the substititue amendment makes minor changes to ensure that current law provisions designed to apply only to indeterminate or bifurcated sentences do not apply to another type of sentence. *See*, *e.g.*, s. 302.045 (3) (clarifying that parole eligibility under the challenge incarceration program only extends to persons serving indeterminate sentences). Fourth, there are a number of provisions that required renumbering or new cross–references as a result of either legislation enacted last session or other changes within the substitue amendment itself.

Fifth, the substitute amendment makes certain substantive changes that should have been made in AB–465 to address gaps or ambiguities in 1997 Wisconsin Act 283. The following table briefly describes those changes:

Statute section	Summary
302.11 (7) (e), 302.113 (9) (f), 302.114 (9) (e)	Authorizes consolidation of all parole or ES revocation proceedings that relate to a single individual

302.113 (8m), 302.114 (8m)	Authorizes department of corrections (DOC) to take physical custody of a person alleged to have violated ES (to mirror provision in current law authorizing DOC to take custody of person alleged to have violated parole)
302.113 (9) (e), 302.114 (9) (d), 908.08 (1)	Authorizes videotaped depositions and use of videotaped statement of a child in ES revocation hearings (to mirror current law provision relating to use of videotape in parole revocation hearings)
973.15 (2m) (b)	Specifies how concurrent and consecutive sentences are to be served when all crimes involved were committed on or after December 31, 1999
973.15 (2m) (e)	Addresses revocation in multiple sentence cases

2. Please note that s. 16.47 (2) provides that, before the passage of the budget bill, neither house may pass a bill that increases the cost of state government by more than $10,000 annually unless the governor, the joint committee on finance or, in some cases, the committee on organization of either house recommends passing the bill as an emergency appropriation. (Of course, s. 16.47 (2) is a rule of legislative procedure; thus, the legislature determines the extent to which it is enforced.)

3. Both SB–357 and AB–465 required that the enhancers for repeat offenders (ss. 939.62 and 961.48) be applied after all other enhancers and that the enhancer for use of a dangerous weapon (s. 939.63) be applied after all but the repeat offender enhancers. Nevertheless, neither bill specified the order in which the other surviving penalty enhancers are to be applied. Under either bill, the court would have been required to "apply them in the order listed," but the intent of that language was for the enhancers listed in s. 973.01 (2) (c) 2. a. to be applied before the subd. 2. b. enhancer, which in turn would be applied before the subd. 2. c. enhancers. As far as I recall, the CPSC did not consider the order in which the subd. 2. a. enhancers are to be applied or the possibility that the order in which those enhancers are to be applied might matter. Instead, they were (in both SB–357 and AB–465) and are (in this substitute amendment and 2001 Assembly Bill 3) simply listed in numerical order.

With respect to the drug crime enhancers (ss. 961.46 and 961.49), the substitute amendment's silence regarding sequencing does not matter, since they will not be applied in combination with the other enhancers. But the substitute amendment's silence does matter in cases in which more than one of the other subd. 2. a. enhancers applies. A judge applying the enhancers in one order will end up with a maximum term of imprisonment that differs from that which results from another judge applying them in a different order.

For example, assume a person commits a battery in a school zone, *see* s. 939.632, and the battery is adjudged a hate crime. *See* s. 939.645. If the former enhancer is applied before the latter, the term of imprisonment required for the battery (a Class A misdemeanor) is increased under s. 939.632 (2) (b) by three months. The hate crime enhancer, s. 939.645 (2) (b), then converts it to a felony with a maximum term of imprisonment of two years. But if the enhancers are applied in the other order, the hate

crime enhancer first converts it into a two–year felony. Under s. 939.632 (2) (a), the maximum period of imprisonmen t is then increased to seven years.

If you would like the substitute amendment to specify the order in which the subd. 2. a. enhancers are to be applied, I can redraft it or draft an amendment to have it do so. Alternatively, given that the number of cases in which the subd. 2. a. enhancers are combined is likely to be small, you may simply want the court of appeals or the supreme court to resolve this matter.

4. There is also one other unresolved question relating to penalty enhancers that arises under this substitute amendment and 2001 Assembly Bill 3. Under s. 939.32 (1) (bm), an attempt to commit a Class I felony is penalized as a Class A misdemeanor, unless a penalty enhancer –– other than one of the enhancers for repeat offenders –– applies. I have been unable to determine whether the CPSC intended to create a repeat offender exception to the general penalty enhancer exception or whether that resulted from an oversight in drafting. I contacted Prof. Hammer regarding this, but I did not receive a response from him.

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