State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–2444/P1
MGD:RLR:kmg:dph

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

AN ACT *to repeal* 46.03 (18) (fm), 961.47, 961.472 and 961.475; and *to create* 51.49 and 973.105 of the statutes; **relating to:** probation and treatment for persons who commit certain drug–related offenses, providing an exemption from emergency rule procedures, and requiring the exercise of rule–making authority.

Analysis by the Legislative Reference Bureau

Current law prohibits a person from possessing various controlled substances. The penalties for possession of these controlled substances range from an unclassified misdemeanor to a Class H felony for a first offense. The higher penalties are for possession of narcotics, cocaine, hallucinogens, stimulants, and certain so–called "club drugs," including flunitrazepam, ketamine, and gamma–hydroxybutyric acid. For many possession offenses, the maximum penalty for a second or subsequent offense is greater than the maximum penalty for a first offense.

The following drug–related activities are also crimes under current law:

1. Keeping or maintaining a place for using controlled substances is a Class I felony.

2. Acquiring a controlled substance by misrepresentation or fraud, or counterfeiting a controlled substance is a Class H felony.

3. Possessing drug paraphernalia is generally an unclassified misdemeanor, though possessing paraphernalia for methamphetamine is a Class H felony.

The maximum penalties for the crimes cited above are as follows:

Crime	*Maximum Fine*	*Maximum Term of Imprisonment (for felonies, includes term of extended supervision)*
Class A misdemeanor	$10,000	Nine months
Class I felony	$10,000	Three and one–half years
Class H felony	$10,000	Six years

Current law provides that a court may allow a person who is convicted for possession of a controlled substance to participate in treatment for drug dependency as an alternative to sentencing if the offender volunteers to participate in treatment and if a treatment facility agrees to provide treatment. The treatment is for the period of time considered necessary by the treatment facility, but may not exceed the maximum possible sentence length for the possession offense unless the offender consents to a longer term. At the end of the treatment period, the court may waive sentencing for the drug possession offense. However, if treatment is ineffective or if the offender does not comply with treatment, the court may sentence the person for the drug possession offense. If a person is convicted for possession of heroin, cocaine, or certain hallucinogens or stimulants, the sentencing court must order the offender to submit to an assessment of the offender's drug use to determine whether the offender is appropriate for treatment.

Conditional discharge is another alternative to sentencing for a drug possession offense for which the maximum penalty is a fine not to exceed $500 or confinement in jail for not more than 30 days or both. If a person has no prior drug–related convictions and pleads guilty or is found guilty of such a possession offense and the person successfully completes probation for the offense, the court may discharge the person's sentence without creating a record of conviction.

This bill repeals the voluntary treatment alternative to sentencing, the assessment requirement for persons convicted of certain possession offenses and the conditional discharge alternative.

If a person is convicted of certain simple drug offenses and the person consents to participate in drug treatment and rehabilitation, the bill requires the court to place the person on probation and order treatment and rehabilitation services as a condition of probation. The simple drug offenses are a first or second conviction of possession of a controlled substance, keeping or maintaining a place for drug use, acquiring a controlled substance by misrepresentation or fraud or counterfeiting a controlled substance, and possession of drug paraphernalia.

The bill also requires a court to place a person who commits certain other crimes on probation if the court finds that commission of the crime was significantly motivated by the offender's use of drugs. Unless the defendant is convicted of an ineligible offense, if the defendant or district attorney requests that the court consider placing the person on probation with treatment and rehabilitation services, the court must order an assessment of the defendant's drug use and hold a hearing on whether to place the defendant on probation. The court must also order an

assessment and hold a hearing if the offender had an unauthorized controlled substance in his or her blood when he or she committed the crime. If after the hearing the court finds that all of the following are true, the court must place the defendant on probation and order drug treatment and rehabilitation services as a condition of probation: 1) the commission of the crime was significantly motivated by the defendant's drug ~~use~~; 2) neither the victim of the offense nor the public will be harmed by placing the defendant on probation with drug treatment and rehabilitation services; 3) placing the defendant on probation is in the best interests of the public; and 4) placing the defendant on probation will not unduly depreciate the seriousness of the offense. The court may also order an assessment and initiate proceedings to consider probation on its own motion. The following are ineligible offenses, for which a person may not be placed on probation under this bill: a Class A, B, C, D, or E felony; an offense involving a weapon; or operating a motor vehicle while intoxicated.

The bill requires the Department of Health and Family Services (DHFS) to promulgate rules that specify the drug treatment and rehabilitation services that counties must provide to persons placed on probation under this bill and to establish minimum standards for the provision of the services. County departments of community programs must either directly provide the required services or contract for provision of the services. Each county department of community programs must submit to DHFS a plan for how the county department intends to provide the required services. ~~The county departments are required to solicit input from residents of the county in developing the plan.~~

When a court places a person on probation for a simple drug offense or a drug motivated offense, the court must specify the drug treatment and rehabilitation services that the person must participate in as a condition of probation. The court may change the services ordered as needed. If a person on probation under this bill violates a condition of probation that is not related to drug treatment or rehabilitation services, the court may revoke the person's probation and order the person to serve a sentence. If a person violates a condition related to treatment or rehabilitation services, the court may impose graduated sanctions, including time in jail. The court may not revoke a person's probation for a violation related to treatment or rehabilitation services unless both of the following conditions are met: 1) the court modified the treatment and rehabilitation conditions or imposed graduated sanctions and the defendant again violated a condition that he or she participate in drug treatment and rehabilitation services, or there are no reasonable treatment and rehabilitation services options other than the services originally ordered by the court; and 2) the court finds that there is no reasonable likelihood that the defendant will abstain from drug use for the remainder of the term of probation. If a person successfully completes probation, the court must vacate the judgment of conviction and expunge the record of conviction.

The bill further requires that the Department of Corrections (DOC) contract with another entity to provide probation supervision services for persons ~~placed on probation and ordered to participate in drug treatment and rehabilitation services~~

~~for offenses committed in the city of Milwaukee~~. In the remainder of the state, DOC must supervise people placed on probation under the bill, as under current law.

~~Finally~~, the bill provides that counties that operate a drug court program that exists before this bill is enacted as an act may continue to serve through the drug court program those persons who are eligible for both the drug court program and the probation and treatment program required by this bill.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

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

SECTION 1. 46.03 (18) (fm) of the statutes is repealed.

SECTION 2. 51.49 of the statutes is created to read:

51.49 Treatment Intervention Program. (1) COUNTY RESPONSIBILITY. (a) The county department of community programs shall provide assessments of drug ~~use~~ abuse that are ordered by the circuit court under s. 973.105 (2). The assessments shall satisfy standards established by the department of health and family services under sub. (2).

(b) The county department of community programs shall develop a network of drug treatment and rehabilitation services consisting of the services required by rule under sub. (2) and any other services that the county elects to provide, and shall provide the services, as ordered by the circuit court, to persons placed on probation under s. 973.105.

(c) The county department of community programs may directly provide the assessments and services that are required under this subsection or may contract with another person to provide the assessments and services. By the first day of the 10th month beginning after the effective date of this paragraph .... [revisor inserts date], the county department of community programs shall submit a plan of services to the department of health and family services specifying who shall provide the

assessments and services and describing how and where they shall be provided. The county department of community programs shall solicit input from residents of the county in developing the plan and selecting providers.

(2) RULES. The department of health and family services shall promulgate rules specifying all of the following:

(a) The services; including treatment for drug use, education concerning the effects of drug use, drug use tests, and employment support; that county departments of community programs must make available to the circuit court for persons placed on probation under s. 973.105.

(b) Minimum standards for the services specified under par. (a).

(c) Requirements for drug use assessments ordered under s. 973.105 (2).

(d) Qualifications for providers of the services required under par. (a) and for the providers of assessments ordered under s. 973.105 (2).

SECTION 3. 961.47 of the statutes is repealed.

SECTION 4. 961.472 of the statutes, as affected by 2003 Wisconsin Act 49, is repealed.

SECTION 5. 961.475 of the statutes is repealed.

SECTION 6. 973.105 of the statutes is created to read:

973.105 Treatment Intervention Program for drug offenders. (1) (a) "Drug" means a controlled substance, as defined in s. 961.01 (4).

(b) "Ineligible offense" means any of the following:

1. A Class A, B, C, D, or E felony.

2. An offense under s. 941.20, 941.21, 941.23, 941.235, 941.237, or 941.29.

3. An offense under s. 346.63.

(c) "Simple drug offense" means an offense under s. 961.41 (3g), 961.42, 961.43 or 961.573 (1), except if the drug paraphernalia is for methamphetamine or attempt to commit an offense (1)(a)

INS 6-3

(2) (a) If a person who is a resident of this state is convicted of a simple drug offense, except a 3rd or subsequent conviction for an offense under s. 961.41 (3g), the court shall order the person to comply with an assessment of the person's drug use and, if the person agrees to participate in drug treatment and rehabilitation services ordered by the court, the court shall place the person on probation under this section.

(b) 1. If a person who is a resident of this state is convicted of a crime, other than an ineligible offense, and any of the following applies, the court shall order the person to comply with an assessment of the person's drug use abuse:

a. The person had a controlled substance that the person was not authorized to ingest in his or her blood when he or she committed the offense.

b. The person or the district attorney, or the court on its own motion, requests a hearing on whether the person satisfies the conditions under subd. 2. a. to d.

2. If the court orders an assessment under subd. 1., the assessor shall report the results of the assessment to the court. Upon receipt of the assessment results, the court shall hold a hearing on the person's eligibility for probation under this paragraph. If the person agrees to participate in drug treatment and rehabilitation services and if the court finds by clear and convincing evidence that all of the following are true, the court shall place the person on probation under this section:

a. The offense was significantly motivated by the person's use of drugs. abuse

b. Neither the victim of the offense nor the public will be harmed by placing the person on probation under this section.

c. Placing the person on probation under this section is in the best interests of the public.

d. Placing the person on probation under this section will not unduly depreciate the seriousness of the offense.

(c) The county department of community programs shall provide any assessment of drug use/abuse ordered under par. (a) or (b).

(3) (a) If a person is placed on probation under this section, the court shall order, as condition of probation, that the person participate in specified drug treatment and rehabilitation services that are included in the plan of services developed by the county department of community programs under s. 51.49 (1). The court shall monitor the person's participation in the ordered services and may modify its order for services at any time. If the person violates a condition of probation, the court may impose graduated sanctions, including incarceration in jail or in a probation and parole holding facility. The person's probation agent or probation supervisor selected under sub. (8), whichever is applicable, shall notify the court if the person violates a condition of probation.

(b) All of the provisions for probation under ss. 973.09 and 973.10, except the following, apply to a person placed on probation under this section:

1. A court may not order a person confined as provided under s. 973.09 (4), except as a sanction imposed under par. (a).

2. A court may not order a person confined in a correctional institution under s. 301.13 or a probation and parole holding facility under s. 301.16 (1q) as provided under s. 973.09 (4) (b), except as a sanction imposed under par. (a).

3. The provisions for revocation of probation under s. 973.10 (2) do not apply.

(4) (a) If the court finds, after providing the person an opportunity for a hearing on revocation, that a person placed on probation under this section violated a condition of probation, other than the condition that the person participate in drug

treatment and rehabilitation services ordered by the court, the court may revoke the person's probation.

(b) The court may not revoke a person's probation for failing to participate in drug treatment and rehabilitation services ordered by the court unless, after providing the person an opportunity for a hearing on revocation, the court finds all of the following:

1. The person violated a condition that he or she participate in drug treatment and rehabilitation services.

2. The court modified the treatment and rehabilitation conditions or imposed graduated sanctions and the person again violated a condition that he or she participate in drug treatment and rehabilitation services, or there are no reasonable treatment and rehabilitation services options other than the services originally ordered by the court.

3. There is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.

(c) If the court revokes a person's probation under this subsection, and the person has already been sentenced, the court shall rescind the stay of the sentence and order the person to begin serving the sentence. If the person was not already sentenced, the court shall sentence the person.

(5) (a) If a person completes his or her term of probation under this section without revocation, the court shall vacate the judgment of conviction for the offense for which the person was placed on probation and shall order that the record of conviction be expunged.

(b) If the court vacates a judgment of conviction under par. (a), the person shall not be subject to any prohibition, disqualification, disability, increased penalty, or

abstains from use of an unauthorized controlled substance for 9 months and

other adverse or unfavorable treatment that would otherwise result from the person having been convicted of the offense.

INS 9-2 → (b) (c) The clerk of court shall notify the department of justice of any expungement ordered under par. (a). Notwithstanding SCR 72.06 (3), the existence and contents of a court record that is expunged under par. (a) may be disclosed to the person who was convicted or, if authorized by that person, to an attorney representing the person. Otherwise, neither the existence nor the contents of the court's records relating to the offense may be disclosed to any person.

INS 9-8 → Bold (8) (6) (a) Notwithstanding sub. (3) (b), a person who is placed on probation under this section for an offense committed in a 1st class city is not under the care or control of the department.

(b) The department shall contract with a person to supervise persons placed on probation under this section for committing an offense in a 1st class city. The department shall issue a request for proposals to provide probation supervision services for offenses committed in a 1st class city.

Bold (9) (7) (a) In this subsection, "drug court program" means a program, operated by a county and a circuit court, under which a defendant whom the court finds committed an offense may agree to participate in drug treatment under the supervision of the court and if the defendant successfully completes treatment, the court does not enter a judgment of conviction for the offense, or enters a judgment of conviction for a lesser offense.

(b) Subsection (2) does not apply to a defendant with respect to a specific offense if the defendant is given the opportunity with respect to that offense to participate in a drug court program that existed on the effective date of this paragraph....[revisor inserts date].

INS 9-25 →

SECTION 7. Nonstatutory provisions.

(1) The department of health and family services shall submit in proposed form the rules required under section 51.49 (2) of the statutes, as created by this act, to the legislative council staff under section 227.15 (1) of the statutes no later than the first day of the 4th month beginning after the effective date of this subsection.

(2) Using the procedure under section 227.24 of the statutes, the department of health and family services may promulgate the rules required under section 51.49 (2) of the statutes, as created by this act, for the period before the effective date of the permanent rules required under section 51.49 (2) of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

SECTION 8. Initial applicability.

(1) The treatment of sections 961.47, 961.472, and 961.475 of the statutes first applies to offenses committed on the effective date of this subsection.

SECTION 9. Effective dates. This act takes effect on the day after publication, except as follows:

(1) The treatment of section 973.105 (2), (3), (4), (5), and (6) (a) of the statutes and SECTION 8 (1) of this act take effect on the first day of the 12th month beginning after publication.

(END)

Ins A1:

unless the person has two or more prior convictions for a simple drug offense, at least one of which was in the previous 10 years, and the person was offered probation and treatment for one of the prior offenses.

Ins A2:

Each county must also create an 11–member community corrections committee to advise the county department in developing the plan for services. The bill requires the following membership for the committee: a judge, two local law enforcement officials, a district attorney, a public defender, a probation agent, and five members who are not public officials, including at least one person who is a recovered drug abuser who successfully completed a drug treatment program.

Ins A3:

If a person is convicted and placed on probation in a county other than his or her county of residence, the convicting court must transfer the case to the person's county of residence for the duration of the probation, and the county of residence must provide the services ordered by the court. If the court in the county of residence revokes probation, the court that entered the judgment of conviction must sentence the person.

The bill also requires each county to give preference for drug treatment and rehabilitation services to those persons on probation who would face the longest terms of incarceration if probation is revoked.

Ins A4:

from the city of Milwaukee who are participating in the probation and treatment program.

Ins A5:

Finally, the bill requires DHFS and DOC to report to the legislature on the effectiveness of the probation and treatment program 18 months after the program is implemented and annually thereafter.

Ins 5–17:

SECTION 1. 961.475 of the statutes is amended to read:

961.475 Treatment option. Whenever any person pleads guilty to or is found guilty of possession or attempted possession of a controlled substance or controlled

substance analog under s. 961.41 (3g), the court may, upon request of the person and with the consent of a treatment facility with special inpatient or outpatient programs for the treatment of drug dependent persons, allow the person to enter the treatment programs voluntarily for purposes of treatment and rehabilitation. Treatment shall be for the period the treatment facility feels is necessary and required, but shall not exceed the maximum sentence allowable unless the person consents to the continued treatment. At the end of the necessary and required treatment, with the consent of the court, the person may be released from sentence. If treatment efforts are ineffective or the person ceases to cooperate with treatment rehabilitation efforts, the person may be remanded to the court for completion of sentencing or for an assessment and probation under s. 973.105, if applicable.

History: 1971 c. 219, 336; 1985 a. 328; 1987 a. 339; 1989 a. 121; 1993 a. 118; 1995 a. 448 s. 287; Stats. 1995 s. 961.475.

Ins 6–3:

(a) If a person who is a resident of this state is convicted of a simple drug offense, the court shall order the person to comply with an assessment of the person's drug abuse and, if the person agrees to participate in drug treatment and rehabilitation services ordered by the court, place the person on probation under this section unless all of the following apply:

1. The person has two or more prior convictions for a simple drug offense, or for an offense committed in another jurisdiction that would be a simple drug offense if committed in this state.

2. At least one of the offenses under subdivision 1. was committed in the 10-year period before the person committed the current offense.

3. The person was offered an opportunity to receive drug treatment and rehabilitation services under this section in connection with one of the offenses under subdivision 1.

Ins 7–4:

(d) If the person is placed on probation in a county other than his or her county of residence, the court that places the person on probation shall transfer the case to the person's county of residence. The court in the person's county of residence shall supervise the person on probation and may revoke the person's probation as provided in sub. (4) or determine that the person has successfully completed probation as provided in (5). If the court in the person's county of residence revokes probation, the court that placed the person on probation shall sentence the person. The county department of community programs for the person's county of residence shall provide the treatment and rehabilitation services ordered by the court.

Ins 7–12:

The first incarceration sanction may not exceed one month and the second incarceration sanction may not exceed 3 months.

Ins 7–22:

(c) If the court orders the person to participate in a service that is covered by the person's health insurance, the health insurance provider shall provide the service or reimburse the county for providing the service.

Ins 9–2:

(6) (a) A person whose conviction is vacated under sub. (5) may petition the court to expunge the record of the conviction. The court may expunge the record of conviction if the court determines that the person will benefit and society will not be harmed by the expungement.

Ins 9–8:

(7) In each county, first priority for services under this section shall be given to the persons who are subject to the longest terms of incarceration if their probation is revoked.

Ins 9–25:

(10) By the first day of the 18th month beginning after the effective date of this subsection .... [revisor inserts date], and every 12 months thereafter, the department of corrections and the department of health and family services shall submit to the legislature under s. 13.172 (2) a report on the effectiveness of the probation and treatment program under this section.

Ins 10–1:

(a) auto ref. "KA"

(1) By the first day of the 10th month beginning after the effective date of this subsection, the county department of community programs shall submit a plan of services to the department of health and family services specifying who shall provide the assessments and services required under section 51.49 of the statutes, as created by this act, and describing how and where they shall be provided.

(2) (a) Each county shall create a community corrections committee to advise the county department of community programs in developing the plan of services under paragraph (a) auto ref. "KA"

(b) The committee shall consist of the following members:

1. A circuit court judge for the county, appointed by the chief judge of the judicial administrative district.

2. The district attorney for the county or his or her designee.

3. A chief of police of a municipality in the county, appointed by the county executive.

4. The county sheriff or his or her designee.

5. A probation, extended supervision, and parole agent appointed by the secretary of ~~the department of~~ corrections.

6. One assistant state public defender, appointed by the state public defender.

7. Four ~~members~~ persons who are residents of the county and are not public officials or employees, including at least one ~~member~~ person who is a recovered drug abuser who successfully completed a drug treatment program.

(c) If a county department of community programs serves more than one county, the counties may create a joint committee on community corrections. The members may be from any of the participating counties.

(d) A community corrections committee created under this subsection shall disband after the plan established under paragraph (a) is submitted to the department of health and family services.

No

No

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auto ref. "KA"

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2444/2dn
RLR:

Rachel Roller:

This bill incorporates changes we discussed prior to your meeting with WISDOM on September 3, 2003.

Under the bill, the community corrections committee only has a one–time task, advising the county department on developing a plan of services. Since the committee has no ongoing responsibilities, ~~I did not specify the length of each member's term.~~ Also, since the committee is advisory, I did not include specifications on what constitutes a quorum and how a chair is elected. These items may be included in a future draft if you wish.

Robin Ryan
Legislative Attorney
Phone: (608) 261–6927
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the bill specifies that the committee ~~it~~ only remain in place until its work in ~~connection~~ ~~that~~ helping develop the plan is complete.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2444/P2dn
RLR:kmg:rs

September 12, 2003

Rachel:

This bill incorporates the changes that we discussed prior to your meeting with WISDOM on September 3, 2003.

Under the bill, the community corrections committee only has a one–time task, advising the county department on developing a plan of services. Since the committee has no ongoing responsibilities, the bill specifies that the committee only remain in place until its work in helping develop the plan is complete. Also, since the committee is advisory, I did not include specifications on what constitutes a quorum and how a chair is elected. These items may be included in a future draft if you wish.

Robin Ryan
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Treatment Intervention Program

ELIGIBILITY

I. Automatic Eligibility

A person who commits any of the following offenses is automatically eligible for the suspended prosecution program and treatment:

1. Possession of a controlled substance (unless the person has 2 or more prior convictions for drug possession, at least one of which was in the previous 10 years, and has been given the opportunity to participate in the program on at least one prior occasion).
2. Keeping or maintaining a place for use of controlled substances.
3. Acquiring a controlled substance by misrepresentation or fraud.
4. Possession of drug paraphernalia (except paraphernalia for methamphetamine).

II. Discretionary Eligibility

A person who commits any crime except a Class A to E felony, a crime involving a weapon, or operating a vehicle while intoxicated is eligible for the program if the court finds by clear and convincing evidence that all of the following are true:

1. The offense was significantly motivated by the person's abuse of drugs.
2. Neither the victim nor the public will be harmed by suspending the prosecution, subject to a suspended prosecution agreement.
3. Suspending the prosecution – subject to the agreement – is in the best interests of the public.
4. Subjecting the person to a suspended prosecution agreement will not unduly depreciate the seriousness of the offense.

The court must make a determination as to whether a person is eligible for the suspended prosecution program and treatment under the discretionary route if the person was under the influence of a controlled substance when he or she committed the crime, or if the defendant or the district attorney request a determination on eligibility. The court may also raise the question of eligibility on its own motion.

ASSESSMENTS

Under both the automatic and discretionary routes, a person must undergo an assessment of his or her abuse of drugs, and must agree to participate in treatment.

TREATMENT SERVICES

- Each county must assemble a network of treatment and rehabilitation services for persons subject to a suspended prosecution agreement or placed on probation for drug abuse. Counties may partner with neighboring counties to provide a network of treatment
- The county may either provide the services or contract for the services.
- The Department of Health and Family Services (DHFS) must promulgate rules specifying which specific services the counties must provide and specifying for the services, including qualifications for services providers.
- Each county must appoint an eleven-member community corrections board to advise the county on creation of a network of treatment services. The committee will consist of municipal law enforcement officers, a district judge, district attorney or prosecuting attorney, public defender and several lay citizens.

SUSPENDED PROSECUTION AND PROBATION

- After guilty or no contest plea or finding of guilt, district attorney and offender enter into suspended prosecution agreement (with court and parties deciding upon the terms), but without entering judgment of conviction
- A person subject to agreement must participate in the services ordered by the court.
- Probation officer supervises person's compliance as if he or she were on probation
- If a person violates a term of agreement that is not related to treatment, the court may revoke the agreement, reinstate the prosecution, enter the judgment of conviction, and sentence the person
- If a person violates a treatment condition, the treatment provider and probation officer may impose progressive sanctions
- If the provider and probation officer recommend incarceration as a sanction, case is returned to court. If court determines that jail is an appropriate short-term sanction, the court reinstates the prosecution and enters the judgment of conviction, but it does not impose a sentence. Instead, it places the person on probation and orders the person confined in jail for no more than two weeks.
- Upon release, person is subject to terms of probation imposed by court
- Any time the person violates a treatment condition after being released, the court may order additional confinement (no more than 1 month)
- Alternatively, the court may revoke the person's probation and impose a sentence for a 2nd or subsequent violation related to treatment, but only if it finds that there is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.
- The court may not revoke a person's probation for a violation related to treatment unless all of the following are true:
  1. The person has previously violated a treatment related condition under the suspended prosecution;
  2. The court modified the treatment conditions or imposed graduated sanctions (confinement would be a required sanction) and the person again violated a condition of treatment; and
  3. There is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.

- If a person abstains from drug use for 9 months and complies with the suspended prosecution agreement, the court must dismiss the charges with prejudice.
- If the person, after having been placed on probation, abstains from drug use for 9 months and complies with the conditions of probation, the court must vacate the person's judgment of conviction.
- The court may also expunge the record of the conviction if the court determines the person will benefit and the society will not be harmed by expungement.

OTHER PROVISIONS

- If a person is subject to suspended prosecution agreement or probation for committing an offense in a county that is not his or her county of residence, the case is transferred to the person's county of residence for the duration of the agreement or probation. The county of residence must provide services.

- The Department of Corrections (DOC) must contract out for supervision services in the city of Milwaukee.
- Courts and counties must give priority for services to those persons who face the longest terms of confinement if probation is revoked.
- DHFS and DOC must submit a report on the effectiveness of the program to the legislature 18 months after the program starts and every year thereafter.
- Counties that have a drug court program may continue to operate the drug court programs, but must add new services for those persons that the bill requires the county to serve and who are not served by the current drug court programs (Dane and LaCrosse counties)

EFFECTIVE DATE

- The suspended prosecution, probation, and treatment program is effective 12 months after the date of publication.
- DHFS has 4 months to promulgate emergency rules
- The counties must submit plans for service networks to DHFS by 10 months after the date of publication.

Source: State Senator Gwendolynne Moore's Office, 415 South Wing, State Capitol

TREATMENT INTERVENTION PROGRAM

ELIGIBILITY

I. Automatic Eligibility

A person who commits any of the following offenses is automatically eligible for probation and treatment:

1. Possession of a controlled substance (unless the person has 2 or more prior convictions for drug possession, at least one of which was in the previous 10 years, and has been given the opportunity to participate in the program on at least one prior occasion).
2. Keeping or maintaining a place for use of controlled substances.
3. Acquiring a controlled substance by misrepresentation or fraud.
4. Possession of drug paraphernalia (except paraphernalia for methamphetamine).

II. Discretionary Eligibility

A person who commits any crime except a Class A to E felony, a crime involving a weapon, or operating a vehicle while intoxicated is eligible for the program if the court finds by clear and convincing evidence that all of the following are true:

1. The offense was significantly motivated by the person's abuse of drugs.
2. Neither the victim nor the public will be harmed by placing the person on probation.
3. Placing the person on probation is in the best interests of the public.
4. Placing the person on probation will not unduly depreciate the seriousness of the offense.

The court must make a determination as to whether a person is eligible for probation and treatment under the discretionary route if the person was under the influence of a controlled substance when he or she committed the crime, or if the defendant or the district attorney request a determination on eligibility. The court may also raise the question of eligibility on its own motion.

ASSESSMENTS

Under both the automatic and discretionary routes, a person must undergo an assessment of his or her abuse of drugs, and must agree to participate in treatment.

TREATMENT SERVICES

- Each county must assemble a network of treatment and rehabilitation services for persons placed on probation for drug abuse.
- The county may either provide the services or contract for the services.
- The Department of Health and Family Services (DHFS) must promulgate rules specifying which specific services the counties must provide and specifying for the services, including qualifications for services providers.
- Each county must appoint a committee to advise the county on creation of a network of treatment services.

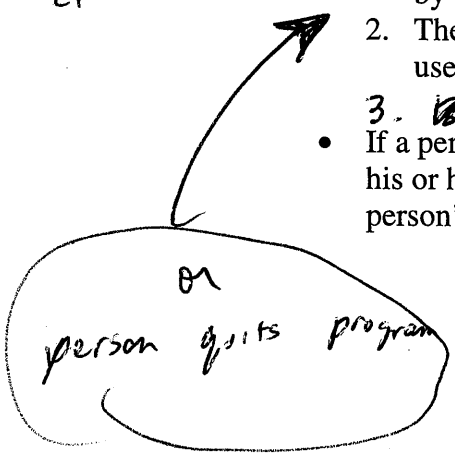
- A county may establish, or two or more counties may agree to establish jointly, a community corrections board to serve at an advisory capacity when the county department develops the service network. The Board shall consist of eleven members:
    - One district judge designated by the chief justice of the Wisconsin Supreme Court;
    - One either the corresponding county District Attorney or a prosecuting attorney appointed by the DA;
    - One municipal law enforcement officer appointed by the Chief executive of a municipality;
    - Either the corresponding county Sheriff or a county law enforcement officer appointed by the Sheriff;
    - One probation and parole officer appointed by the Department of Corrections;
    - One Public Defender from the corresponding county;
    - Four lay citizens, no more than two of who shall be from the same county if two or more counties establish the corrections board. If the community corrections board is established for a county in which a community college is located, one of the four lay citizen members shall be a representative of the community college;
    - And one recovered drug addict who has successfully completed a treatment program.

PROBATION

- A person placed on probation must participate in the services ordered by the court.
- If a person violates a term of probation that is not related to treatment, the court may revoke the person's probation.
- If a person violates a treatment condition, the court may impose progressive sanctions, including time in jail (up to 1 month for the first violation, and up to 3 months for the 2nd violation). The court may not revoke a person's probation for a violation related to treatment unless all of the following are true:
    1. The court modified the treatment conditions or imposed graduated sanctions and the person again violated a condition of treatment; or there are no reasonable treatment alternatives to the services originally ordered by the court.
    2. There is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.
    3. ~~Confinement sanction imposed~~ already
- If a person abstains from drug use for 9 months and successfully completes his or her term of probation without revocation, the court must vacate the person's judgment of conviction.

graduate sanctions

ct



- The court may also expunge the record of the conviction if the court determines the person will benefit and the society will not be harmed by expungement.

OTHER PROVISIONS

- If a person is placed on probation for committing an offense in a county that is not his or her county of residence, the case is transferred to the person's county of residence for the duration of probation. The county of residence must provide services.
- The Department of Corrections (DOC) must contract out for probation supervision services in the city of Milwaukee.
- Courts and counties must give priority for services to those persons who face the longest terms of confinement if probation is revoked.
- DHFS and DOC must submit a report on the effectiveness of the program to the legislature 18 months after the program starts and every year thereafter.
- Counties that have a drug court program may continue to operate the drug court programs, but must add new services for those persons that the bill requires the county to serve and who are not served by the current drug court programs (Dane and LaCrosse counties)

EFFECTIVE DATE

- The probation and treatment program is effective 12 months after the date of publication.
- DHFS has 4 months to promulgate emergency rules
- The counties must submit plans for service networks to DHFS by 10 months after the date of publication.

Treatment Intervention Program

ELIGIBILITY

I. Automatic Eligibility

A person who commits any of the following offenses is automatically eligible for the suspended prosecution program and treatment:

1. Possession of a controlled substance (unless the person has 2 or more prior convictions for drug possession, at least one of which was in the previous 10 years, and has been given the opportunity to participate in the program on at least one prior occasion).
2. Keeping or maintaining a place for use of controlled substances.
3. Acquiring a controlled substance by misrepresentation or fraud.
4. Possession of drug paraphernalia (except paraphernalia for methamphetamine).

II. Discretionary Eligibility

A person who commits any crime except a Class A to E felony, a crime involving a weapon, or operating a vehicle while intoxicated is eligible for the program if the court finds by clear and convincing evidence that all of the following are true:

1. The offense was significantly motivated by the person's abuse of drugs.
2. Neither the victim nor the public will be harmed by suspending the prosecution, subject to a suspended prosecution agreement.
3. Suspending the prosecution – subject to the agreement – is in the best interests of the public.
4. Subjecting the person to a suspended prosecution agreement will not unduly depreciate the seriousness of the offense.

The court must make a determination as to whether a person is eligible for the suspended prosecution program and treatment under the discretionary route if the person was under the influence of a controlled substance when he or she committed the crime, or if the defendant or the district attorney request a determination on eligibility. The court may also raise the question of eligibility on its own motion.

ASSESSMENTS

Under both the automatic and discretionary routes, a person must undergo an assessment of his or her abuse of drugs, and must agree to participate in treatment.

TREATMENT SERVICES

- Each county must assemble a network of treatment and rehabilitation services for persons subject to a suspended prosecution agreement or placed on probation for drug abuse. Counties may partner with neighboring counties to provide a network of treatment
- The county may either provide the services or contract for the services.

From Kelly →

- The Department of Health and Family Services (DHFS) must promulgate rules specifying which specific services the counties must provide and specifying for the services, including qualifications for services providers.
- Each county must appoint an eleven-member community corrections board to advise the county on creation of a network of treatment services. The committee will consist of municipal law enforcement officers, a district judge, district attorney or prosecuting attorney, public defender and several lay citizens.

1 DHFS approval of plan, quality assurance per county to implement

SUSPENDED PROSECUTION AND PROBATION

- After guilty or no contest plea or finding of guilt, district attorney and offender enter into suspended prosecution agreement (with court and parties deciding upon the terms), but without entering judgment of conviction
- A person subject to agreement must participate in the services ordered by the court.
- Probation officer supervises person's compliance as if he or she were on probation
- If a person violates a term of agreement that is not related to treatment, the court may revoke the agreement, reinstate the prosecution, enter the judgment of conviction, and sentence the person
- If a person violates a treatment condition, the treatment provider and probation officer may impose progressive sanctions
- If the provider and probation officer recommend incarceration as a sanction, case is returned to court. If court determines that jail is an appropriate short-term sanction, the court reinstates the prosecution and enters the judgment of conviction, but it does not impose a sentence. Instead, it places the person on probation and orders the person confined in jail for no more than two weeks.
- Upon release, person is subject to terms of probation imposed by court
- Any time the person violates a treatment condition after being released, the court may order additional confinement (no more than 1 month)
- Alternatively, the court may revoke the person's probation and impose a sentence for a 2nd or subsequent violation related to treatment, but only if it finds that there is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.
- The court may not revoke a person's probation for a violation related to treatment unless all of the following are true:
  1. The person has previously violated a treatment related condition under the suspended prosecution;
  2. The court modified the treatment conditions or imposed graduated sanctions (confinement would be a required sanction) and the person again violated a condition of treatment; and
  3. There is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.

- If a person abstains from drug use for 9 months and complies with the suspended prosecution agreement, the court must dismiss the charges with prejudice.
- If the person, after having been placed on probation, abstains from drug use for 9 months and complies with the conditions of probation, the court must vacate the person's judgment of conviction.
- The court may also expunge the record of the conviction if the court determines the person will benefit and the society will not be harmed by expungement.

OTHER PROVISIONS

- If a person is subject to suspended prosecution agreement or probation for committing an offense in a county that is not his or her county of residence, the case is transferred to the person's county of residence for the duration of the agreement or probation. The county of residence must provide services.
- The Department of Corrections (DOC) must contract out for supervision services in the city of Milwaukee.
- Courts and counties must give priority for services to those persons who face the longest terms of confinement if probation is revoked.
- DHFS and DOC must submit a report on the effectiveness of the program to the legislature 18 months after the program starts and every year thereafter.
- Counties that have a drug court program may continue to operate the drug court programs, but must add new services for those persons that the bill requires the county to serve and who are not served by the current drug court programs (Dane and LaCrosse counties)

EFFECTIVE DATE

- The suspended prosecution, probation, and treatment program is effective 12 months after the date of publication.
- DHFS has 4 months to promulgate emergency rules
- The counties must submit plans for service networks to DHFS by 10 months after the date of publication.

Bill proposes having ~~[illegible]~~ a county get funding once they submit a plan that meets DHFS's approval. Conceivably, a county that doesn't want to participate could just submit an incomplete plan.

How to ensure statewide coverage?

Dsida, Michael

From: Dsida, Michael
Sent: Wednesday, October 01, 2003 1:38 PM
To: Roller, Rachel
Cc: Bablitch, Kelly
Subject: RE: TAP bill -- additional questions

Congratulations, and welcome back! I hope your wedding and honeymoon went well.

I just wanted to add a note to the first comment below. A person charged with a simple drug offense could also be charged with an optional offense (prostitution, burglary...) instead of -- or in addition to -- an ineligible offense.

-----Original Message-----
From: Dsida, Michael
Sent: Monday, September 29, 2003 1:03 PM
To: Bablitch, Kelly
Subject: TAP bill -- additional questions

What happens if a person is charged with an "ineligible offense" (such as a Class A-E felony) at the same time he or she is charged with a simple possession offense? Do you not want the deferred prosecution requirement to apply in that case? (If the person is acquitted of the ineligible offense but found guilty of the possession offense, he or she can get into the program through probation.) FYI -- the same issue also arises in the context of motivated-by-drug crimes.

Given the prevalence of alcohol use among people who are dependent on drugs, and given your interest in covering OWI offenses, it probably makes sense to describe the assessment as relating to "substance abuse," not just "drug abuse." Is that okay?

Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@state.legis.wi.us

Dsida, Michael

From: Dsida, Michael
Sent: Wednesday, October 01, 2003 3:58 PM
To: Roller, Rachel
Subject: TAP - jail sanction, deferred prosecution for optional offenses, and other issues

1. From what I understand, you want the next draft to require simple possession cases to begin with a deferred prosecution agreement, for which confinement cannot be a sanction. (You decided that the confinement should wait until other sanctions have been tried and the case has been reinstated.) One problem with that approach is that it would be inconsistent with what Dane County (and maybe others) are doing. From what I understand, Dane County confines people who have not pled or been found guilty.

If you would like, I can draft the bill in a way that preserves the confinement option, ~~either~~ for everyone or only for drug court programs that are currently operating. Any thoughts? preserve

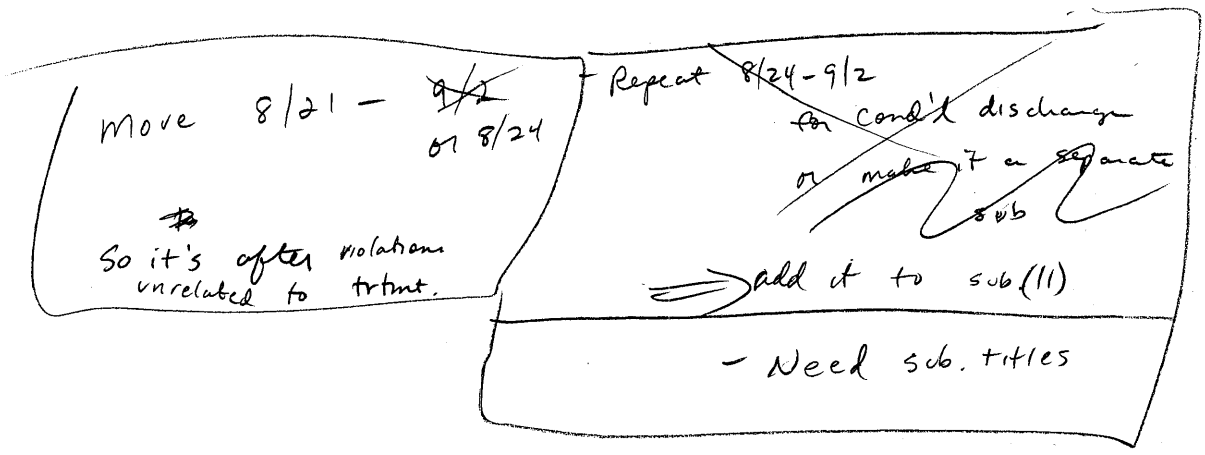
2. Under current law a DA can enter into a pre-trial deferred prosecution agreement with a defendant charged with any offense. Should the bill give explicit authorization for the DA to do so with respect to "optional offenses"? FYI -- it doesn't need to. No

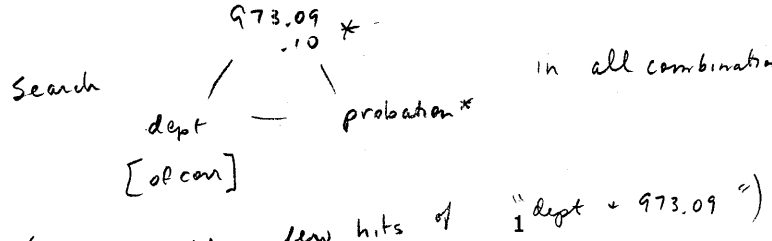
3. How, if at all, should the bill treat possession of marijuana ordinance violations? Should they not be treated as prior offenses for purposes of s. 973.105 (2) (a) 1.? (Robin did not treat them as prior offenses in previous drafts.)

4. A person charged with a possession offense who is ineligible for the mandatory treatment/probation route (i.e., sub. (2) (a) 1. to 3. all apply) under the"/P2" version of the bill is also ineligible for the optional treatment/probation option. Is that your intent? No

5. In addressing the optional treatment option, the /P2 refers to a person having a controlled substance in his or her blood when committing a crime. I don't believe that police take a blood sample unless being intoxicated or having a prohibited blood alcohol content is an element of the offense, so as a practical matter, this option will be used only in OWI cases. Does that matter? Take it out

Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@state.legis.wi.us





11/18 – Pk to Rachel –

Told her there wd be constl probs w/ mandatory diversion

R: Stich w/ probation

Can we ~~[illegible]~~ rq probation w/o entering judgment of conviction???

Repeater cases to Wimmer – Voting
1 ~~939.62~~

Don't call it "sentence"

Deferred judgment order

Make it clear it's not a conviction for purposes of voting, 939.62 ... (& Stoiber bill)

1/6

MA w/ Rachael

– Use 961.47 as base

Q's

– ~~Do~~ Don't ~~[redacted]~~ include drunk driving or drugged driving?

– Other alc-related offenses? Yes

~~[redacted]~~

~~If~~ If county program meets DHFS std, then prior offense ~~[redacted]~~

rq work w/ Dane + LaCrosse

either as a condn ~~of probation~~ def pros. agmt → program meets DHFS rqmts →

Expunge charge

Rq compilation of info re

Not a public record

Have ~~the~~ the DAs report in all cases

Rule specify method of determing success/failure

What if acquitted of violent crime but ~~acquitted of~~ found guilty of ~~[redacted]~~ mandatory treatment + optional treatment crime

~~Use~~ Use "drug court" language

Give community panel more ~~add~~ input w/ county re how county complies w/ Courts

Dsida, Michael

From: Dsida, Michael
Sent: Monday, January 05, 2004 1:12 PM
To: Roller, Rachel
Subject: TIP bill

Rachel-

As I mentioned in our phone conversation, the most significant question relates to how to facilitate pre-conviction mandatory treatment without interfering with prosecutorial discretion. The best way to do so might be to expand upon s. 961.47 and extend the scope of that section so that it applies in all of the cases you want covered.

Otherwise, with two exceptions, I've sent all of the questions and comments that I have had so far to you in the attached emails (although I am sure I will have other questions once I start working on this again).

The exceptions:

1. In my 10/1 email, I asked how, if at all, should the bill treat possession of marijuana ordinance violations. (For example, should they not be treated as prior offenses? The same question applies to drunk driving offenses, since first offenses are often prosecuted as ordinance violations.

2. You should look at s. 967.055 regarding the limits imposed by current law on deferring prosecutions in drunk driving cases.


TAP - jail sanction, deferred ...


RE: TAP bill -- additional que...

(Sorry about misspelling the acronym!)

Hope this helps.

Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@state.legis.wi.us

Dsida, Michael

From: Dsida, Michael
Sent: Friday, January 09, 2004 8:54 AM
To: Roller, Rachel
Subject: RE: TIP

not a problem

-----Original Message-----
From: Roller, Rachel
Sent: Thursday, January 08, 2004 4:44 PM
To: Dsida, Michael
Subject: TIP

Hi Mike:

Can we make the following addition to our TIP bill? We're looking for something very general...

...With regard to treatment - I think it makes sense to have DHFS promulgate rules about what specific treatment services should be provided by each county; however, in the actual bill, it might make sense to have some description of what that will mean. Maybe something simply describing a network of different options (so that it's clear that different types must be available - inpatient treatment as needed to address special detoxification or relapse situations or severe dependence, outpatient treatment, drug education and prevention courses, narcotic replacement therapy, etc.), that treatment services meet "best practices" standards and be evaluated, something like that.

Roller, Rachel

From: ThompsonK@mail.opd.state.wi.us
Sent: Thursday, January 22, 2004 2:36 PM
To: Rachel.Roller@legis.state.wi.us
Subject: FW: TIP questions

TIP outline1.doc

-----Original Message-----
From: Roller, Rachel [mailto:Rachel.Roller@legis.state.wi.us]
Sent: Thursday, January 15, 2004 11:47 AM
To: Thompson, Kelli
Subject: TIP questions

Hi Kelli:

I'm so sorry that I was unable to attend the SCAODA meeting yesterday. I have a nasty cold that just won't go away. I'm planning on going home as soon as I finish this email. Mike Dsida, the Legislative Reference Bureau drafter who has been diligently drafting Senator Moore's Treatment Incentive Program (TIP) legislative proposal, has posed several new questions. Many of these questions pertain to issues raised several months ago by Elliott Levine and Paige Styler (?). I'm looking for some advice and direction from you, Elliot, Paige or anyone else at the SPD's office who is willing to comment. In particular, I would appreciate advice from PD's with active drug courts in their counties, as their expertise may best help us in dealing with the below situations. I imagine that it will be difficult to approach some of these questions without being able to view the entire bill. I've attached an outdated outline that describes our proposal in some detail. I hope it is somewhat helpful. Any assistance is most appreciated:

1. Under the /P2 (an old outdated draft that did not reflect Sen. Moore's intent), counties must give priority to persons who are subject to the longest term of incarceration if probation is revoked. I want to revise this to cover people who are subject to a conditional discharge order, but we won't know who would have the longest term of incarceration upon revocation, since there will be no sentence imposed and stayed. Do you just want to compare maximum terms of imprisonment for the charged offense(s)? Another alternative -- give priority to people on probation (since they are closest to jail) or under a conditional discharge order (since the resources will have their greatest impact if they are provided quickly).

2. Do you want the following fee requirement to apply to persons participating in the diversion program? If so, does it apply to conditional discharge people? To people in Milwaukee (since DOC will not be supervising them)? If it does apply in Milwaukee, do you want to earmark the fee for the payment of the contractor? (Your answer may require me to amend s. 304.074(4m)(a), but you don't need to look at that section.)

304.074(2)
(2) The department shall charge a fee to probationers, parolees, and persons on extended supervision to partially reimburse the department for the costs of providing supervision and services. The department shall set varying rates for probationers, parolees, or persons on extended supervision based on ability to pay and with the goal of receiving at least $1 per day, if appropriate, from each probationer, parolee, and person on extended supervision. The department shall not charge a fee while the probationer, parolee, or person on extended supervision is exempt under sub. (3). The

department shall collect moneys for the fees charged under this subsection and credit those moneys to the appropriation account under s. 20.410 (1) (gf).

304.074(3)
(3) (intro.) The department may decide not to charge a fee under sub. (2) to any probationer, parolee or person on extended supervision while he or she meets any of the following conditions:

304.074(3)(a)
(a) Is unemployed.

304.074(3)(b)
(b) Is pursuing a full-time course of instruction approved by the department.

304.074(3)(c)
(c) Is undergoing treatment approved by the department and is unable to work.

304.074(3)(d)
(d) Has a statement from a physician certifying to the department that the probationer, parolee or person on extended supervision should be excused from working for medical reasons.

3. Should the contract agency for Milwaukee only have access to juvenile delinquency records, in the same way that DOC does under s. 48.78(2)(d)4. and 938.78(2)(d)4.?

ok to have pvt agy

4. Should graduated sanctions be only required for treatment-related violations of the court's order? Or are they required for all violations?

5.In "discretionary eligibility" cases, the court orders an assessment before entering its conditional discharge order. But the bill does not address the timing of the assessment in automatic eligibility cases. It probably makes sense to have the assessment precede any order, but that will require additional court appearances. In addition, you might then want an exception for out-of-home-county cases, so that the assessment can be done by the county in which the person will be treated. (On the other hand, in discretionary eligibility cases, the assessment is conducted in the county in which the offense occurred. In addition, the order is entered by the court from the offense county. Is that okay?)

6.Section 961.475 is not used much, as far as I know, but it probably makes sense to amend it (which Robin did in the "/P2") to make it consistent with what the rest of the bill is doing. But do you want to permit a court to subject a person whose treatment is ineffective to a conditional discharge order? Or would you want to start that person at probation, given that the person has already tried a treatment program?

7.On a related note, one option that we've never discussed but that you may want to consider -- allowing the court to go straight to probation (i.e., bypassing the conditional discharge step) in discretionary eligibility cases. You might prefer to have all cases begin with conditional discharge, but it might be easier to sell if people in discretionary eligibility cases (which may, in some cases, involve more serious offenses) are treated more severely.

8. If a person is charged with more than one simple possession offense at the same time, can he or she get into the program by pleading guilty to just one offense? I'll assume that you want to require that all of the charges in a simple possession case first be disposed of in one way or another. Otherwise, you will have to specify what happens to the other offense(s) while the person is in treatment. More importantly, DAs will object to having proceedings with respect to the other charges suspended because of the difficulty in proving the case later. They will also want to maximize their leverage over the person by having as many guilty/no contest pleas or

ok

findings of guilt as possible.

9. One concern that I have is how to distinguish a violation that is related to treatment to one that is not (which is relevant for the purpose of determining when revocation can occur). I suspect that some providers will require people to work, care for their children, not get arrested... as part of a treatment plan. I was thinking that unrelated requirements are those that are imposed by a court (regardless of whether the treatment provider imposes them as well). But I imagine that courts will impose detailed treatment requirements from time to time. ("The defendant shall submit to urinalysis at least X times per week.") Here's a thought -- just limit the quicker revocations to those for violating "conditions that are imposed by the court and that are unrelated to the person's substance abuse treatment." But no matter what, you may end up with a lot of litigation over what is "related to" substance abuse treatment. Any thoughts?

10. Do you want to require a hearing before the court incarcerates someone as a sanction? One option might be to require the defendant to waive the right to a hearing if he or she wants to stay in the program. If the defendant wants to contest anything, he or she can do so, but only if he or she is willing to run the risk of revocation. But that seems pretty coercive. (As an aside, s. 302.113 (8m) (b) appears to permit incarceration to be imposed without a hearing as a sanction for a violation of extended supervision -- in lieu of revocation -- based on a defendant's admitting to the violation.)

11. The previous draft of your bill applied only to Wisconsin residents, but current s. 961.47 applies to residents and non-residents alike. Converting that section into your drug court program statute (if you keep the residency requirement) will mean that non-residents are no longer eligible for conditional discharge. Is that okay? I assume that it is, given that the s. 961.47 currently applies only to a limited number of drugs and is subject to the judge's discretion.

12. Lastly, currently in Dane and LaCrosse Drug Courts, at what point is a defendent released from the treatment program and his/her record expunged/not entered? Is there a set timeline or are guidelines flexible? And should a repeat offender who had successfully completed treatment through a drug court and has been arrested again for using be able to reenter into the program? If so, what kind of time window would you allow?

<<TIP outline1.doc>>

Mtg w/ Rachel – P/c w/ Kelli Thompson Kim Heller Marotta
Elliott Levine Mike Tobin

Q re "motivated by abuse of drugs"
cocaine sales to feed marijuana habit ⇒ DA response
marijuana "not addictive" – therefore not eligible

1) Capture occasional user
Use DSM-IV

2) Treatment for diversion programs shd be the same as for cond'l discharge

3) Revocation – Need this ATR stuff

Presumption
– Need Finding in order to not have the person enter

Q's: 1) Give counter discretion. (Delete provision)
2)

Graduated incentives too

State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-2444/P3
MGD&RLR:kmg:rs

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

AN ACT ***to repeal*** 46.03 (18) (fm), 961.47 and 961.472; ***to amend*** 961.475; and ***to create*** 51.49 and 973.105 of the statutes; **relating to:** probation, and treatment for persons who commit certain drug-related offenses, providing an exemption from emergency rule procedures, and requiring the exercise of rule-making authority.

Analysis by the Legislative Reference Bureau

Current law prohibits a person from possessing various controlled substances. The penalties for possession of these controlled substances range from an unclassified misdemeanor to a Class H felony for a first offense. The higher penalties are for possession of narcotics, cocaine, hallucinogens, stimulants, and certain so-called "club drugs," including flunitrazepam, ketamine, and gamma-hydroxybutyric acid. For many possession offenses, the maximum penalty for a second or subsequent offense is greater than the maximum penalty for a first offense.

The following drug-related activities are also crimes under current law:

1. Keeping or maintaining a place for using controlled substances is a Class I felony.

2. Acquiring a controlled substance by misrepresentation or fraud, or counterfeiting a controlled substance is a Class H felony.

3. Possessing drug paraphernalia is generally an unclassified misdemeanor, though possessing paraphernalia for methamphetamine is a Class H felony.

The maximum penalties for the crimes cited above are as follows:

Crime	*Maximum Fine*	*Maximum Term of Imprisonment (for felonies, includes term of extended supervision)*
Class A misdemeanor	$10,000	Nine months
Class I felony	$10,000	Three and one-half years
Class H felony	$10,000	Six years

Current law provides that a court may allow a person who is convicted for possession of a controlled substance to participate in treatment for drug dependency as an alternative to sentencing if the offender volunteers to participate in treatment and if a treatment facility agrees to provide treatment. The treatment is for the period of time considered necessary by the treatment facility, but may not exceed the maximum possible sentence length for the possession offense unless the offender consents to a longer term. At the end of the treatment period, the court may waive sentencing for the drug possession offense. However, if treatment is ineffective or if the offender does not comply with treatment, the court may sentence the person for the drug possession offense. If a person is convicted for possession of heroin, cocaine, or certain hallucinogens or stimulants, the sentencing court must order the offender to submit to an assessment of the offender's drug use to determine whether the offender is appropriate for treatment.

Conditional discharge is another alternative to sentencing for a drug possession offense for which the maximum penalty is a fine not to exceed $500 or confinement in jail for not more than 30 days or both. If a person has no prior drug-related convictions and pleads guilty or is found guilty of such a possession offense and the person successfully completes probation for the offense, the court may discharge the person's sentence without creating a record of conviction.

This bill repeals the assessment requirement for persons convicted of certain possession offenses and the conditional discharge alternative.

If a person is convicted of certain simple drug offenses and the person consents to participate in drug treatment and rehabilitation, the bill requires the court to place the person on probation and order treatment and rehabilitation services as a condition of probation unless the person has two or more prior convictions for a simple drug offense, at least one of which was in the previous ten years, and the person was offered probation and treatment for one of the prior offenses. The simple drug offenses are possession of a controlled substance, keeping or maintaining a place for drug use, acquiring a controlled substance by misrepresentation or fraud or counterfeiting a controlled substance, and possession of drug paraphernalia (except paraphernalia for methamphetamine).

The bill also requires a court to place a person who commits certain other crimes on probation if the court finds that commission of the crime was significantly motivated by the offender's abuse of drugs. Unless the defendant is convicted of an ineligible offense, if the defendant or district attorney requests that the court consider placing the person on probation with treatment and rehabilitation services,

the court must order an assessment of the defendant's abuse of drugs and hold a hearing on whether to place the defendant on probation. The court must also order an assessment and hold a hearing if the offender had an unauthorized controlled substance in his or her blood when he or she committed the crime. If after the hearing the court finds that all of the following are true, the court must place the defendant on probation and order drug treatment and rehabilitation services as a condition of probation: 1) the commission of the crime was significantly motivated by the defendant's abuse of drugs; 2) neither the victim of the offense nor the public will be harmed by placing the defendant on probation with drug treatment and rehabilitation services; 3) placing the defendant on probation is in the best interests of the public; and 4) placing the defendant on probation will not unduly depreciate the seriousness of the offense. The court may also order an assessment and initiate proceedings to consider probation on its own motion. The following are ineligible offenses, for which a person may not be placed on probation under this bill: a Class A, B, C, D, or E felony; an offense involving a weapon; or operating a motor vehicle while intoxicated.

The bill requires the Department of Health and Family Services (DHFS) to promulgate rules that specify the drug treatment and rehabilitation services that counties must provide to persons placed on probation under the bill and to establish minimum standards for the provision of the services. County departments of community programs must either directly provide the required services or contract for provision of the services. Each county department of community programs must submit to DHFS a plan for how the county department intends to provide the required services. Each county must also create an 11–member community corrections committee to advise the county department in developing the plan for services. The bill requires the following membership for the committee: a judge, two local law enforcement officials, a district attorney, a public defender, a probation agent, and five members who are not public officials, including at least one person who is a recovered drug abuser who successfully completed a drug treatment program.

Under the bill, when a court places a person on probation for a simple drug offense or a drug motivated offense, the court must specify the drug treatment and rehabilitation services that the person must participate in as a condition of probation. The court may change the services ordered as needed. If a person on probation under this bill violates a condition of probation that is not related to drug treatment or rehabilitation services, the court may revoke the person's probation and order the person to serve a sentence. If a person violates a condition related to treatment or rehabilitation services, the court may impose graduated sanctions, including time in jail. The court may not revoke a person's probation for a violation related to treatment or rehabilitation services unless both of the following conditions are met: 1) the court modified the treatment and rehabilitation conditions or imposed graduated sanctions and the defendant again violated a condition that he or she participate in drug treatment and rehabilitation services, or there are no reasonable treatment and rehabilitation services options other than the services originally ordered by the court; and 2) the court finds that there is no reasonable

likelihood that the defendant will abstain from drug use for the remainder of the term of probation. If a person abstains from drug use for at least nine months and successfully completes probation, the court must vacate the judgment of conviction. The court may also expunge the record of conviction if the court determines that the person will benefit and the public will not be harmed by the expungement.

If a person is convicted and placed on probation in a county other than his or her county of residence, the convicting court must transfer the case to the person's county of residence for the duration of the probation, and the county of residence must provide the services ordered by the court. If the court in the county of residence revokes probation, the court that entered the judgment of conviction must sentence the person.

The bill also requires each county to give preference for drug treatment and rehabilitation services to those persons on probation who would face the longest terms of incarceration if probation is revoked.

The bill further requires that the Department of Corrections (DOC) contract with another entity to provide probation supervision services for persons from the city of Milwaukee who are participating in the probation and treatment program. In the remainder of the state, DOC must supervise people on probation under the bill, as under current law.

The bill also provides that counties that operate a drug court program that exists before this bill is enacted as an act may continue to serve through the drug court program those persons who are eligible for both the drug court program and the probation and treatment program required by this bill.

Finally, the bill requires DHFS and DOC to report to the legislature on the effectiveness of the probation and treatment program 18 months after the program is implemented and annually thereafter.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

PRELIM ANAL

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

SECTION 1. 46.03 (18) (fm) of the statutes is repealed.

SECTION 2. 51.49 of the statutes is created to read:

51.49 Treatment Intervention Program. (1) COUNTY RESPONSIBILITY. (a) The county department of community programs shall provide assessments of drug abuse that are ordered by the circuit court under s. 973.105 (2). The assessments shall satisfy standards established by the department of health and family services under sub. (2).

971.41.(2)

substance abuse

(b) The county department of community programs shall develop a network of drug treatment and rehabilitation services, including the services required by rule under sub. (2) and any other services that the county elects to provide, and shall provide the services, as ordered by the circuit court, to persons who are subject to a conditional discharge order under s. 971.41 (3) or placed on probation under s. 973.105. → 971.41(6)

(c) The county department of community programs may directly provide the assessments and services that are required under this subsection or may contract with another person to provide the assessments and services.

(2) RULES. The department of health and family services shall promulgate rules specifying all of the following:

(a) The services, including treatment for drug abuse, education concerning the effects of drug abuse, drug abuse tests, and employment support, that county departments of community programs must make available to the circuit court for persons placed on probation under s. 973.105. → 971.41(6)

(b) Minimum standards for the services specified under par. (a).

(c) Requirements for drug abuse assessments ordered under s. ~~973.105 (2)~~.

(d) Qualifications for providers of the services required under par. (a) and for the providers of assessments ordered under s. 973.105 (2). → 961.41(2)

SECTION 3. 961.47 of the statutes is repealed.

SECTION 4. 961.472 of the statutes, as affected by 2003 Wisconsin Act 49, is repealed.

SECTION 5. 961.475 of the statutes is amended to read:

961.475 Treatment option. Whenever any person pleads guilty to or is found guilty of possession or attempted possession of a controlled substance or controlled substance analog under s. 961.41 (3g), the court may, upon request of the person and

with the consent of a treatment facility with special inpatient or outpatient programs for the treatment of drug dependent persons, allow the person to enter the treatment programs voluntarily for purposes of treatment and rehabilitation. Treatment shall be for the period the treatment facility feels is necessary and required, but shall not exceed the maximum sentence allowable unless the person consents to the continued treatment. At the end of the necessary and required treatment, with the consent of the court, the person may be released from sentence. If treatment efforts are ineffective or the person ceases to cooperate with treatment rehabilitation efforts, the person may be remanded to the court for completion of sentencing or for an assessment and probation under s. 973.105, if applicable.

SECTION 6. 973.105 of the statutes is created to read:

973.105 Treatment Intervention Program for drug offenders. (1) (a) (b) "Drug" means a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m).

(b) "Disqualifying offense" means any of the following:

1. A Class A, B, C, D, or E felony.

2. An offense under s. 941.20, 941.21, 941.23, 941.235, 941.237, or 941.29.

3. An offense under s. 346.63.

(c) "Simple drug offense" means an offense or attempt to commit an offense under s. 961.41 (3g), 961.42, 961.43 (1) (a), or 961.573 (1), except if the drug paraphernalia is for methamphetamine.

(2) (a) If a person who is a resident of this state is convicted of a simple drug offense, the court shall order the person to comply with an assessment of the person's drug abuse and, if the person agrees to participate in drug treatment and rehabilitation services ordered by the court, place the person on probation under this section unless all of the following apply:

1. The person has 2 or more prior convictions for a simple drug offense or for an offense committed in another jurisdiction that would be a simple drug offense if committed in this state.

2. At least one of the offenses under subd. 1. was committed in the 10–year period before the person committed the current offense.

3. The person was offered an opportunity to receive ~~drug~~ treatment and rehabilitation services under this section in connection with one of the offenses under subd. 1.

(b) 1. If a person who ~~is a resident of~~ this state is convicted of a crime, other than an ineligible offense, and any of the following applies, the court shall order the person to comply with an assessment of the person's ~~drug abuse~~ ...

~~a. The person had a controlled substance that the person was not authorized to ingest in his or her blood when he or she committed the offense.~~

b. The person or the district attorney, or the court on its own motion, requests a hearing on whether ~~the person satisfies the conditions under~~ subd. 2. a. to d. applies.

2. If the court orders an assessment under subd. 1., the assessor shall report the results of the assessment to the court. Upon receipt of the assessment results, the court shall hold a hearing on the person's eligibility for ~~probation~~ under this paragraph. If the person agrees to participate in ~~drug~~ treatment and rehabilitation services and if the court finds by clear and convincing evidence that all of the following are true, the court shall ~~place the person on probation under this section~~:

a. The offense was significantly motivated by the person's ~~abuse of drugs~~.

b. Neither the victim of the offense nor the public will be harmed by ~~placing the person on probation under this section~~.

c. Placing the person on probation under this section is in the best interests of the public.

d. Placing the person on probation under this section will not unduly depreciate the seriousness of the offense.

(c) The county department of community programs shall provide any assessment of drug abuse ordered under par. (a) or (b).

(d) If the person is placed on probation in a county other than his or her county of residence, the court that places the person on probation shall transfer the case to the person's county of residence. The court in the person's county of residence shall supervise the person on probation and may revoke the person's probation as provided in sub. (4) or determine that the person has successfully completed probation as provided in sub. (5). If the court in the person's county of residence revokes the probation, the court that placed the person on probation shall sentence the person. The county department of community programs for the person's county of residence shall provide the treatment and rehabilitation services ordered by the court.

(3) If a person is placed on probation under this section, the court shall order, as condition of probation, that the person participate in specified drug treatment and rehabilitation services that are included in the plan of services developed by the county department of community programs under s. 51.49 (1). The court shall monitor the person's participation in the ordered services and may modify its order for services at any time. If the person violates a condition of probation, the court may impose graduated sanctions, including incarceration in jail or in a probation and parole holding facility. The first incarceration sanction may not exceed one month and the 2nd incarceration sanction may not exceed 3 months. The person's probation

agent or probation supervisor selected under sub. (8), whichever is applicable, shall notify the court if the person violates a condition of probation.

(b) All of the provisions for probation under ss. 973.09 and 973.10, except the following, apply to a person placed on probation under this section:

1. A court may not order a person confined as provided under s. 973.09 (4), except as a sanction imposed under par. (a).

2. A court may not order a person confined in a correctional institution under s. 301.13 or a probation and parole holding facility under s. 301.16 (1q) as provided under s. 973.09 (4) (b), except as a sanction imposed under par. (a).

3. The provisions for revocation of probation under s. 973.10 (2) do not apply.

(c) If the court orders the person to participate in a service that is covered by the person's health insurance, the health insurance provider shall provide the service or reimburse the county for providing the service.

(d) If the court finds, after providing the person an opportunity for a hearing on revocation, that a person placed on probation under this section violated a condition of probation other than the condition that the person participate in drug treatment and rehabilitation services ordered by the court, the court may revoke the person's probation.

(e) The court may not revoke a person's probation for failing to participate in drug treatment and rehabilitation services ordered by the court unless, after providing the person an opportunity for a hearing on revocation, the court finds all of the following:

1. The person violated a condition that he or she participate in drug treatment and rehabilitation services.

2. The court modified the treatment and rehabilitation conditions or imposed graduated sanctions ~~and the person again violated a condition that he or she participate in drug treatment and rehabilitation services~~, or there are no reasonable treatment and rehabilitation services options other than the services originally ordered by the court.

3. There is no reasonable likelihood that the person will abstain from drug use for the remainder of the term of probation.

~~(5)~~ If the court revokes a person's probation under ~~this subsection~~, and ~~the~~ person has already been sentenced, ~~the court shall rescind the stay of the sentence and order the person to begin serving the sentence. If the person was not already~~ sentenced, the court shall sentence the person.

~~(5m)~~ (a) If a person abstains from use of an unauthorized controlled substance for 9 months and completes his or her term of probation ~~under this section~~ without revocation, the court shall vacate the judgment of conviction for the offense for which the person was placed on probation.

(b) If the court vacates a judgment of conviction under ~~par. (a)~~, the person shall not be subject to any prohibition, disqualification, disability, increased penalty, or other adverse or unfavorable treatment that would otherwise result from the person having been convicted of the offense.

~~(6)~~ (a) A person whose conviction is vacated under sub. (5) may petition the court to expunge the record of the conviction. The court may expunge the record of conviction if the court determines that the person will benefit and society will not be harmed by the expungement.

(b) The clerk of court shall notify the department of justice of any expungement ordered under par. (a). Notwithstanding SCR 72.06 (3), the existence and contents

of a court record that is expunged under par. (a) may be disclosed to the person who was convicted or, if authorized by that person, to an attorney representing the person. Otherwise, neither the existence nor the contents of the court's records relating to the offense may be disclosed to any person.

~~(7) In each~~ The county, first priority for services under this ~~section shall be given~~ paragraph to the persons who are subject to the longest terms of incarceration if their probation is revoked.

~~(8)~~ (a) ~~Notwithstanding sub. (2) (b),~~ a person who is placed on probation under ~~this section for an offense committed~~ in a 1st class city is not under the care or control of the department.

(b) The department shall contract with a person to supervise persons on probation under ~~this section in a 1st class city~~. The department shall issue a request for proposals to provide probation supervision services in a 1st class city.

~~(9)~~ (a) In this subsection, "drug court program" means a program, operated by a county and a circuit court, ~~under~~ which a defendant whom the court finds committed an offense may agree to participate in drug treatment under the supervision of the court ~~and~~ if the defendant successfully completes treatment, the court does not enter a judgment of conviction for the offense or enters a judgment of conviction for a lesser offense.

(b) ~~Subsection (2)~~ does not apply to a defendant with respect to a specific offense if the defendant is given the opportunity with respect to that offense to participate in a drug court program that existed on the effective date of this paragraph .... [revisor inserts date].

~~(10)~~ By the first day of the 18th month beginning after the effective date of this subsection .... [revisor inserts date], and every 12 months thereafter, the department

of corrections and the department of health and family services shall submit to the legislature under s. 13.172 (2) a report on the effectiveness of the probation ~~and treatment~~ program under this section.

SECTION 7. Nonstatutory provisions.

(1) (a) By the first day of the 10th month beginning after the effective date of this subsection, each county department of community programs shall submit a plan of services to the department of health and family services specifying who shall provide the assessments and services required under section 51.49 of the statutes, as created by this act, and describing how and where they shall be provided.

(b) Each county shall create a community corrections committee to advise the county department of community programs in developing the plan of services under paragraph (a). The committee shall consist of the following members:

1. A circuit court judge for the county, appointed by the chief judge of the judicial administrative district.

2. The district attorney for the county or his or her designee.

3. A chief of police of a municipality in the county, appointed by the county executive.

4. The county sheriff or his or her designee.

5. A probation, extended supervision, and parole agent, appointed by the secretary of corrections.

6. One assistant state public defender, appointed by the state public defender.

7. Four persons who are residents of the county and are not public officials or employees, including at least one person who is a recovered drug abuser who successfully completed a drug treatment program.

(c) If a county department of community programs serves more than one county, the counties may create a joint committee on community corrections. The members may be from any of the participating counties.

(d) A community corrections committee created under this subsection shall disband after the plan established under paragraph (a) is submitted to the department of health and family services

(2) The department of health and family services shall submit in proposed form the rules required under section 51.49 (2) of the statutes, as created by this act, to the legislative council staff under section 227.15 (1) of the statutes no later than the first day of the 4th month beginning after the effective date of this subsection.

(3) Using the procedure under section 227.24 of the statutes, the department of health and family services may promulgate the rules required under section 51.49 (2) of the statutes, as created by this act, for the period before the effective date of the permanent rules required under section 51.49 (2) of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

SECTION 8. Initial applicability.

(1) The treatment of sections 961.41, 961.472, 961.475, and 973.105 of the statutes first applies to offenses committed on the effective date of this subsection.

SECTION 9. Effective dates. This act takes effect on the day after publication, except as follows:

(1) The treatment of sections 961.47, 961.472, 961.475, and 973.105 (2), (3), (4), (5), (6), (7), (8) (a), (9), and (10) of the statutes and SECTION 8 (1) of this act take effect on the first day of the 12th month beginning after publication.

(END)

INSERT 5/5

The services shall include different options for substance abuse treatment, be consistent with the best practices in substance abuse treatment, and be evaluated for the purpose of determining their effectiveness.

INSERT 5/11

The rules shall require that the services include at least

INSERT 5/14

who are subject to a conditional discharge order under s. 971.41 (3) or

INSERT 5/19

SECTION 1. 961.47 (title) of the statutes is renumbered 971.41 (title) and amended to read:

971.41 (title) ~~**Conditional discharge for possession or attempted possession as first offense**~~ **Alternatives to incarceration for drug offenders;**

History: 1971 c. 219; 1985 a. 29; 1989 a. 121; 1991 a. 39; 1995 a. 448 s. 285; Stats. 1995 s. 961.47.

SECTION 2. 961.47 (1) of the statutes is renumbered 971.41 (2) (a) (intro.) and amended to read:

971.41 **(2)** (a) (intro.) Whenever any person ~~who has not previously been convicted of any offense under this chapter, or of any offense under any statute of the United States or of any state or of any county ordinance relating to controlled substances or controlled substance analogs, narcotic drugs, marijuana or stimulant, depressant or hallucinogenic drugs,~~ who is a resident of this state pleads guilty or no contest to or is found guilty ~~of possession or attempted possession of a controlled substance or controlled substance analog under s. 961.41 (3g) (b)~~ one or more offenses in a simple drug offense case and there are no other charges against the person pending in that case, the court, without entering a judgment of guilt and with the consent of the accused, ~~may~~ shall defer further proceedings, order the person to submit to a substance abuse assessment, and ~~place him or her on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an~~

~~adjudication of guilt and proceed as otherwise provided.~~ enter a conditional discharge order under sub. (3), unless all of the following apply:

(4) COMPLIANCE WITH CONDITIONAL DISCHARGE ORDER. Upon fulfillment of the terms and conditions of a conditional discharge order entered under sub. (2), the court shall discharge the person and dismiss the proceedings against him or her. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of prohibitions, disqualifications ~~or~~, disabilities, increased penalties, or other adverse or unfavorable treatment imposed by law upon conviction of a crime, including the additional penalties imposed for 2nd or subsequent convictions under s. 961.48. ~~There may be only one discharge and dismissal under this section with respect to any person.~~

History: 1971 c. 219; 1985 a. 29; 1989 a. 121; 1991 a. 39; 1995 a. 448 s. 285; Stats. 1995 s. 961.47.

SECTION 3. 961.47 (2) of the statutes is renumbered 971.41 (2) (c) and amended to read:

971.41 **(2)** (c) Within 20 days after ~~probation is granted~~ a conditional discharge order is entered under this ~~section~~ subsection, the clerk of court shall notify the department ~~of justice~~ of the name of the individual ~~granted probation~~ who is subject to the order and any other information required by the department under rules promulgated by the department. This report shall be upon forms provided by the department.

History: 1971 c. 219; 1985 a. 29; 1989 a. 121; 1991 a. 39; 1995 a. 448 s. 285; Stats. 1995 s. 961.47.

INSERT 6/10

, which may include placing the person on probation in the manner described in, and subject to the requirements of, s. 971.41 (6). This section does not apply if the court is required to enter a conditional discharge order under s. 971.41 (2)

INSERT 6/19

but does not include conduct that constitutes a violation of s. 961.573 (3).

****NOTE: I believe that this draft's treatment of methamphetamine–related drug paraphernalia is more consistent with your response to Item 5 of the drafter's note dated August 27, 2003.

INSERT 6/20

(d) "Simple drug offense case" means a case in which a person is charged with one or more simple drug offenses but not with any other offense.

INSERT 7/14

SECTION 4. 971.41 (2) (b) of the statutes is created to read:

971.41 **(2)** (b) 1. Whenever any person who is a resident of this state pleads guilty or no contest to or is found guilty of a crime other than a disqualifying offense and there are no other charges against the person pending in that case, the court, without entering a judgment of guilt, shall order the person to submit to a substance abuse assessment by the county department of community programs if

INSERT 8/7

(8) OFFENSES COMMITTED OUTSIDE OF A PERSON'S COUNTY OF RESIDENCE. (a)

INSERT 8/11

. If the court in the person's county of residence

INSERT 8/12

, the court shall discharge the person and dismiss the proceedings under sub. (4).

INSERT 8/13

for a reason unrelated to the person's substance abuse treatment, the court may transfer the case to the court ~~which~~ that entered the order, which shall enter the judgment of conviction and

INSERT 8/14

If the court in the person's county of residence revokes the order based on the person violating a treatment requirement, the court in the person's county of residence shall proceed under sub. (5) (b).

(b) If the court in the person's county of residence places the person on probation under sub. (5) (b), that court shall monitor the person's compliance with the conditions of probation under sub. (3) and shall proceed under sub. (6) (a) if the person meets the requirements of that paragraph. If the court revokes the person's probation for a reason unrelated to the person's substance abuse treatment, the court shall transfer the case to the county in which the person pled guilty or no contest or was found guilty, and the court for that county shall sentence the person. The court of the person's county of residence may impose graduated sanctions under sub. (6) (b) for other violations. If the court in the person's county of residence revokes the person's probation under sub. (6) (d), the court shall transfer the case to the county in which the person pled guilty or no contest or was found guilty, and the court for that county shall sentence the person.

(c)

INSERT 8/15

for the county in which the person pled guilty or no contest or was convicted and the court for the person's county of residence

INSERT 8/16A

SECTION 5. 971.41 (3) of the statutes is created to read:

971.41 **(3)** REQUIREMENTS OF ORDER; MONITORING COMPLIANCE.

INSERT 8/16B

under sub. (2) or places a person on probation under sub. (6)

INSERT 10/12

SECTION 6. 971.41 (5) of the statutes is created to read:

971.41 **(5)** VIOLATION OF CONDITIONAL DISCHARGE ORDER; GRADUATED SANCTIONS; REVOCATION. (a) If a person violates a term or condition of a conditional discharge order that is unrelated to the person's substance abuse treatment, the court may revoke the order, enter the judgment of conviction, and sentence the person.

(b) If a person violates a requirement

, the court may impose graduated sanctions, which may include modifying the treatment requirements or the conditional discharge order. The court may revoke the conditional discharge order based on such a violation only if the court has previously imposed a different sanction on the person under this paragraph.

SECTION 7. 971.41 (6) of the statutes is created to read:

971.41 **(6)** PROBATION. (a) If a court revokes a conditional discharge order under sub. (5) (b), the court shall enter the judgment of conviction but withhold sentence and place the person on probation. The court shall require, as a condition of probation, that the person participate in specified substance abuse treatment program and rehabilitative services that are included in the plan of services developed by the county department of community programs under s. 51.49 (1).

(b)

INSERT 10/19

, including the additional penalties imposed for 2nd or subsequent convictions under s. 961.48.

(c)

INSERT 11/5

department of community services shall give

INSERT 12/3

SECTION 8. 973.09 (4) (d) of the statutes is created to read:

973.09 **(4)** (d) This subsection does not apply to a person placed on probation under s. 971.41 (6) unless the court orders that

***NOTE: please review the above insert to statute.

SECTION 9. 973.10 (2) (intro.) of the statutes is amended to read:

973.10 **(2)** (intro.) If a probationer violates the conditions of probation, other than probation imposed under s. 971.41 (6), the department of corrections may initiate a proceeding before the division of hearings and appeals in the department of administration. Unless waived by the probationer, a hearing examiner for the division shall conduct an administrative hearing and enter an order either revoking or not revoking probation. Upon request of either party, the administrator of the division shall review the order. If the probationer waives the final administrative hearing, the secretary of corrections shall enter an order either revoking or not revoking probation. If probation is revoked, the department shall:

History: 1971 c. 298; 1975 c. 41, 157, 199; 1977 c. 347; 1981 c. 50; 1983 a. 27, 197; 1985 a. 262 s. 8; 1989 a. 31, 107; 1995 a. 96, 387; 1997 a. 283.

Dsida, Michael

From: Roller, Rachel
Sent: Monday, February 23, 2004 3:41 PM
To: Dsida, Michael
Subject: FW: Senator's Moore's Bill

What do you think about the constitutional questions raised below, with regard to TIP?

Duncan:
Just before I left for NYC, Joe Ellwanger left me a copy of Sen. Moore's version of the TIP legislation and asked me to look it over.
After reviewing it, I have a few questions and comments. I will refer to them by their corresponding page and line numbers in draft bill.
Treatment Intervention Program (page 1, lines 10 and following): This is labeled as a county responsibility, but I couldn't find any reference to how this will be funded. Will the state provide funding, will it be shared, or will the counties be required to foot the bill themselves? This would create a crushing burden for Milwaukee County, and I suspect that unless the state is willing to provide some substantial support it will be viewed as an unfunded mandate.
Alternatives to incarceration for drug offenders (page 3, lines 7 and following): Line 15 specifically limits application of this statute to state residents. (There is a similar reference on page 6, line 12). What would happen to a guy from Chicago arrested for a simple drug offense? This seems to discriminate against non-state residents and may create some 14th Amendment equal protection and due process issues insofar as it creates a two-tiered criminal justice system, one for Wisconsin residents and another for out-of-state residents. I know we treat out-of-state residents differently for purposes of some state services (e.g., education at state universities), but it seems that the criminal justice system is something of an entirely different order.
Probation (page 8, lines 7-21): Lines 7-10 require the court to vacate a judgment of conviction if a person abstains from the use of an authorized controlled substance and completes the term of his/her probation without revocation for nine months. I am not sure that nine months is a long enough time frame. I would suggest at least one year of "clean time" before the judgment is vacated. This is an important milestone in the life of an alcoholic/addict and getting through that first year significantly improves the chance for long-term sobriety.
I guess that's it for now. If you would like to forward this to other members of the AODA/TIP Committee, please feel free to do so. Thanks.
Peace and all good,

John

John Celichowski, OFM Cap.
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1015 N. 9th Street
Milwaukee, Wisconsin 53233
(414) 271-0135, ext. 15
Cell (414) 232-9705
Fax (414) 271-0637
jcgtownlaw@aol.com

P/C to Rachel
Gave her options
She wants to leave as is for now

P/C ... at least ...

1

LEXSEE 3 CAL. 3D 226

In re CLENNON WASHINGTON KING on Habeas Corpus

Crim. No. 14130

Supreme Court of California

3 Cal. 3d 226; 474 P.2d 983; 90 Cal. Rptr. 15; 1970 Cal. LEXIS 202

October 2, 1970

SUBSEQUENT HISTORY:

Respondent's petition for a rehearing was denied October 28, 1970.

DISPOSITION:

Respondent's petition for a rehearing was denied October 28, 1970.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, convicted of failure to support his children in violation of *Cal. Penal Code § 270*, and whose conviction was adjudged a felony based on petitioner's absence from the state for at least 30 days, sought habeas corpus relief.

OVERVIEW: Petitioner was convicted of failure to support his children in violation of *Cal. Penal Code § 270*, and the conviction was adjudged a felony based on petitioner's absence form the state for at least 30 days. Petitioner sought habeas corpus relief and the court held that the provision of § 270 that punished nonsupporting fathers who stayed out of the state more heavily that those that stayed in the state violated the equal protection clauses of the U. S. Const. amend. XIV, and of the Cal. Const., art. I, §§ 11, 21. The court directed the trial court to correct its record to reflect that the offense for which petitioner was convicted was a misdemeanor. The court held that the felony classification also violated the privileges and immunities clause of the U. S. Const. art. IV, § 2, because its effect was to arbitrarily discriminate against non-California citizens. The court found that there was no compelling governmental interest justifying the felony classification for fathers who stayed out of the state.

OUTCOME: The court directed the trial court to correct its record to reflect that the offense for which petitioner was convicted was a misdemeanor because the *Cal. Penal Code § 270* punishment of nonsupporting fathers who stayed out of the state weighed more heavily on those that stayed in the state and violated the equal protection clauses of the United States and California constitutions and was not justified by a compelling governmental interest.

LexisNexis (TM) HEADNOTES- Core Concepts:

Criminal Law & Procedure > Criminal Offenses > Miscellaneous OffensesFamily Law > Parental Duties & Rights > Care & Control of Children
[HN1] See *Cal. Penal Code § 270.*

Criminal Law & Procedure > Habeas Corpus > Custody Requirement
[HN2] Because the burdens of a felony conviction are substantial and have a continuing impact upon the convicted defendant even after he has served his term, the discharge of a defendant during the pendency of a habeas corpus proceeding does not render the petition moot.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues
[HN3] The constitutionality of legislation is always open to challenge on habeas corpus.

Constitutional Law > Equal Protection > Scope of Protection
[HN4] It is basic that the guarantees of equal protection embodied in the U. S. Const. amend. XIV and the Cal. Const. art. I, §§ 11 and 21, prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. This principle does not preclude the state from drawing any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose. In cases involving suspect classifications or touching on fundamental interests, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that distinctions drawn by the law are necessary to further its purpose.

Constitutional Law > Fundamental Freedoms

Jones v. Helms 101 SCt 2434
Tennessee v. Sligh 846 SW2d 262
People v. Jones 64 Cal Rptr 622
Ex parte Boetsch 812 SW2d 600

[HN5] Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

Constitutional Law > Fundamental Freedoms
[HN6] The constitutional right to travel embodies more than merely the right to cross state lines and move about the country; it includes as well the right of the individual freely to choose the state in which he wishes to reside.

Governments > Legislation > Overbreadth & Vagueness
[HN7] If a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.

Criminal Law & Procedure > Appeals > Standards of Review > Standards GenerallyGovernments > Legislation > Interpretation
[HN8] Wherever a statute is reasonably susceptible of an interpretation consistent with the Constitution, the courts will give it such construction to preserve its constitutionality.

Criminal Law & Procedure > Appeals > Standards of Review > Standards GenerallyGovernments > Legislation > Interpretation
[HN9] If elimination of objectionable parts of a statute requires a wholesale rewriting, a court's attempt to do so transgresses both the legislative intent and the judicial function.

Governments > Legislation > Interpretation
[HN10] Unconstitutional provisions will not vitiate a whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions.

COUNSEL:

Heisler & Stewart, Francis Heisler, Peter Haberfeld and C. B. King for Petitioner.

Oscar Williams and Charles Stephen Ralston as Amici Curiae on behalf of Petitioner.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Mark Leicester, Deputy Attorney General, for Respondent.

JUDGES:

In Bank. Opinion by Tobriner, J., expressing the unanimous view of the court. Wright, C.J., McComb, J., Peters, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

OPINIONBY:

TOBRINER

OPINION:

[*229] **[**985]** **[***17]** On February 7, 1967, after a nonjury trial, petitioner Clennon Washington King was convicted of failure to support his children in violation of *Penal Code section 270.* n1 Based on petitioner's absence from the state for 30 days, the offense was adjudged a felony. In this habeas corpus proceeding, petitioner attacks the constitutionality of the felony provision of section 270. n2 We hold that insofar as the section punishes **[*230]** nonsupporting fathers who "remain out of the state for 30 days" more heavily than nonsupporting fathers who are within California, this penal provision establishes a classification not sufficiently related to any legitimate governmental **[**986]** **[***18]** objective, and as such violates the equal protection clause of our Constitution.

n1 [HN1] *Penal Code section 270* provides in relevant part: "A father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars ($ 1000) or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. If the father, during such violation, remains out of the state for 30 days, or if he fails or refuses to comply with the order of a court of competent jurisdiction requiring him to make any provision for the maintenance, support, medical treatment or other remedial care of such minor child and remains out of the state for 10 days without doing so, he is guilty of a felony. . . . Proof of abandonment or desertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse. . . . Proof of abandonment or desertion of a child by such father or the omission by such father to furnish such food, shelter, clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the state."

n2 After we issued an order to show cause, petitioner was discharged from custody upon completion of his term. [HN2] Because the burdens of a felony conviction are substantial and have a

continuing impact upon the convicted defendant even after he has served his term, the discharge of petitioner during the pendency of this proceeding does not render his petition moot. (Cf. *Carafas v. LaVallee (1968) 391 U.S. 234, 237 [20 L.Ed.2d 554, 558, 88 S.Ct. 1556]; Sibron v. New York (1968) 392 U.S. 40 [20 L.Ed.2d 917, 88 S.Ct. 1889]; People v. Succop (1967) 67 Cal.2d 785, 789-790 [63 Cal.Rptr. 569, 433 P.2d 473].)* Similarly, although ordinarily a writ of habeas corpus will not be issued when the claimed error could have been, but was not, raised on appeal, petitioner's arguments are based in part on decisions of the United States Supreme Court rendered subsequent to his conviction and thus present "special circumstances" constituting an excuse for failure to employ the remedy of appeal. (*In re Black (1967) 66 Cal.2d 881, 886-887 [59 Cal.Rptr. 429, 428 P.2d 293].)* Moreover this court has uniformly held that [HN3] the constitutionality of legislation is always open to challenge on habeas corpus (see, e.g., *In re Dixon (1953) 41 Cal.2d 756, 762-763 [264 P.2d 513].)*

Petitioner, a school teacher and minister, spent his childhood, received his education, and was married in the South. Although petitioner held teaching credentials and had earned an advanced academic degree, he experienced difficulty in finding employment, apparently because he had been active in the early phase of the civil rights movement and had become a controversial figure. In December 1958, petitioner, his wife, and their five children moved to California, and purchased a home in Compton. After initiating procedures to obtain a California teaching credential (a process that was to take several months), petitioner obtained part-time employment in the post office and as a porter in a Beverly Hills department store. He began to build a congregation in a San Pedro church to which he had been appointed pastor, and, also, undertook the publication of a religious newsletter. His earnings were not sufficient to enable the family to retain the home they were purchasing, however, and it became necessary to give up the house, apply for public assistance, and move into public housing. The King's sixth child was born in July 1959.

In November 1959 petitioner moved his family to Rosarita Beach in Mexico in the belief that his missionary activities, which then consisted primarily of publishing the newsletter, could be carried on more economically in Mexico. At the trial, petitioner testified that after learning that it was not possible formally to establish a permanent residence in Mexico at Tijuana, the nearest large city, he left his family on December 5, 1959, to go to Mexico City. He expected to be absent only a few days and left $50 with his wife for food and other necessities.

Mrs. King testified at trial that she was unaware of her husband's destination or plans and, thus, two days after his departure, on December 5, 1959, she left Rosarita Beach with her children and traveled to San Diego where she applied for, and received, public assistance. Mrs. King thereafter obtained employment as a licensed vocational nurse, but the family continued to receive public assistance to supplement her earnings. Petitioner **[*231]** contributed nothing to the support of the family after he left Rosarita Beach.

When petitioner learned that his wife and children had returned to the United States and were in San Diego, he attempted to contact them by letter. He did not follow them to San Diego, however, but instead traveled to Albany, Georgia, where he acquired a house, a store-front office, and a congregation, and repeatedly urged his wife and children to join him there. He sent letters, telephoned, and, finally, in July 1960, went to San Diego in an attempt to persuade his family to rejoin him, but Mrs. King and the children chose to remain in California.

California authorities then instituted nonsupport proceedings against petitioner, apparently under the Uniform Reciprocal Enforcement of Support Act, n3 and later sought petitioner's extradition for violation of *Penal Code section 270.* Several years thereafter, in 1966, King surrendered to authorities in Chicago, Illinois, waived extradition and was returned to California for criminal prosecution.

n3 *Code of Civil Procedure, sections 1660 - 1661.*

In California petitioner was charged by information with failure to support his children from July 1, 1960, through June 1, 1966, and with being absent from the state from July 10, 1960, through June 1, 1966, in violation of *section 270 of the Penal Code.* After a nonjury trial the court found King guilty of the charged felony. Although the trial court did not specifically find that petitioner had been out of the state for a 30-day period, the court, in rendering its judgment, fully reviewed petitioner's testimony regarding his activities since 1960. The testimony clearly established that King had been absent from the state for more than the statutory period. Under these circumstances the finding of **[**987]** **[***19]** defendant's absence from the state for the requisite period of time, implicit in the judgment of conviction, quite obviously rested on King's own testimony and not on the statutory presumption of absence. n4

n4 Section 270 provides in part that "Proof of

abandonment or desertion of a child by such father or the omission by such father to furnish such food, shelter or clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the state." Although petitioner suggests that the trial court did not believe it necessary to make a specific finding as to absence in view of this presumption, on the instant record we are convinced that the court's conclusion was based on evidence introduced at trial rather than on the presumption.

If the conviction were grounded on this statutory presumption, however, it could not withstand constitutional due process scrutiny, for, as the Court of Appeal has held (*People v. Johnson (1968) 258 Cal.App.2d 705, 709 [66 Cal.Rptr. 99]),* there is no rational connection between the fact presumed (absence from the state) and the fact to be proved (more than 30 days of failing to support) (see *Leary v. United States (1969) 395 U.S. 6, 36 [23 L.Ed.2d 57, 81, 89 S.Ct. 1532]; People v. Stevenson (1962) 58 Cal.2d 794, 797 [26 Cal.Rptr. 297, 376 P.2d 297]).*

[*232] Petitioner attacks his felony conviction on the ground that the felony provision of section 270 violates constitutional strictures of equal protection. He argues that in punishing a father who "remains out of the state" more severely than a father remaining within the state, the provision establishes a classification not sufficiently related to any legitimate governmental purpose and effectively undertakes an impermissible, invidious discrimination against non-California residents. For the reasons discussed below, we conclude that the felony provision of section 270 must succumb to the constitutional attack mounted by petitioner.

(1) [HN4] It is basic that the guarantees of equal protection embodied in the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21, of the California Constitution, prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. This principle, of course, does not preclude the state from drawing any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose. (*Rinaldi v. Yaeger (1966) 384 U.S. 305, 308-309 [16 L.Ed.2d 577, 579-580, 86 S.Ct. 1497]; Baxstrom v. Herold (1966) 383 U.S. 107, 111 [15 L.Ed.2d 620, 623, 86 S.Ct. 760]; Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 233 [18 Cal.Rptr. 501, 368 P.2d 101].)* (2) Moreover, "in cases involving 'suspect classifications' or touching on 'fundamental interests' . . . the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that distinctions drawn by the law are *necessary* to further its purpose." (*Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 847];* see *Shapiro v. Thompson (1969) 394 U.S. 618, 638 [22 L.Ed.2d 600, 617, 89 S.Ct. 1322]; Sherbert v. Verner (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 971, 83 S.Ct. 1790].* See generally *Developments in the Law — Equal Protection (1969) 82 Harv.L.Rev. 1064, 1120-1131.)*

Section 270 of the Penal Code, in prescribing varying penalties for its violation, distinguishes between two "categories" or "classifications" of nonsupporting fathers — (1) those nonsupporting fathers who "remain out of the state" for 30 days and (2) those who do not — and the section singles out those falling within the former classification for more severe punishment. Thus, under the section as presently drafted, any father who "remains out of the state" of California for 30 days while not supporting his child is guilty of a felony; a father who commits the identical act of criminal nonfeasance, but happens to be within California, is guilty only of a misdemeanor.

The application of this distinction may often lead to what appears to be **[*233]** fortuitous, and even arbitrary, results. Thus, for example, if a father of a family in New **[**988]** **[***20]** York fails to provide support for his children, and his family subsequently moves to San Francisco, the father by remaining in New York for 30 days will be guilty of a felony; a nonsupporting father in Los Angeles whose family moves to San Francisco, will, by contrast, only be guilty of a misdemeanor if he remains in Los Angeles. Although the *criminal quality* of the New York father's conduct appears to be no different than that of the Los Angeles father, by the terms of section 270 he has committed a much more serious crime and is subjected to harsher penalties.

To justify this seemingly illogical classification the People proffer the two broad objectives which underlie the nonsupport provision generally — (1) to protect public funds from the financial burden of supporting children whose fathers are able to support them and (2) to deter fathers from subjecting their children to the adverse impact of becoming public charges. We can discern no rational relationship, however, between these unquestionably valid general purposes and the distinguishing factor — the *location* of a nonsupporting father — upon which the felony-misdemeanor classification turns. (3) As the Court of Appeal pointed out in *People v. Jones (1967) 257 Cal.App.2d 235 [64 Cal.Rptr. 622],* the nature of the crime of nonsupport does not vary with the place of its commission: "[discrimination] *solely* on the basis of location inside or outside of the state bears no more relation

to the punitive and deterrent purposes of section 270 than differing locations of nonsupporting fathers within this state." (Original italics.) *(257 Cal.App.2d at pp. 238-239.)* As odious as the offense of nonsupport of a child may be, it does not take on varying ethical coloration because of its geographic locale. Thus, when viewed in relation to the main purposes of the criminal nonsupport provision, the classification drawn appears arbitrary and irrational.

Shifting its grounds of justification, the state argues in the alternative that another governmental purpose justifies the distinction drawn between fathers within and without California. The state contends that it has a legitimate interest in facilitating the enforcement of the support obligations of section 270, and reasons that because of the difficulty in enforcing such obligations against absent fathers, the provision serves to aid that enforcement by "encouraging" absent fathers to move to and remain in California. As we understand this contention, the state claims the authority to impose an additional criminal sanction simply to deter fathers from remaining out of the state. (4) Although we concede that the felony provision of section 270 may bear an arguable rational relationship to this goal of "encouraging" nonsupporting fathers to move to, or remain in, California, where they will be more amenable to this state's process, that relationship cannot justify **[*234]** the classification. Such a purpose — to require individuals to move to or remain in California — lacks constitutional sanction because it violates the individual's constitutional right to choose his own domicile and to travel freely throughout the country.

As the United States Supreme Court noted in *United States v. Guest (1966) 383 U.S. 745, 757-758 [16 L.Ed.2d 239, 248-249, 86 S.Ct. 1170]:* "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. [HN5] In any event, freedom to travel throughout the United States has long been recognized as a basic right under our Constitution." (See *Edwards v. California (1941) 314 U.S. 160, 178-181, 183-185 [86 L.Ed. 119, 127-129, 130-132, 62 S.Ct. 164]* (Douglas, J. (joined by Black and Murphy, JJ.) and Jackson, J., concurring in separate opinions); *Twining v. New Jersey (1908) 211 U.S. 78, 97 [53 L.Ed. 97, 105, 29 S.Ct. 14]; Slaughterhouse Cases (1873) 83 U.S. (16 Wall.) 36, 79* **[**989]** **[***21]** *[21 L.Ed. 394, 409]; Ward v. Maryland (1871) 79 U.S. (12 Wall.) 418, 430 [20 L.Ed. 449, 452]; Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 180 [19 L.Ed. 357, 360]; Crandall v. Nevada (1868) 73 U.S. (6 Wall.) 35, 43-44 [18 L.Ed. 745, 747]; Passenger Cases (1849) 48 U.S. (7 How.) 283, 492 [12 L.Ed. 702, 789]; Corfield v. Coryell (E.D.Pa. 1823) 6 F.Cas. 546, 552.)*

(5) The recent United States Supreme Court decision in *Shapiro v. Thompson (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322],* clearly demonstrates that [HN6] this constitutional "right to travel" embodies more than merely the right to cross state lines and move about the country; it includes as well the right of the individual freely to choose the state in which he wishes to reside. In *Shapiro* , the court, in examining the validity of residency requirements imposed by several states as a condition to receiving welfare benefits, found that a main purpose of such requirements was to inhibit the migration of needy persons into those states; the court rejected such a purpose as constitutionally impermissible in light of the needy individuals' "right to travel." The interest realistically impaired by the residence provisions at issue in *Shapiro* was not an indigent's right to "travel" across or within a given state, but his right to travel to, and make his home in, a particular state. In declaring that the impairment of an individual's choice to live wherever he wants within this country constitutes a violation of the individual's constitutional "right to travel," the court recognized that this historic and fundamental right rested not only on a view of the **[*235]** states as necessary links in the network of a "national highway" (see *United States v. Guest (1966) 383 U.S. 745 [16 L.Ed.2d 239, 86 S.Ct. 1170]; Crandall v. Nevada (1868) 73 U.S. (6 Wall.) 35 [18 L.Ed. 745]*) open to the passage of all, but, just as fundamentally, was grounded in a notion of the Federal Union as a "national homeland" open to the residence of all. n5

n5 Justice Stewart, concurring in the *Shapiro* decision, declared that the constitutional right to travel, "of course, includes the right of 'entering and abiding in any State in the Union [citation] . . .'" *(394 U.S. at p. 642 [22 L.Ed.2d at p. 619])* (see *Edwards v. California (1941) 314 U.S. 160, 183 [86 L.Ed. 119, 130, 62 S.Ct. 164]* (Jackson, J., concurring) ("This court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing."); *Corfield v. Coryell (E.D.Pa. 1823) 6 F.Cas. 546, 552* ("The right of a citizen of one state to pass through, or to reside in any other state . . ."). (See also *In re Higgins (1965) 46 Misc.2d 233*

[259 N.Y.S.2d 874, 877-882].)

(6) The provision at issue in the instant case, of course, does not seek to inhibit people from moving to California but, conversely, effectively *requires* nonsupporting fathers living outside the state to move into California to avoid additional criminal penalties. Such a provision embodies as invidious a discrimination against the exercise of constitutional rights as the statutes before the court, in *Shapiro*, however, for an individual's right to choose his place of domicile obviously affords him the right to select a home outside this state. Because the provision posits additional criminal liability on an individual *solely* because he chooses to remain outside the state, we find that the felony provision constitutes a denial of the equal protection of the laws and is therefore invalid. n6 [HN7] "If a law has 'no **[***22]** **[**990]** other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' *United States v. Jackson, 390 U.S. 570, 581 (1968).*" (*Shapiro* **[*236]** *v. Thompson (1969) 394 U.S. 618, 631 [22 L.Ed.2d 600, 613, 89 S.Ct. 1322].)* n7

n6 The felony classification also appears constitutionally defective as violative of the privileges and immunities clause of article IV, section 2, of the federal Constitution, providing that "[the] citizens of each State shall be entitled to all privileges and immunities of citizens in the several states," since the effect of section 270 will generally be to arbitrarily discriminate against non-California citizens. Although the classification is not drawn precisely along state citizenship lines, in practice the provision undoubtedly operates to penalize out-of-state citizens more heavily than California citizens, even though both have committed the same crime, and as such would appear to exhibit the very vice to which article IV, section 2, was addressed. (See *Toomer v. Witsell (1948) 334 U.S. 385 [92 L.Ed. 1460, 68 S.Ct. 1157]; Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 180 [19 L.Ed. 357, 360].)*

The coincident application of the privileges and immunities clause and the constitutional right to travel in this case is not surprising, since several cases in the past have designated article IV, section 2, as one source of the constitutional right to travel. (See *Corfield v. Coryell (E.D.Pa. 1823) 6 F.Cas. 546, 552; Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 180 [19 L.Ed. 357, 360]; Ward v. Maryland (1871) 79 U.S. (12 Wall.) 418, 430 [20 L.Ed. 449, 452].)*

n7 Inasmuch as section 270 serves to penalize the exercise of defendant's fundamental constitutional right to travel, its classification scheme could of course only be justified by a showing that the provision is "necessary to promote a *compelling* governmental interest." (*Shapiro v. Thompson, 394 U.S. 618, 634 [22 L.Ed.2d 600, 615, 89 S.Ct. 1322];* cf. *Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 847].)* Since we find that the basic objective of the felony provision — to induce nonsupporting fathers to come to California — is not a constitutionally legitimate one, we have no occasion to apply the compelling governmental interest test in the instant case.

Although the People claim that the objective served by the felony provision should be seen as the facilitation of the administration of support obligations, rather than as the movement of nonsupporting fathers to California, we believe analysis is only obscured by the proffer of this broader, though not unrelated, "governmental purpose." In the *Shapiro* case the states sought to justify the challenged residency requirement by a similar "generalized" purpose of "protecting the public fisc"; while the court conceded the propriety of this "fiscal responsibility" purpose, it held that the objective could not be achieved "by invidious distinctions between classes of its citizens." *(394 U.S. at p. 633 [22 L.Ed.2d at p. 614].)* In like manner, the state's interest in administering its support obligation law cannot be achieved by discriminating against that class who choose to remain outside the state. (Accord *Carrington v. Rash (1965) 380 U.S. 89, 96 [13 L.Ed.2d 675, 680, 85 S.Ct. 775]* ("The [constitutional right to vote] . . . means, at the least, that states may not casually deprive a class of individuals of the right to vote because of some remote administrative benefit to the state."); cf. *Bruton v. United States (1968) 391 U.S. 123, 134-135 [20 L.Ed.2d 476, 484-485, 88 S.Ct. 1620].)*

We note that the statute which we examine in the instant case is *not* one which singles out, for greater punishment, nonsupporting fathers who *flee* from California with the intent to hinder the state's enforcement of support obligation or which focuses on those who "remain out of the state" for the *purpose* of evading California process and sanction. (Cf. *18 U.S.C. § 1073* (interstate flight with intent to avoid prosecution).) Section 270 does not purport to hinge its more severe felony sanction on an additional moral culpability which may conceivably be attributed to the conscious "evader"; instead it casts its felony net more widely and ensnares all those nonsup-

porting fathers who happen "to remain out of the state" for 30 days, whether the father was intentionally evading California process or not. n8

n8 Under the federal law proscribing interstate flight to avoid prosecution "the gravamen of the offense . . . is that the defendant fled a state with intent to avoid prosecution therein, *and mere absence from the state of prosecution . . . is not sufficient proof of the federal crime.*" (Italics added.) (*Barrow v. Owen (5th Cir. 1937) 89 F.2d 476, 478;* see also *Maenza v. United States (5th Cir. 1957) 242 F.2d 339, 341; Reis v. United States Marshal (E.D.Pa. 1961) 192 F.Supp. 79, 81; State v. Miller (1966) 76 N.M. 62, 67 [412 P.2d 240, 243].)*

(7) The People suggest, however, that this court follow the lead of the Court of Appeal in *People v. Jones (1967) 257 Cal.App.2d 235, 239* **[**991]** **[***23]** *[64 Cal.Rptr. 622],* and construe the felony provision as applying only "to a **[*237]** resident father who *compounds* his offense of omission (nonsupport) with an action of commission, i.e., fleeing the state." n9 [HN8] Although wherever a statute is reasonably susceptible of an interpretation consistent with the Constitution, the courts will give it such construction to preserve its constitutionality (*Simpson v. City of Los Angeles (1953) 40 Cal.2d 271, 280 [253 P.2d 464]),* we do not believe that the construction adopted in *Jones* can be reconciled with the explicit language of section 270. By its unequivocal terms, the felony provision of section 270 applies to every nonsupporting father "who remains out of the state" for 30 days; this language is too clear to permit us to construe it as intended to apply only to resident fathers who flee the state to evade their support obligations. [HN9] If elimination of objectionable parts of a statute requires a wholesale rewriting, a court's attempt to do so transgresses both the legislative intent and the judicial function. (*Vogel v. County of Los Angeles (1967) 68 Cal.2d 18, 25 [64 Cal.Rptr. 409, 434 P.2d 961]; People v. Stevenson (1962) 58 Cal.2d 794, 798 [26 Cal.Rptr. 297, 376 P.2d 297]; City of Los Angeles v. Lewis (1917) 175 Cal. 777, 781 [167 P. 390].)* n10

n9 The Attorney General argues that as thus construed the felony provision would be applicable to defendant since he "brought his family in California, had lived in California, and had left his family here in California while wilfully failing to support them." Defendant, however, neither left his family in California nor "fled" from California; he moved *with* his family to Rosarita Beach, Mexico, planning to reside therein, and only then left his family with inadequate support. Although the state argues that defendant should reasonably have known that his family would return to California for public assistance, and thus can be charged with leaving his family without support in California, there was still no showing that the avoidance of his support obligations was a dominant purpose of defendant's departure from the state (cf. *Hett v. United States (9th Cir. 1965) 353 F.2d 761, 763,* cert. den. *384 U.S. 905 [16 L.Ed.2d 358, 86 S.Ct. 1339]).* In any event, since we conclude that the statute cannot be so construed, we need not resolve these contentions.

n10 Inasmuch as a criminal statute positing heavier penalties on those nonsupporting fathers who flee the state for the purpose of avoiding their obligations is not properly before us, we, of course, intimate no opinion on the constitutionality of such a statute.

(8a) Our conclusion that the felony provision of section 270 lacks constitutional viability does not affect the validity of the remainder of the statute. Having been independently enacted (Stats. 1939, ch. 1001, § 1, p. 2783) and bearing no necessary relationship to the balance of the statute, the felony provision may be severed. (9) [HN10] "[Unconstitutional] provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions." (*Danskin v. San Diego Unified School Dist. (1946) 28 Cal.2d 536, 555 [171 P.2d 885]; People v. Lewis (1939) 13 Cal.2d 280, 284 [89 P.2d 388].)* (8b) Inasmuch as petitioner's conviction of the felony necessarily included a finding of guilt as to misdemeanor nonsupport, **[*238]** our conclusion herein does not require that we set aside the conviction in its entirety.

The Superior Court of the County of San Diego is directed to correct its records in conformity with our decision herein to reflect that the offense of which petitioner was convicted in People v. Clennon Washington King, S.C. No. 9879, is a misdemeanor.

Dsida, Michael

From: Dsida, Michael
Sent: Wednesday, February 25, 2004 4:55 PM
To: Roller, Rachel
Subject: REVISED: Additional questions for Rachel regarding TIP draft

My comments are in italics. More on the other questions tomorrow or Friday.

-----Original Message-----
From: Roller, Rachel
Sent: Friday, February 20, 2004 4:55 PM
To: Dsida, Michael
Subject: RE: REVISED: Additional questions for Rachel regarding TIP draft

See the answers to your questions below, typed in red:

1) In "discretionary eligibility" cases, the court orders an assessment before entering its conditional discharge order. But the bill does not address the timing of the assessment in automatic eligibility cases. It probably makes sense to have the assessment precede any order, but that will require additional court appearances. In addition, you might then want an exception for out-of-home-county cases, so that the assessment can be done by the county in which the person will be treated. (On the other hand, in discretionary eligibility cases, the assessment is conducted in the county in which the offense occurred. In addition, the order is entered by the court from the offense county. Is that okay?)

Yes, let's have the assessment for automatic eligibility preceding the order and allow for an exception for out-of-home-county cases. The last question is ok by me.

After looking at this issue again, I'm not sure why I thought that, in discretionary eligibility cases, the assessment would need to be conducted in the county in which the offense occurred. I think it can be conducted in the person's home county in the same way as it would be in automatic eligibility cases. Any thoughts on this? Maybe the bill shouldn't say anything on this issue. Don't include

2)Section 961.475 is not used much, as far as I know, but it probably makes sense to amend it (which Robin did in the "/P2") to make it consistent with what the rest of the bill is doing. But do you want to permit a court to subject a person whose treatment is ineffective to a conditional discharge order? Or would you want to start that person at probation, given that the person has already tried a treatment program?

I want the court to have the option to subject a person who has gone through a treatment program to enter into a conditional discharge order.

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6) Under the /P2, counties must give priority to persons who are subject to the longest term of incarceration if probation is revoked. I want to revise this to cover people who are subject to a conditional discharge order, but we won't know who would have the longest term of incarceration upon revocation, since there will be no sentence imposed and stayed. Do you just want to compare maximum terms of imprisonment for the charged offense(s)? Another alternative -- give priority to people on probation (since they are closest to jail) or under a conditional discharge order (since the resources will have their greatest impact if they are provided quickly).

I like the priority going to probation and conditional discharge order cases. Once those priorities are met, counties will look at the maximum terms of imprisonment for the charged offense (s).

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way, you may have already thought about this, but the maximum term of imprisonment criteria may lead to less county support, since they will be helping reduce state prison populations, not jail populations.)

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I want the court to have the option to subject a person who has gone through a treatment program to enter into a conditional discharge order.

3) On a related note, one option that we've never discussed but that you may want to consider -- allowing the court to go straight to probation (*i.e.*, bypassing the conditional discharge step) in discretionary eligibility cases. You might prefer to have all cases begin with conditional discharge, but it might be easier to sell if people in discretionary eligibility cases (which may, in some cases, involve more serious offenses) are treated more severely.

Can we give the courts the discretion to either enter into conditional discharge or go straight to probation?

4) I just want to make sure on this: I know you told me that you don't want to cover drunk driving offenses, but I don't remember whether drunken ATV-ing, snowmobiling, or boating should also be treated as "ineligible offenses."

They should be considered ineligible offenses.

5) Are they (graduated sanctions) only required for treatment-related violations of the court's order? Or are they required for all violations?

They are required solely for treatment-related violations of the court order... but could we add language that allows for sanctions regarding violations that were committed due to the offender's dependency? Am I being redundant here?

6) Under the /P2, counties must give priority to persons who are subject to the longest term of incarceration if probation is revoked. I want to revise this to cover people who are subject to a conditional discharge order, but we won't know who would have the longest term of incarceration upon revocation, since there will be no sentence imposed and stayed. Do you just want to compare maximum terms of imprisonment for the charged offense(s)? Another alternative -- give priority to people on probation (since they are closest to jail) or under a conditional discharge order (since the resources will have their greatest impact if they are provided quickly).

I like the priority going to probation and conditional discharge order cases. Once those priorities are met, counties will look at the maximum terms of imprisonment for the charged offense (s).

7) Do you want the following fee requirement to apply to persons participating in the diversion program? If so, does it apply to conditional discharge people? To people in Milwaukee (since DOC will not be supervising them)? If it does apply in Milwaukee, do you want to earmark the fee for the payment of the contractor? (Your answer may require me to amend s. 304.074(4m)(a), but you don't need to look at that section.)

Can we add this section to be developed through DOC administrative rule?

304.074(2)
(2) The department shall charge a fee to probationers, parolees, and persons on extended supervision to partially reimburse the department for the costs of providing supervision and services. The department shall set varying rates for probationers, parolees, or persons on extended supervision based on ability to pay and with the goal of receiving at least $1 per day, if appropriate, from each probationer, parolee, and person on extended supervision. The department shall not charge a fee while the probationer, parolee, or person on extended supervision is exempt under sub. (3). The department shall collect moneys for the fees charged under this subsection and credit those moneys to the appropriation account under s. 20.410 (1) (gf).

304.074(3)
(3) (intro.) The department may decide not to charge a fee under sub. (2) to any probationer, parolee or person on extended supervision while he or she meets any of the following conditions:

304.074(3)(a)
(a) Is unemployed.

304.074(3)(b)
(b) Is pursuing a full-time course of instruction approved by the department.

304.074(3)(c)
(c) Is undergoing treatment approved by the department and is unable to work.

304.074(3)(d)
(d) Has a statement from a physician certifying to the department that the probationer, parolee or person on extended supervision should be excused from working for medical reasons.

Stop here

8) Should the contract agency have access to juvenile delinquency records, in the same way that DOC does under s. 48.78(2)(d)4. and 938.78(2)(d)4.?

Yes, they should have access to the records, but can they also be bound by confidentiality like DOC?

9) What happens if the contract agency determines that there has been a violation at the end of the term of probation? Does the term get extended, as in s. 304.072(3)? (We may need similar treatment for conditional discharge cases.)

Can't we used the graduated sanction language for the agency as we do for the county probation officers?

10) Is a person who is subject to a conditional discharge order in Milwaukee to be supervised by the contract agency?

Yes

11) Do DOC rules regarding probation apply to a person being supervised by the contract agency?

Yes

Dsida, Michael

From: Dsida, Michael
Sent: Thursday, February 26, 2004 4:15 PM
To: Roller, Rachel
Subject: TAP q's

I need to clarify what we talked about the other day regarding the duration of probation. (That was why I called.) Beyond that, I think I only have two sets of questions/concerns today:

1. Under the bill, the county department pays for assessments and services for persons who are subject to a conditional discharge order or placed on probation for an automatic eligibility or a discretionary eligibility offense. But does the county department also pay for assessments and services in ATR cases? What if the person is already required to participate in treatment as a condition of ES/parole/probation? (Currently, if the person cannot pay for or does not have insurance for treatment, either DOC or (depending on the county and the person's financial situation) the county department will provide it.)

2. Please look at page 9, lines 1-12. I'm not sure if this is consistent with your intent. It would allow the court to revoke probation without first using graduated sanctions if subd. 2.b. applies. (Subdivisions 1. and 3. would have to apply too). Also, is subd. 2. a. okay? It would also allow the court to revoke without using graduated sanctions.

Mike Dsida
Legislative Reference Bureau
608/266-9867
michael.dsida@state.legis.wi.us

leave alone

1) Counties estimate costs, forward to DOA
2) DOA determines state costs
3) to determine when funding enough, after considering estimate in 1 + 2

Gov
WCA
w/consult'n from
HFS
DOC
DOJ
2 chief judges
1 DA's

Dsida, Michael

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