2009 DRAFTING REQUEST

Bill

Received: **11/25/2008**

Received By: **phurley**

Wanted: **As time permits**

Identical to LRB:

For: **Tony Staskunas (608) 266-0620**

By/Representing:

This file may be shown to any legislator: **NO**

Drafter: **phurley**

May Contact:

Addl. Drafters:

Subject: **Drunk Driving - penalties**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Staskunas@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Increase penalties for 4th and subsequent OWI

Instructions:

Make 4th, 5th, & 6th a Class H with not less than 2 years; 7,8.9 a class G with 3 years minimum; 10+ an F with 4 years minimum. Make sure truth in sentencing doesn't erode minimums

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?				_____			S&L
/1	phurley 11/30/2008 rryan 02/04/2009	bkraft 12/11/2008	phenry 12/12/2008	_____ _____ _____ _____	sbasford 12/12/2008	sbasford 02/27/2009	

FE Sent For:

↳ At Intro.

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Sep Request

↑ OWI penalties

4th = ~~penalty~~ felony class I felony

4th ⇒ put into 5+6th (346.65(2)(am)5.

4, 5, 6 =
Class H + not less than 2 years + class H maximum

7, 8, 9 = minimum [redacted] years + 6 maximum

10+ = minimum 4 years + 7 maximum

Note: minimums should mean real prison time. How does TIS affect these minimums?

- How can we make sure imprisonment = real time in prison?
- Plug judicial ways "out"

Also, TS wants a list of crimes with mandatory minimums

LRB–0934/1
PJH:...:...

2009 BILL

AN ACT ...; **relating to:** fines and terms of imprisonment for certain drunken driving offenses and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, a person who commits an offense relating to operating a vehicle while intoxicated or under the influence of a controlled substance (OWI) is subject to a forfeiture or fine and, for a second or subsequent offense, a period of imprisonment. Currently, a person who commits a second OWI offense is subject to a fine between $350 and $1,100 and may be imprisoned for not less than five days nor more than six months, a person who commits a third offense is subject to a fine between $600 and $2000 and may be imprisoned for not less than 30 days nor more than one year, a person who commits a fourth offense may be fined between $600 and $2000 and may be imprisoned for not less than 60 days nor more than one year.

Upon committing a fifth or sixth OWI offense, a person is guilty of a Class H felony, and is subject to a minimum fine of $600, a six month minimum term of imprisonment and a maximum term of imprisonment of six years. A seventh, eighth, or ninth OWI offense is a Class G felony, and the person is subject to a maximum fine of $10,000 and a maximum term of imprisonment of ten years. A tenth or subsequent OWI offense is a Class F felony, and the person is subject to a maximum fine of $25,000, and a maximum term of imprisonment of 12 years and six months.

Under current law, a person who is sentenced for a felony is sentenced to a bifurcated sentence, and the person serves a portion of his or her sentence confined in a prison and a portion under extended supervision outside of prison.

This bill makes a fourth OWI offense a Class H felony and requires a person who commits a fourth, fifth, or sixth OWI offense to serve a minimum of two years

in prison under a bifurcated sentence. The bill requires a person who commits a seventh, eighth, or ninth OWI offense to serve a minimum of three years in prison under a bifurcated sentence and a person who commits a tenth or subsequent OWI offense to serve a minimum of four years in prison under a bifurcated sentence.

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. 346.65 (2) (am) 4. of the statutes is repealed.

SECTION 2. 346.65 (2) (am) 5. of the statutes is amended to read:

346.65 **(2)** (am) 5. Except as provided in pars. (f) and (g), is guilty of a Class H felony and shall be fined not less than $600 ~~and imprisoned for not less than 6 months~~ if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1), equals 4, 5, or 6, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one. The confinement portion of a bifurcated sentence imposed on the person under s. 973.01 shall be not less than 2 years.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 3. 346.65 (2) (am) 6. of the statutes is amended to read:

346.65 **(2)** (am) 6. Except as provided in par. (f), is guilty of a Class G felony if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307 (1), equals 7, 8, or 9, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

The confinement portion of a bifurcated sentence imposed on the person under s. 973.01 shall be not less than 3 years.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 4. 346.65 (2) (am) 7. of the statutes is amended to read:

346.65 **(2)** (am) 7. Except as provided in par. (f), is guilty of a Class F felony if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307 (1), equals 10 or more except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one. The confinement portion of a bifurcated sentence imposed on the person under s. 973.01 shall be not less than 4 years.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 5. 346.65 (2) (f) of the statutes is amended to read:

346.65 **(2)** (f) If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction under s. 346.63 (1), the applicable minimum and maximum forfeitures, fines, or imprisonment under par. (am) for the conviction are doubled. An offense under s. 346.63 (1) that subjects a person to a penalty under par. (am) 3., ~~4.,~~ 5., 6., or 7. when there is a minor passenger under 16 years of age in the motor vehicle is a felony and the place of imprisonment shall be determined under s. 973.02.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 6. 346.65 (2c) of the statutes is amended to read:

346.65 **(2c)** In sub. (2) (am) 2., 3., ~~4.,~~ 5., 6., and 7., the time period shall be measured from the dates of the refusals or violations that resulted in the revocation or convictions. If a person has a suspension, revocation, or conviction for any offense

under a local ordinance or a state statute of another state that would be counted under s. 343.307 (1), that suspension, revocation, or conviction shall count as a prior suspension, revocation, or conviction under sub. (2) (am) 2., 3., ~~4.,~~ 5., 6., and 7.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 7. 346.65 (2g) (a) of the statutes is amended to read:

346.65 **(2g)** (a) In addition to the authority of the court under s. 973.05 (3) (a) to provide that a defendant perform community service work for a public agency or a nonprofit charitable organization in lieu of part or all of a fine imposed under sub. (2) (am) 2., 3., ~~4.,~~ and 5., (f), and (g) and except as provided in par. (ag), the court may provide that a defendant perform community service work for a public agency or a nonprofit charitable organization in lieu of part or all of a forfeiture under sub. (2) (am) 1. or may require a person who is subject to sub. (2) to perform community service work for a public agency or a nonprofit charitable organization in addition to the penalties specified under sub. (2).

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 8. 346.65 (2g) (ag) of the statutes is amended to read:

346.65 **(2g)** (ag) If the court determines that a person does not have the ability to pay a fine imposed under sub. (2) (am) 2., 3., ~~4.,~~ or 5., (f), or (g), the court shall require the defendant to perform community service work for a public agency or a nonprofit charitable organization in lieu of paying the fine imposed or, if the amount of the fine was reduced under sub. (2e), in lieu of paying the remaining amount of the fine. Each hour of community service performed in compliance with an order under this paragraph shall reduce the amount of the fine owed by an amount determined by the court.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

SECTION 9. 346.65 (7) of the statutes is amended to read:

346.65 **(7)** A person convicted under sub. (2) (am) 2., 3., ~~4.,~~ 5., 6., or 7. or (2j) (am) 2. or 3. shall be required to remain in the county jail for not less than a 48–consecutive–hour period.

History: 1971 c. 278; 1973 c. 218; 1977 c. 193; 1979 c. 221; 1981 c. 20; 1985 a. 80, 337; 1987 a. 3, 27, 398, 399; 1989 a. 105, 176, 271; 1991 a. 39, 251, 277, 315; 1993 a. 198, 317, 475; 1995 a. 44, 338, 359, 425; 1997 a. 27, 135, 199, 237, 277, 283, 295; 1999 a. 32, 109; 2001 a. 16 ss. 3443k, 4060gm, 4060hw, 4060hy; 2001 a. 109; 2003 a. 33, 97, 139, 326; 2005 a. 149, 317, 389; 2007 a. 97, 111.

(END)

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Fully Implementing Truth-in-Sentencing

The changes in Wisconsin sentencing laws are substantial and were a long time in coming. With the passage of 2001 Wis. Act 109, the pieces are in place for the full implementation of truth-in-sentencing as originally envisioned by Wisconsin lawmakers.

by Michael B. Brennan, Thomas J. Hammer & Donald V. Latorraca

In Feb. 1, 2003 the second wave of truth-in-sentencing legislation will hit Wisconsin's shores. This follows a long, hard-fought political battle over the full implementation of truth-in-sentencing that has been waged over the last four years. This article previews the most significant aspects of the new legislation, which is known as 2001 Wisconsin Act 109 (Act 109).

Identifying the initial applicability and effective dates of the new law's many provisions requires caution. While the new crime classification system and other substantive law changes described below apply only to offenses committed on and after Feb. 1, 2003, some of the new bill's procedural changes take effect on that date but are not limited in application to offenses committed on and after it.[1] Still other procedural changes took effect in July 2002 on the day after Act 109 was published. These timing issues are addressed as they arise in the discussion that follows.

Truth-in-Sentencing Part I

In June 1998 the Wisconsin Legislature enacted 1997 Wisconsin Act 283 (Act 283). With this landmark piece of legislation, the state's indeterminate sentencing system was abandoned in favor of a newly minted truth-in-sentencing regime.[2] The new law was to apply for the first time to felonies committed on and after Dec. 31, 1999.

Act 283 may be fairly characterized as establishing the infrastructure for truth-in-sentencing in Wisconsin. Its provisions effectuated the break from the old indeterminate model and created a new bifurcated structure for prison sentences: a term of confinement in prison followed by a term of extended supervision in the community. Although Act 283 speaks in some detail about the new type of sentence, it is evident that the legislature did not envision the law going into effect without considerable supplementation. This is obvious from language in the bill delaying its effective date from June 1998 (the time of passage) to December 1999 and creating a Criminal Penalties Study Committee (CPSC) with numerous responsibilities to be completed in the interim. These included: 1) developing supplementary legislation to create a uniform classification system for all felonies, including those found outside the Wisconsin Criminal Code; 2) making recommendations for the classification of each felony and Class A misdemeanor in the new system in a manner that places crimes of similar severity into the same class; 3) drafting temporary advisory sentencing guidelines; 4) suggesting rules to improve the process of revoking extended supervision; and 5) designing a sentencing commission to monitor sentencing

practices and provide information on sentencing practices to governmental entities and the public.[3]

The CPSC responded to these legislative mandates in August 1999 with a lengthy report and statutory proposals for full implementation of truth-in-sentencing.[4] It was anticipated that these proposals would be enacted prior to Dec. 31, 1999, when the new sentencing policy would go into effect. However, that did not occur. The state assembly promptly considered and passed the CPSC's proposals (with a few minor changes), but the bill stalled in the state senate. Accordingly, Act 283 went into effect without the additional implementing legislation.

During the next two and one-half years, the assembly and senate each passed bills that largely tracked the CPSC's recommendations, but differences between those bills were never reconciled. Finally, during a special session called by Gov. McCallum in 2002 to deal with Wisconsin's budget crisis, both legislative houses agreed on budget adjustment legislation that included nearly all of the CPSC's proposals. On July 26, 2002, the governor signed that bill into law. It is known as 2001 Wis. Act 109.

A New Felony Classification System

As the CPSC undertook its charge of classifying the nearly 500 felonies that exist in the Criminal Code, the Uniform Controlled Substances Act, the Vehicle Code, and elsewhere throughout the Wisconsin Statutes, it readily determined that preserving the existing system of six felony classes (A, B, BC, C, D, and E), which is used only for Criminal Code offenses, was unworkable. With so many felonies to place in so few categories, it would be impossible to answer the legislative mandate of classifying crimes of similar severity in the same felony class. Accordingly, the CPSC proposed expanding the felony classification system from six to nine classes. The legislature agreed, and the new nine-class system will go into effect for crimes committed on and after Feb. 1, 2003. **See Figure 1.**

The CPSC initially placed crimes in the new A-I classification system by using for each crime the mandatory release (MR) date under pre-Act 283 law when a court imposed the maximum sentence for committing the crime. As a general rule, MR in the old indeterminate world was statutorily fixed at two-thirds of the sentence actually imposed.[5] For the offender given a maximum sentence, MR was at two-thirds of that maximum. Service of the sentence to the MR date reflected the longest period the defendant could be held in prison before being mandatorily paroled.[6]

The CPSC concluded that the maximum initial term of confinement for each crime in the new truth-in-sentencing system ought to roughly parallel the maximum the person could serve in prison before reaching MR under the indeterminate sentencing law that preceded Act 283. Use of MR dates from prior law to classify crimes in the new A-I classification system would accomplish this. To allow for the worst case scenario of a prisoner who, under the old law, was given a maximum sentence and held to the MR date, the committee applied the two-thirds "MR converter" to the maximum possible sentence under pre-Act 283 law to initially place each crime in the new classification system.

Figure 1

Act 109: The New A-I Felony Classification System

(applicable to felonies committed on and after Feb. 1, 2003)

In the terminology of 1997 Act 283 and 2001 Act 109, the term of confinement plus the term of extended supervision equals the term of imprisonment. The maximum term of probation for Class B-H felonies equals the maximum initial term of confinement for those crimes. For Class I felonies, the maximum term of probation is three years.

Felony Class	Max. Initial Term of Confinement	Max. Initial Term of Extended Supervision	Max. Term of Imprisonment	Maximum Fine
A	Life	-	Life	-
B	40 years	20 years	60 years	-
C	25 years	15 years	40 years	$100,000
D	15 years	10 years	25 years	$100,000
E	10 years	5 years	15 years	$50,000
F	7.5 years	5 years	12.5 years	$25,000
G	5 years	5 years	10 years	$25,000
H	3 years	3 years	6 years	$10,000
I	18 months	2 years	3.5 years	$10,000

An example of the MR conversion process may be helpful. Consider the crime of burglary, which under current

law is a Class C felony. Prior to Dec. 31, 1999, the maximum indeterminate term of imprisonment for this offense was 10 years. If the judge sentenced an offender to a full 10-year prison term, and the offender were held in custody until the MR date, release to parole would occur after six and two-thirds years. Using that figure as the MR converter, the closest felony class in the new A-I system would be Class F, for which the maximum initial term of confinement is seven and one-half years. See **Figure 1**. Accordingly, burglary initially would be categorized as a Class F felony.

After applying the MR converter to move hundreds of felonies into the new classification system, the CPSC next considered whether an adjustment to a different class was necessary so that crimes of similar severity would be classified together. The committee's final recommendations for classifying offenses were adopted by the legislature in Act 109 (with but a few changes) and will apply to crimes that are committed on and after Feb. 1, 2003. The new classifications for many routinely prosecuted felonies are presented in **Figure 2**. The classification of controlled substance offenses is shown in **Figure 3**.

A few offenses remain unclassified, even after Act 109, due to oversight or the vagaries of the legislative process. These include operating an automobile while intoxicated with a minor passenger (third or fourth offense)[7] and the felony enhancement for committing domestic abuse during the 72-hour period following a domestic abuse incident.[8] Absent classification of these unclassified offenses through trailer legislation, Act 283 rules regarding unclassified offenses will apply; for example, the term of initial confinement to prison may not exceed 75 percent of the term of imprisonment imposed.

New Limits on Extended Supervision Terms

Act 109 differs from Act 283 as to the manner by which the maximum term of extended supervision (ES) that may be imposed at the time of sentencing is determined. Under Act 283, the maximum ES available at the time of sentencing was the difference between the maximum term of imprisonment for the crime of conviction and the initial term of confinement actually imposed. Act 283 thus could be read to allow for very long periods of extended supervision. For example, a person convicted of a Class B felony, which under Act 283 carries a maximum term of imprisonment of 60 years and a maximum term of initial confinement of 40 years, theoretically could be sentenced to one year in confinement followed by 59 years of extended supervision.

Act 109 caps the maximum ES available at the time of sentencing for classified felonies pursuant to a statutory schedule. See **Figure 1**. The CPSC proposed and the legislature agreed that the purposes of ES could realistically be accomplished within these limits without excessively consuming future resources.

These limits on extended supervision are not absolute. In some circumstances the amount of time an offender actually spends on ES could be longer than that ordered by the judge at sentencing; it could even be longer than the maximum periods of ES shown in **Figure 1**. This could happen if the offender completes the initial term of confinement and then goes on ES, only to have ES revoked at some point. Suppose, for example, that a person is convicted of a new Class G felony (for which the maximum initial term of confinement is five years and the maximum initial term of ES is five years) and that the judge imposes the maximum penalties. Assume that after serving five years in prison and four years on extended supervision, the ES is revoked. Upon the offender's return to court for sentencing after revocation,[9] the judge has the full length of the original ES term (five years) to work with in fashioning a remedy.[10] The court might decide that the offender must be confined for two of those five years. When those two years have been served, the defendant returns to ES status for what Act 109 calls "the remaining extended supervision portion of the bifurcated sentence."[11] This phrase means the total length of the bifurcated sentence (10 years in the example) minus time already spent in confinement (seven years in the example) for a total remaining ES portion of three years. If the defendant serves out this disposition without additional revocation problems, the defendant will have spent a total of seven years in confinement and seven years on ES before being discharged.

Michael B. Brennan, Northwestern 1989, is the judge for Branch 15 of the Milwaukee County Circuit Court. He was the staff counsel for the Criminal Penalties Study Committee.

Thomas J. Hammer, Marquette 1975, is an associate professor of law at Marquette University Law School. He was the reporter for and a member of the Criminal Penalties Study Committee.

Donald V. Latorraca, Washington University in St. Louis School of Law 1985, is an assistant attorney general for the Wisconsin Department of Justice. The comments in this article are the authors' and do not necessarily reflect the opinions of the Wisconsin Attorney General or the Wisconsin Department of Justice.

Fines

While fines play a limited role in the disposition of most felony cases, Act 109 nonetheless addresses them in the new A-I classification system for crimes committed on and after Feb. 1, 2003. See **Figure 1**. The new fine schedule acknowledges the differing severity of crimes. It also addresses the concern that the $10,000 maximum fine used in the current A-E classification system would be inappropriately low for certain more serious crimes. Act 109 does not disturb the very high fines for certain felonies codified outside the Criminal Code, which, in the opinion of the CPSC, ought to be retained at present levels.[12]

Probation

Current law provides that the original term of probation for a person convicted of a felony shall be for not less than one year nor more than either the statutory maximum term of *imprisonment* for the crime or three years, whichever is greater.[13] If the defendant should be convicted at the same time of two or more crimes, including at least one felony, the maximum original term of probation may be increased by one year for each felony conviction.[14] There is also a specific statutory schedule of original terms of probation for people convicted of one or more misdemeanors.[15]

SideBar: Problems with the New Truth-in-Sentencing Law

Act 283 did not amend the statutes regulating maximum original terms of probation. The CPSC recommended that the maximum original term of probation for Class B-H felonies[16] be linked to the maximum term of *confinement* for crimes in those classes, rather than the maximum term of *imprisonment*. The committee believed that the dual objectives of probation - rehabilitation of the offender and protection of the state and community interest[17] - could be achieved within these time periods. The legislature adopted the CPSC's recommendations.

The maximum term of probation for each felony class is listed in **Figure 1**. Note that the maximum original term of probation for Class I felonies is three years.[18] The minimum term of probation in a felony case remains at one year.

Substantive Criminal Law Changes

Acting on the recommendations of the Criminal Penalties Study Committee, the legislature included within Act 109 numerous changes to the substantive criminal law, the most significant of which are summarized in this section. These changes take effect on Feb. 1, 2003, and apply to offenses committed on and after that date.

Battery. While classifying the various permutations of the basic battery offense, the CPSC noted how confusing Wis. Stat. section 940.19 had become with the adoption of various amendments over time. The battery statute has been revised to return simplicity and straightforwardness to the law of battery. Preserved are traditional forms of misdemeanor battery (causing bodily harm with intent to cause bodily harm) and felony aggravated battery (causing great bodily harm with intent to cause great bodily harm). Also maintained are intermediate offenses of causing great bodily harm[19] or substantial bodily harm[20] by an act done with intent to cause bodily harm. Finally, the section of the statute that classifies as more serious batteries committed against victims who are 62 years of age or older and victims with a physical disability is preserved without change. See **Figure 4**. The provision making it a battery to cause substantial bodily harm with intent to cause substantial bodily harm is repealed.[21]

Felony Murder. Act 109 amends the felony murder statute to provide that the maximum term of imprisonment for the underlying offense may be increased by not more than 15 years.[22] This is a reduction from the 20-year increase that is provided for under current law and which has its origins in the days of the old indeterminate sentencing system.

Figure 4

Act 109: Battery (Wis. Stat. § 940.19)

Offense Class	Intent	Harm Caused
Class E felony	Intent to Cause Great Bodily Harm	Great Bodily Harm
Class H felony	Intent to Cause Bodily Harm	Great Bodily Harm
Class I felony	Intent to Cause Bodily Harm	Substantial Bodily Harm

Carjacking. Act 109 makes certain modifications to the carjacking statute. The provision increasing	Class A misdemeanor	Intent to Cause Bodily Harm	Bodily Harm

the penalty for causing death by carjacking is repealed, but carjacking is added as a predicate offense for a felony murder charge. This leaves carjacking as a Class C felony offense.[23]

Possession of a Firearm by a Felon. Act 109 classifies the crime of possession of a firearm by a felon as a Class G felony with a maximum initial term of confinement of five years followed by a maximum initial ES term of five years.[24] Provisions in the current statute for increased penalties for repeat offenders are repealed under the reasoning that the Class G penalties are stringent enough to deal with even repeat violators of this law.

Operating Vehicle Without Owner's Consent. The operating vehicle without owner's consent statute prohibits taking and driving any vehicle without the consent of the owner. Act 109 classifies this as a Class H felony.[25] The less serious offense of driving or operating any vehicle without the consent of the owner is classified as a Class I felony.[26] Under Act 109 either of these offenses may be mitigated to a Class A misdemeanor if the defendant proves by a preponderance of the evidence that he or she abandoned the vehicle without damage within 24 hours after the vehicle originally was taken from the owner's possession.[27]

Fleeing an Officer. Act 109 restructures the penalties for the various fleeing felonies; the restructured penalties are shown in **Figure 5**. These changes are designed to better stratify offense severity according to the harm caused by the actor. Act 109 also creates a new misdemeanor fleeing offense, which reads as follows: "No operator of a vehicle, after having received a visual or audible signal to stop his or her vehicle from a traffic officer, or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits."[28] A new statutory subsection specifically provides that misdemeanor fleeing is not a lesser included offense of felony fleeing; it also prohibits conviction for both offenses for acts arising out of the same incident or occurrence.[29]

Figure 5

Act 109: Fleeing an Officer (Wis. Stat. § 346.04(3))

Harm	Felony Class	Max. Initial Term of Confinement	Max. Initial Term of Extended Supervision	Maximum Fine
No Bodily Harm; No Property Damage	I	18 months	2 years	$10,000
Bodily Harm or Damage to property of Another	H	3 years	3 years	$10,000
Great Bodily Harm to Another	F	7.5 years	5 years	$25,000
Death of Another	E	10 years	5 years	$50,000

Controlled Substances. Act 109 makes important changes in the controlled substances statutes. In addition to classifying drug offenses in the new A-I classification system, it specifies penalties for new crimes of delivery of, and possession of with intent to deliver, less than 1 gram of cocaine and less than 200 grams of marijuana. The creation of the new crimes responds to the number of cases involving those amounts and judges' sentencing practices in those cases. Another important change is the classification of first offense possession of methamphetamine as a misdemeanor. These and other controlled substance penalties are shown in **Figure 3**.

Figure 3: Depiction of Certain Controlled Substances Offenses with Stratified Penalties in the A-I Classification System

Property Crimes. Act 109 amends the dollar amounts used for distinguishing various property crimes, the severity of which is linked to the value of the property stolen, damaged, and so on. For these offenses the Act establishes the cut-off between misdemeanors and felonies at $2,500. Further, it classifies felony property

offenses at three levels based upon value as follows: $2,500, $5,000, and $10,000.

Penalty Enhancers

Current Wisconsin statutes contain a plethora of penalty enhancement statutes that have been enacted over the course of the last 20 years. Chapter 939 alone contains at least a dozen enhancement provisions. The CPSC considered the amount of actual incarceration time available to judges in the new A-I classification system, and whether it provides sufficient exposure to appropriately sentence an offender who has committed the most aggravated form of an underlying offense. It also considered the extent to which certain penalty enhancers actually are used and the experience of states that have adopted determinate sentencing and decreased the number of such enhancers. As a result of this analysis, the CPSC recommended retaining certain enhancers and repealing others, with many of the latter recharacterized as sentencing aggravators in an omnibus sentencing statute. Act 109 codifies these recommendations.

In the wake of Act 109 the following enhancers codified in chapter 939 are retained: use of a dangerous weapon;[30] violent crime in a school zone;[31] increased penalty for certain domestic abuse offenses;[32] and "hate crimes."[33] Other chapter 939 enhancers have been repealed as enhancers but identified as aggravating factors that the judge must consider at sentencing.[34] These sentencing aggravators may convince the judge to impose a longer sentence, but they do not affect the maximum possible sentence.

Act 109 preserves the habitual criminality enhancer. However, it applies the MR converter to the statutory provisions that specify the amount by which terms of imprisonment may be increased.[35]

Act 109 also affects controlled substance penalty enhancers. The penalty doubler for second and subsequent offenses is recast to resemble the general habitual criminality statute.[36] If a defendant is a second or subsequent drug offender, the maximum term of imprisonment may be increased by four years if the new offense is a Class E-I felony, and six years if a Class C or D felony. The penalty enhancer for distributing or possessing with intent to deliver a controlled substance within 1,000 feet of a school, youth center, park, correctional facility, and so on is set at five years, but the minimum term of imprisonment previously required by this enhancer has been repealed.[37] Act 109 retains the enhancer for distribution of controlled substances to individuals under age 18.[38]

Minimum Sentences

To maximize the judge's sentencing discretion, Act 109 repeals most mandatory and presumptive minimum sentences, including the presumptive minimum prison terms for felony drug offenses and for committing a crime while armed with a dangerous weapon. However, it retains those minimum penalties that exist within the complex penalty structure for the offense of operating while under the influence of an intoxicant.[39] And, contrary to the recommendation of the CPSC, Act 109 retains the seldom used statutes requiring bifurcated sentences and minimum terms of incarceration for repeat sex offenders[40] and repeat serious violent offenders.[41]

Enhanced Misdemeanors

Act 283 mandated bifurcated sentences for defendants sentenced to prison for felonies committed on and after Dec. 31, 1999. It did not authorize bifurcated sentences for those sentenced to prison upon conviction for enhanced misdemeanors. The CPSC concluded that a misdemeanant who is dangerous enough or has committed offenses serious enough to warrant incarceration in prison[42] also should receive a bifurcated sentence. The legislature agreed and Act 109 amends the relevant sentencing statutes accordingly.[43]

When sentencing a person to prison upon conviction of an enhanced misdemeanor, the court must bifurcate the sentence into confinement and extended supervision terms. The confinement term must be for at least one year[44] and may not exceed 75 percent of the total length of the bifurcated sentence.[45] Further, the term of extended supervision may not be less than 25 percent of the length of the confinement term.[46]

Attempts

Wisconsin law has long provided that, as a general proposition, a person who attempts to commit a felony may be imprisoned for a term not to exceed one-half the maximum penalty for the completed offense.[47] The simplicity of this approach has been confounded by Act 283, which brought truth-in-sentencing to attempted

felonies but did not specify the procedure for determining the maximum initial term of confinement for them. This has led to ambiguity in calculating the maximum initial term of confinement and the term of extended supervision in the attempt context.

Act 109 preserves the traditional rule that attempts are punishable at one-half the maximum penalty for the completed crime, but it does so with language that removes the ambiguity just described. The following propositions, which are derived from Act 109 and are subject to certain exceptions spelled out in the attempt statute, depict the calculation of attempt penalties under the Act:[48]

- Maximum term of imprisonment for an attempt = one-half the maximum term of imprisonment for the completed offense.
- Maximum initial term of confinement for an attempt = one-half the maximum initial term of confinement for the completed offense.
- Maximum initial term of extended supervision for an attempt = one-half the maximum initial term of extended supervision for the completed offense.
- Maximum fine for an attempt = one-half the maximum fine for the completed offense.

An attempt to commit a life imprisonment felony is punishable as a Class B felony.[49] An attempt to commit a Class I felony is punishable as a Class A misdemeanor.[50] Act 109 also includes numerous provisions describing how attempt penalties are calculated when penalty enhancement statutes are involved.[51]

Not Guilty by Reason of Mental Disease or Defect

Under present law the maximum term of institutionalization for persons found not guilty by reason of mental disease or defect (NGI acquittees) is set at two-thirds of the maximum sentence for the underlying offense (including any penalty enhancers).[52] If the underlying offense is punishable by life imprisonment, institutionalization may be for life, subject to termination as provided for by statute.[53] The two-thirds formula applicable to most crimes is a carryover from the days of indeterminate sentencing and thus sets a maximum term of institutionalization at the same point in time as mandatory release on parole. Act 283 did not make any adjustments to the two-thirds formula.

The CPSC recommended that the NGI statutes be amended to tie maximum institutionalization for felony offenses to the maximum initial term of confinement in prison for those crimes. This would maintain the approach of prior law that maximum institutionalization ought to equal the maximum amount of time that a defendant could serve in prison prior to first release. The legislature adopted this recommendation in Act 109, which specifies that the maximum commitment term for a person found not guilty by reason of mental disease or defect may not exceed the maximum initial term of confinement for a felony offense plus any additional imprisonment authorized by any applicable penalty enhancers.[54] For life imprisonment crimes, the maximum institutionalization may be for life.[55] For misdemeanors, a court may commit a person found not guilty by reason of mental disease or defect to a term not exceeding two-thirds of the maximum term of imprisonment, including any additional imprisonment authorized by any applicable penalty enhancement statutes.[56]

Sentencing Guidelines and Notes

For crimes committed on and after Feb. 1, 2003, sentencing courts will be required to use sentencing guidelines, where applicable.[57] Until the new sentencing commission develops these guidelines, trial courts should apply the temporary advisory sentencing guidelines drafted by the CPSC.

Sidebar: Problems with Truth-in-Sentencing

Perhaps the greatest challenge the CPSC faced was its statutory charge to create such guidelines. Ultimately, the CPSC adopted a format with two parts: 1) a two-page worksheet for the 11 offenses that implicate approximately three-quarters of the state's prison resources, and 2) sentencing notes to be used with the worksheets. The worksheets and sentencing notes are published in the CPSC Final Report.[58]

The sentencing worksheet guides the judge first, in assessing the severity of the offense, and second, in assessing the offender's risk to the community. The judge then consults a graph to determine where these two assessments intersect, which gives the judge an advisory starting point from which to begin when deciding the

length of the sentence. The sentencing notes explain many of the considerations and concepts underlying the questions posed on the sentencing worksheet.

While the court must consider any applicable guideline when fashioning a sentence, Act 109 does not obligate the judge to make a sentencing decision within any range or recommendations specified in the guidelines.[59] Further, the defendant does not have a right to appeal a sentencing decision on the basis that the court departed in any way from any guideline.[60]

At one point the budget adjustment bill that became Act 109 contained language that could have altered the standard of appellate review of criminal sentences. There also was a provision to require judges to make "findings of fact as to the elements of the sentence." Such language was eliminated in joint conference and later by the line-item veto. However, Act 109 does require a court at sentencing to "state the reasons for its sentencing decision ... in open court and on the record," or to state those reasons in writing "if the court determines that it is not in the interest of the defendant for it to state the reasons for its sentencing decision in the defendant's presence."[61]

Extended Supervision and Its Revocation

The CPSC envisioned a format for ES that would consist of differing levels of supervision based on an offender's behavior. Thus far, because of cost constraints, that vision has not been realized and ES has taken on a strong resemblance to parole.

Act 109 enacted several ES-related changes recommended by the CPSC. A new statute allows the Department of Corrections (DOC), as a sanction for a violation of ES, to confine an offender who admits the violation in writing for up to 90 days in a regional detention facility or, with the approval of the sheriff, in a county jail.[62] The 90-day sanction provides the DOC with an alternative to revoking the offender's extended supervision. The option became available on July 30, 2002 (the day following publication of Act 109).

As to the process of revoking extended supervision, the CPSC concluded that the current revocation system in which administrative law judges (ALJs) make the revocation decisions works well. Hundreds of cases are adjudicated each year in the administrative forum, thus relieving circuit courts of that burden. While the CPSC made certain recommendations to shorten the revocation process, the current system in which an ALJ conducts the revocation hearing and makes the revocation decision will continue. However, Act 109 significantly departs from the current practice in which the ALJ (or the DOC if the defendant waives a hearing) determines the amount of time to be served after revocation of ES. If the ALJ decides that ES should be revoked (or if that decision is made by the DOC in the case of a defendant who waives a revocation hearing), the revoking authority must make a recommendation to the circuit court for the county in which the defendant was convicted concerning the length of time for which he or she should be returned to prison. The amount of reincarceration time is then to be decided by the circuit judge.

Act 109 provides that, after ES has been revoked, the court "shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision ... and less all time served in confinement for previous revocations of extended supervision under the sentence."[63] If the court orders the person returned to prison for less than the entire time remaining on the bifurcated sentence, the offender serves the prison time and then returns to ES status for what Act 109 calls "the remaining extended supervision portion of the bifurcated sentence." This term means the total length of the bifurcated sentence minus all time already spent in confinement serving the sentence.[64]

These new extended supervision revocation procedures apply to persons who are the subjects of ES revocation proceedings commenced by the DOC on and after Feb. 1, 2003.

Sentence Modification

A Wisconsin circuit court possesses the inherent authority to modify a previously imposed sentence based on either new factors or a conclusion that the original sentence was "unduly harsh or unconscionable."[65] Act 109 does not alter an offender's right to seek sentence modification on these grounds. It does, however, create additional procedures for modifying a bifurcated sentence.

Modification of Conditions of Extended Supervision. Effective Feb. 1, 2003, either the DOC or a defendant may petition a sentencing court to modify any judicially imposed conditions of ES.[66] An offender may not petition to modify ES conditions earlier than one year before, or more than once before, he or she is released to ES. Once the defendant is released to ES, he or she must wait one year before petitioning the court for ES modification.[67]

Upon receiving the petition, the court must serve the district attorney. Additionally, it may direct the clerk to provide notice to victims against whom the defendant committed the crime.[68] The court may conduct a hearing on the petition. The court may modify the conditions only if it determines that the petition meets both the DOC's and the public's needs and the modification is consistent with the objectives of the defendant's sentence[69] Both the DOC and the defendant have the right to appeal an order modifying or denying a petition to modify ES conditions. Reversal is appropriate only if the sentencing court erroneously exercised its discretion in granting or denying the modification petition.[70]

These provisions of Act 109 take effect on Feb. 1, 2003.[71] However, they are not limited to persons serving sentences for offenses committed after that date[72] and therefore would be available to those sentenced under Act 283.

Petition for Release from Initial Confinement Based on Age or Terminal Illness. Act 109 creates a statutory procedure for inmates to obtain early release from a term of confinement based on their age or a terminal condition.[73] This provision applies to offenders serving a bifurcated sentence for a crime other than a Class B felony. The offender may petition the DOC program review committee (PRC) for release from confinement if he or she: is at least 65 years old and has served at least five years of confinement; is at least 60 years old and has served at least 10 years of confinement; or has a terminal condition. A terminal condition is defined as an "incurable condition resulting in a medical prognosis of a life expectancy of six months or less."[74] The inmate has a statutory right to counsel and, if indigent, the public defender shall provide representation.[75]

The PRC must determine whether modification is in the public interest. The PRC may deny the petition if it is not in the public interest. If the PRC finds that the petition serves the public interest, then the DOC must refer the petition to the sentencing court. The sentencing court must conduct a hearing at which the offender, the district attorney, and the victim have the right to be present. At such a hearing the offender must demonstrate by a preponderance of the evidence that the modification is in the public interest. If the court finds that modification is in the public interest and grants the petition, then it may order release of the offender to ES and convert the unserved confinement portion of the sentence to ES. The total length of the term of imprisonment remains unchanged.[76]

An offender has the right to appeal the sentencing court's denial of the petition, while the district attorney may appeal the sentencing court's decision to grant the petition. On review, the appellate court applies an erroneous exercise of discretion standard.[77] Once the PRC or a court denies an offender's petition, the offender is precluded from filing another petition for one year following the date of the petition's denial.[78]

These provisions of Act 109 took effect on July 30, 2002 (the day after publication of the Act). The section of Act 109 establishing a Feb. 1, 2003, effective date for most truth-in-sentencing changes does not apply to modifications based on age or terminal illness.[79]

Petition for Sentence Adjustment. As part of the legislative compromise to incorporate the CPSC recommendations into the budget adjustment bill, a mechanism was inserted by which an offender may petition the sentencing court to adjust a sentence.[80] New Wis. Stat. section 973.195 provides that an offender serving a bifurcated sentence on a Class C, D, or E felony may petition the sentencing court to adjust the sentence if the inmate has served 85 percent of the term of confinement in prison. An offender serving a bifurcated sentence on a Class F, G, H, or I felony may petition the sentencing court to adjust the sentence if the inmate has served 75 percent of the term of confinement in prison. Offenders serving bifurcated sentences for Class B felonies may not petition for sentence adjustment.[81]

The petition for sentence adjustment must be based upon specific statutory grounds. These include: 1) progress in conduct, rehabilitation, treatment, education, or other correctional programming; 2) a change in the law related to sentencing or ES revocation that would have resulted in a shorter period of confinement at the time of the original sentencing or revocation; 3) the offender is subject to a sentence in another state or the offender is an illegal alien subject to deportation; and 4) adjustment is in the interests of justice.[82] Wis. Stat. section

973.195 does not provide an offender with a statutory right to counsel when filing such a petition.

Upon receipt of the petition, the court may summarily deny it. If the court holds the petition for consideration, it must notify the district attorney. If the district attorney objects, the court shall deny the offender's petition. If the district attorney does not object, the district attorney shall notify the victim if the underlying conviction is for soliciting a child for prostitution and certain sexual assault offenses. If the victim objects, the court shall deny the petition.[83]

If the court receives no objection from the district attorney or the victim, the court may adjust the offender's sentence if it finds adjustment is in the public interest and articulates its reasoning in writing. If the court reduces the remaining portion of the offender's confinement term, it must increase the ES so that the total term of imprisonment remains unchanged.[84] But if a subsequent change in the penalties for the offense has resulted in a decrease in the maximum sentence or extended supervision, the court may reduce the total period of imprisonment or ES to the maximum allowed under the new law had it been in effect at the time of the original sentencing.[85]

An offender is limited to one petition for sentence adjustment for each bifurcated sentence.[86] There is no statutory right of appeal to the inmate if the court denies the petition or to the state if the court grants the petition.

These provisions of Act 109 take effect on Feb. 1, 2003,[87] and clearly apply to offenders who commit their crimes on and after that date. But how do they affect those sentenced under Act 283 for crimes committed between Dec. 31, 1999, and Feb. 1, 2003? For such offenders, the answer is unclear. On the one hand, it could be argued that the legislature intended to make sentence adjustment available to them because the relevant initial applicability section of Act 109 does not limit the new section 973.195 to offenses committed on and after Feb. 1, 2003.[88] Further, at least some Act 283 offenders would be able to assert that one of the grounds upon which a section 973.195 petition may be brought applies to their situation: a change in the law related to sentencing or ES revocation that would have resulted in a shorter period of confinement at the time of the original sentencing or revocation.[89]

On the other hand, one could reasonably contend that the legislature could not have intended the new section 973.195 to apply to crimes committed before Feb. 1, 2003, because the "applicable percentage" of the sentence that must be completed before a petition for sentence adjustment may be made is described in Act 109 by referring to the new A-I classification system that applies for the first time to crimes committed on and after Feb. 1, 2003.[90] Further, the statute is completely silent about how to determine the "applicable percentage" for those serving Act 283 sentences for unclassified crimes like drug offenses.

The absence of a clear resolution of this dilemma means that either trailer legislation or court decisions will be needed to resolve the fate of Act 283 offenders who seek adjustment of their sentences.

Sentencing Commission

Following the CPSC's recommendations, Act 109 creates a sentencing commission. It will include members appointed by the executive, legislative, and judicial branches of government and the State Bar of Wisconsin. The commission, which is attached to the Department of Administration, consists of 18 voting and three nonvoting members and has the authority to appoint an executive director and other staff to assist it in performing its duties.[91]

The commission's primary responsibilities include monitoring and compiling data on sentencing practices and developing advisory sentencing guidelines. In addition, it will provide information to the legislature, state agencies, and the public regarding the costs and other needs that result from sentencing practices; inform judges and lawyers about sentencing guidelines; assist the legislature in assessing the costs of legislation; and study the role of racial bias in sentencing. The commission is also to publish and distribute to all circuit judges an annual report regarding its work, and study how sentencing options affect various types of offenders and offenses.[92]

The commission has the potential to guide the statewide development of sentencing practices in a cost-effective manner without compromising public safety.

Joint Review Committee on Criminal Penalties

Act 109 creates a Joint Review Committee on Criminal Penalties that includes members appointed by the executive, legislative, and judicial branches.[93] This committee's primary function is to review legislative proposals creating new crimes or revising penalties for existing crimes. In reviewing a bill, the committee will consider the costs of the proposal to various branches of government, consistency of the proposed penalties with current penalties, the language necessary to conform proposed penalties with existing criminal statutes, and whether other existing criminal statutes already prohibit the conduct that is the subject of the proposed legislation.

The Joint Review Committee could serve a vital purpose in providing the legislature with valuable information necessary to make informed choices regarding the value and impact of proposed criminal justice legislation.

Conclusion

The changes in Wisconsin's sentencing laws discussed in this article are indeed substantial. And they were a long time in coming. However, with the passage of Act 109, the pieces are now in place for the full implementation of truth-in-sentencing as originally envisioned by our state's lawmakers.

Endnotes

[1]*See* 2001 Wis. Act 109, §§ 9359, 9459.

[2]A detailed description of the provisions of 1997 Wis. Act 283 may be found in Michael B. Brennan and Donald V. Latorraca, "Truth-in Sentencing," Wis. Lawyer, May 2000, at 14.

[3]1997 Wis. Act 283 § 454(1)(e).

[4]The CPSC's Final Report and Appendices may be found at www.doa.state.wi.us/secy/index.asp.

[5]Wis. Stat. § 302.11(1) (2001-2002). There is no mandatory release for persons sentenced to life imprisonment. Wis. Stat. § 302.11(1m) (2001-2002).

[6]For certain serious felonies mandatory release upon service of two-thirds of the sentence was presumptive but could be denied by the Parole Commission. *See* Wis. Stat. § 302.11(1g) (2001-2002).

[7]Wis. Stat. § 346.65(2)(f) (2001-2002).

[8]Wis. Stat. § 939.621 (2001-2002).

[9]Under Act 109 a person whose extended supervision has been revoked is returned to the circuit court of the county of conviction, where the judge determines how much additional confinement time must be served as a remedy. Wis. Stat. § 302.113(9)(am) (2001-2002).

[10]Upon revocation of extended supervision, "the court shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision ... and less all time served in confinement for previous revocations of extended supervision under the sentence." Wis. Stat. § 302.113(9)(am) (2001-2002).

[11]Wis. Stat. § 302.113(9)(c) (2001-2002).

[12]*See, e.g.*, Wis. Stat. § 133.03(1), (2) (trusts and monopolies).

[13]Wis. Stat. § 973.09(2)(b)1. (1999-2000).

[14]Wis. Stat. § 973.09(2)(b)2. (1999-2000).

[15]*See* Wis. Stat. § 973.09(2)(a) (1999-2000).

[16]Probation is not an option for Class A felonies. Wis. Stat. § 973.09(1)(c) (2001-2002).

[17]*See State v. Miller*, 175 Wis. 2d 204, 499 N.W.2d 215 (Ct. App. 1993).

[18]This recommendation is consistent with current law that provides that the maximum original term of probation shall be for not more than the maximum period of imprisonment for the crime of conviction or three years, whichever is greater. *See* Wis. Stat. § 973.09(2)(b)1. (1999-2000).

[19]Wis. Stat. section 939.22(14) defines "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ or other serious bodily injury."

[20]Wis. Stat. section 939.22(38) defines "substantial bodily harm" as "bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth."

[21]Wis. Stat. section 940.19(3) (1999-2000) is repealed.

[22]Wis. Stat. § 940.03 (2001-2002).

[23]Wis. Stat. § 943.23 (2001-2002).

[24]Wis. Stat. § 941.29 (2001-2002).

[25]Wis. Stat. § 943.23(2) (2001-2002).

[26]Wis. Stat. § 943.23(3) (2001-2002).

[27]*See* Wis. Stat. § 943.23(3m) (2001-2002).

[28]*See* Wis. Stat. § 346.04(2t) (2001-2002).

[29]*See* Wis. Stat. § 346.04(4) (2001-2002).

[30]Wis. Stat. § 939.63 (2001-2002).

[31]Wis. Stat. § 939.632 (2001-2002).

[32]Wis. Stat. § 939.621 (2001-2002).

[33]Wis. Stat. § 939.645 (2001-2002).

[34]*See* Wis. Stat. § 973.017 (2001-2002). Examples of enhancers that have been repealed and then incorporated into the omnibus sentencing statute include commission of certain sex crimes while infected with acquired immunodeficiency syndrome, HIV, or a sexually transmitted disease (§ 939.622); gang crimes (§ 939.625); use of a bulletproof garment (§ 939.64); concealing identity (§ 939.641); using the sex offender registry in the course of committing a crime (§ 939.646); crimes against the elderly (§ 939.647); and terrorism (§ 939.648).

[35]*See* Wis. Stat. § 939.62(1) (2001-2002).

[36]Wis. Stat. § 961.48 (2001-2002).

[37]Wis. Stat. § 961.49 (2001-2002).

[38]Wis. Stat. § 961.46 (2001-2002).

[39]*See* Wis. Stat. § 346.65(2) (2001-2002).

[40]Wis. Stat. § 939.623 (2001-2002).

[41]Wis. Stat. § 939.624 (2001-2002).

[42]The committee was specifically concerned with those offenders who face prison sentences of more than one year because their misdemeanor crimes have been enhanced by application of one or more penalty enhancer statutes, including habitual criminality. It was not dealing with the situation in which a defendant has been sentenced to prison for a felony and to the county jail for a misdemeanor and who, by operation of law, will serve both sentences (whether consecutive or concurrent) in the state prisons. *See* Wis. Stat. § 973.03(2) (2001-2002).

[43]*See* Wis. Stat. § 973.01(1) (2001-2002).

[44]Wis. Stat. § 973.01(2)(b) (intro.) (2001-2002).

[45]Wis. Stat. § 973.01(2)(b)10. (intro.) (2001-2002).

[46]Wis. Stat. § 973.01(2)(d) (intro.) (2001-2002).

[47]*See* Wis. Stat. § 939.32(1) (2001-2002).

[48]*See* Wis. Stat. § 939.32(1g), (1m) (2001-2002).

[49]Wis. Stat. § 939.32(1)(a) (2001-2002).

[50]Wis. Stat. § 939.32(1)(bm) (2001-2002).

[51]*See* Wis. Stat. § 939.32(1g), (1m) (2001-2002).

[52]Wis. Stat. § 971.17(1) (1999-2000).

[53]Wis. Stat. § 971.17(1) (1999-2000).

[54]Wis. Stat. § 971.17(1)(b) (2001-2002)

[55]Wis. Stat. § 971.17(1)(c) (2001-2002).

[56]Wis. Stat. § 971.17(1)(d) (2001-2002).

[57]Wis. Stat. § 973.017(2)(a) (2001-2002).

[58]*See* **www.doa.state.wi.us/secy/index.asp**.

[59]Wis. Stat. § 973.017(10) (2001-2002).

[60]*Id.*

[61]Wis. Stat. § 973.017(10m)(a), (b) (2001-2002).

[62]Wis. Stat. § 302.113(8m)(b) (2001-2002).

[63]Wis. Stat. § 302.113(9)(am) (2001-2002).

[64]Wis. Stat. § 302.113(9)(c) (2001-2002).

[65]*See, e.g., State v. Grindemann*, 2002 WI App 106, ¶21, ___ Wis.2d ___, 648 N.W.2d 507.

[66]Wis. Stat. § 302.113(7m)(e)1., 2. (2001-2002).

[67]Wis. Stat. § 302.113(7m)(e)2. (2001-2002).

[68]Wis. Stat. § 302.113(7m)(b) (2001-2002).

[69]Wis. Stat. § 302.113(7m)(c) (2001-2002).

[70]Wis. Stat. § 302.113(7m)(d) (2001-2002).

[71]*See* 2001 Wis. Act 109, § 9459(1).

[72]*See* 2001 Wis. Act 109, § 9359(3).

[73]Wis. Stat. § 302.113(9g) (2001-2002).

[74]Wis. Stat. § 302.113(9g)(a), (b) (2001-2002).

[75]Wis. Stat. § 302.113(9g)(j) (2001-2002).

[76]Wis. Stat. § 302.113(9g)(f) (2001-2002).

[77]Wis. Stat. § 302.113(9g)(h) (2001-2002).

[78]Wis. Stat. § 302.113(9g)(i) (2001-2002).

[79]*See* 2001 Wis. Act 109, § 9459(1).

[80]The Criminal Penalties Study Committee did not propose the sentence adjustment procedure discussed in this section. Rather, it was devised by senate and assembly budget negotiators during the final stages of the 2002 special session of the legislature. Act 109 is the product of that special session.

[81]While inmates serving a bifurcated sentence for an enhanced misdemeanor apparently may petition for a sentence adjustment, the statute does not specify the applicable percentage of time that they must serve before petitioning and obtaining release.

[82]Wis. Stat. § 973.195(1r)(b) (2001-2002).

[83]Wis. Stat. § 973.195(1r)(c)-(f) (2001-2002).

[84]Wis. Stat. § 973.195(1r)(g) (2001-2002).

[85]Wis. Stat. § 973.195(1r)(h) (2001-2002).

[86]Wis. Stat. § 973.195(1r)(i) (2001-2002).

[87]*See* 2001 Wis. Act 109, § 9459(1).

[88]*See* 2001 Wis. Act 109, § 9359(3).

[89]Wis. Stat. § 973.195(1r)(b)3. (2001-2002).

[90]*See* Wis. Stat. § 973.195(1g) (2001-2002).

[91]Wis. Stat. §§ 15.105(27), 973.30 (2001-2002).

[92]Wis. Stat. § 973.30 (2001-2002).

[93]Wis. Stat. § 13.525 (2001-2002).

Figure 2

The Classification of Routinely Prosecuted Felonies

Class A
1st Degree Intentional Homicide

Class B
Attempted 1st Degree Intentional Homicide
1st Degree Reckless Homicide[1]
2nd Degree Intentional Homicide
1st Degree Sexual Assault
1st Degree Sexual Assault of a Child

Class C
Armed Robbery
Arson of Building
2nd Degree Sexual Assault
2nd Degree Sexual Assault of a Child
Homicide by Intox. Use of Vehicle (with prior OWI-type conviction)

Class D
2nd Degree Reckless Homicide
1st Degree Reckless Injury
Homicide by Intox. Use of Vehicle
(no prior OWI-type convictions)

Class E
Robbery
Aggravated Burglary
Aggravated Battery

Class F
Burglary
2nd Degree Reckless Injury 1st Degree
Recklessly Endangering
Injury by Intox.Use of Vehicle

Class G
3rd Degree Sexual Assault
2nd Degree Recklessly Endangering Safety
Felon in Possession of Firearm
Theft (> $10,000)
Receiving Stolen Property (> $10,000)
Theft from Person

Class H
Battery to Law Enforcement Officer
Operating Vehicle w/o Owner's Consent ("take & drive")
Perjury
Felony Escape
Felony Bail Jumping
False Imprisonment
Forgery
Theft (> $5,000 but ≤ $10,000)
Receiving Stolen Property (> $5,000 but ≤ $10,000)

Class I
Arson of Property other than a Building
Possession of Burglarious Tools
Operating Vehicle w/o Owner's Consent ("drive/operate")
Theft (> $2,500 but ≤ $ 5,000)[2]
Receiving Stolen Property (> $2,500 but ≤ $ 5,000)[3]
Failure to Support (more than 120 days)
Possession of Firearm in School Zone

[1]Wis. Stat. § 940.02(1). The "Len Bias" form of reckless homicide is a Class C felony in the new classification system.

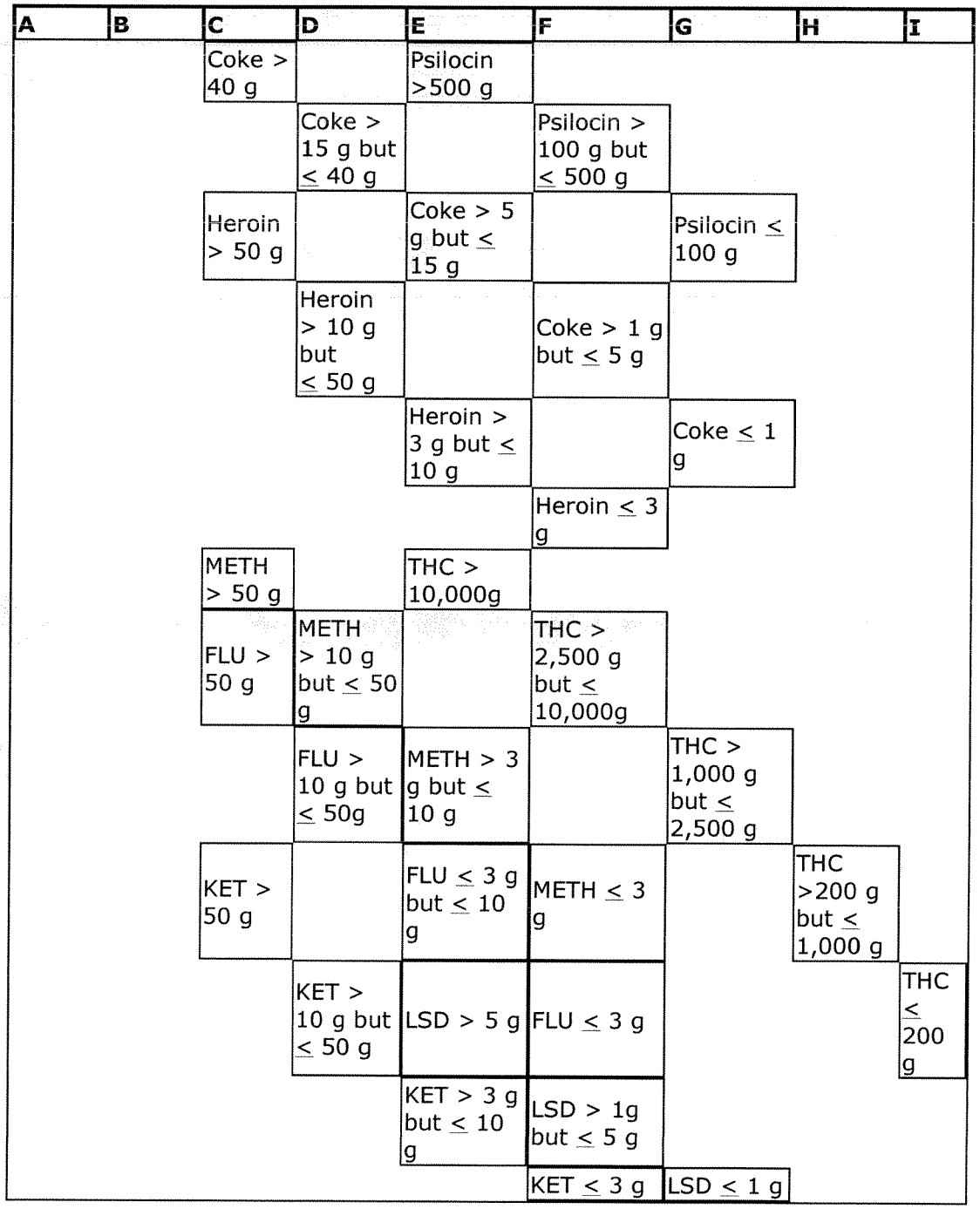
[2]If the value of the property taken does not exceed $2,500, the theft is a Class A misdemeanor.

[3]If the value of the stolen property does not exceed $2,500, the crime is a Class A misdemeanor.

Figure 3

Depiction of Certain Controlled Substances Offenses with Stratified Penalties in the A-I Classification System The crimes depicted in this figure involve delivery of and possession of with intent to deliver controlled substances.

Coke = Cocaine
LSD = Lysergic Acid Diethylamide
Heroin = Heroin
THC = Tetrahydrocannabinols (Marijuana)
METH = Methamphetimine Amphetamine, Phencyclidine (PCP) and Methcathinone
KET = Ketamine **Psilocin** = Psilocin and Psilocybin **FLU** = Flunitrazepam



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Wisconsin Briefs from the Legislative Reference Bureau

Brief 02–7 August 2002

TRUTH-IN-SENTENCING AND CRIMINAL CODE REVISION

2001 Wisconsin Act 109, passed by the legislature and signed by Governor Scott McCallum on July 26, 2002, makes significant changes to the state's criminal penalties structure. It also modifies the "truth-in-sentencing" law, enacted by 1997 Wisconsin Act 283, which increased maximum sentences for felony convictions, changed the sentencing system, and eliminated parole. The new sentencing provisions generally will apply to crimes committed February 1, 2003, or later.

BACKGROUND

In general, in Wisconsin, a felony is a crime punishable by imprisonment of more than one year in the state's prison system. (Misdemeanors are lesser crimes, which usually involve confinements of less than a year, which are served in county jail.) Under the criminal penalty system which existed prior to 1997 Wisconsin Act 283, most convicted felons did not serve their entire sentence inside prison. They were generally eligible for discretionary parole after being confined for 25% of the sentence. Those who did not receive discretionary parole were usually paroled by a "mandatory release date", which was set at two-thirds of the sentence time. (Prisoners could be held beyond the mandatory release date under certain circumstances, such as for misbehavior while in prison.) When determining a sentence, many judges took these legal variations into consideration and set term lengths that would require a convict to actually serve a certain minimum amount of prison time.

In response to calls for greater certainty and uniformity regarding incarceration time, Act 283 created a determinate sentencing structure for all felons sentenced for crimes committed on or after December 31, 1999 (other than those sentenced to life imprisonment). It also eliminated parole for prisoners sentenced for crimes committed on or after that date. (Prisoners sentenced for crimes committed before that date remain eligible for parole.) Felons are now required to serve the entire length of both portions of a bifurcated sentence, which includes: 1) a period of incarceration, followed by 2) a period of extended supervision outside prison. The maximum length of the entire sentence is established by law, but the judge may determine the respective length of the two components, provided the felon serves a minimum of one year in confinement and the sentence is split so that at least 25% of it is spent under extended supervision.

Act 283 increased the maximum penalties for most felonies by 50% to accommodate the extended supervision period, and it created the Criminal Penalties Study Committee to make recommendations about reclassifying all felonies and some Class A misdemeanors in a uniform criminal code, so that offenses of similar severity are similarly penalized. The committee submitted its final report on August 31, 1999. Although the committee's recommendations were considered in four prior bills (1999 Assembly Bill 465, 1999 Senate Bill 357, 2001 AB-3, and 2001 SB-55), passage came as part of Act 109, the budget reform bill enacted in 2002.

Prepared by Daniel F. Ritsche, Legislative Analyst

FELONY SENTENCING

Prior to Act 109, most felonies were classified into six categories designated by letters, but there were more than 200 other felonies that were not classified. The tables below compare classifications and penalties before and after the passage of truth-in-sentencing, but before the most recent changes.

	Offenses before 12/31/99		Offenses between 12/31/99 and 2/1/03	
Felony Class	Maximum Sentence	Mandatory Release Date	Maximum Sentence	Maximum Prison Time
Class A	Life in Prison	Not Applicable	Life in Prison	Life in Prison
Class B	40 years	2/3 of sentence	60 years	40 years
Class BC	20 years	2/3 of sentence	30 years	20 years
Class C	10 years	2/3 of sentence	15 years	10 years
Class D	5 years	2/3 of sentence	10 years	5 years
Class E	2 years	2/3 of sentence	5 years	2 years

New Felony Penalties. Under Act 109, all existing felonies (about 500 in number) and some Class A misdemeanors were divided into nine felony classes with maximum sentence lengths set for each type. Persons convicted for crimes committed on or after February 1, 2003, are subject to the following penalties:

Felony Class	Maximum Term of Confinement	Maximum Extended Supervision	Maximum Term of Sentence	Maximum Fine
Class A	Life in prison	(see note below)	Life	None
Class B	40 years	20 years	60 years	None
Class C	25 years	15 years	40 years	$100,000
Class D	15 years	10 years	25 years	100,000
Class E	10 years	5 years	15 years	50,000
Class F	7.5 years	5 years	12.5 years	25,000
Class G	5 years	5 years	10 years	25,000
Class H	3 years	3 years	6 years	10,000
Class I	1.5 years	2 years	3.5 years	10,000

Note: In the case of Class A life sentences, the judge may: 1) deny extended supervision; 2) determine the person will be eligible for extended supervision after serving 20 years; or 3) set a specific date beyond 20 years on which the person will become eligible for extended supervision. In the case of a life sentence, extended supervision covers the remainder of a person's life after release from prison.

Conditions of Extended Supervision. The Department of Corrections (DOC) administers extended supervision, with conditions for the supervision set by the court, by DOC, or both. Examples of these requirements include participation in drug abuse treatment or testing, educational programs, electronic monitoring, or community service work. A person who violates a condition of extended supervision may be returned to prison to serve all or part of the remaining total sentence.

SENTENCING COMMISSION

An 18-member Sentencing Commission will study sentencing practices around the state and adopt advisory sentencing guidelines that judges must consider when passing sentences for crimes committed on or after February 1, 2003. The commission, which is scheduled to sunset December 31, 2007, will also: 1) provide information to the legislature, state agencies, and

the public about the costs and needs of the DOC that result from sentencing practices; 2) provide information to judges and lawyers about the sentencing guidelines; 3) publish annual reports for the use of circuit judges; 4) make recommendations to the governor, the legislature, and the supreme court on the effect of race in sentencing decisions; 5) help the legislature in assessing the cost of enacting new or revised statutes affecting criminal sentencing; 6) study how sentencing options affect various types of offenders and offenses; and 7) submit semi-annual statistical reports regarding various types of criminal sentences, both statewide and in specified geographic areas.

SENTENCING STANDARDS

When passing sentences for crimes committed on or after February 1, 2003, judges must consider the sentencing guidelines adopted by the Sentencing Commission, as well as: 1) protection of the public, 2) gravity of the offense, 3) rehabilitative needs of the defendant, 4) applicable mitigating factors, and 5) applicable aggravating factors. Although courts are required to consider the guidelines, a convict has no right to appeal a sentencing decision because it departs in any way from any guideline. The judge must state his or her reasons for the sentencing decision on the record, either in open court or, if the judge determines that it is not in the best interests of the defendant to verbally state the reasons in the defendant's presence, by means of a written statement included in the trial record.

Aggravating Factors. When determining a sentence, the judge must consider the following aggravating factors:

- Use of disguise or other identity concealment.
- Crimes involving information obtained from the state's database of registered sex offenders.
- Crimes associated with criminal gang activity.
- Committing a crime while wearing a bullet-resistant vest.
- Crimes intended to influence a governmental unit or punish a governmental unit for a prior policy decision if the perpetrator caused bodily harm, great bodily harm, or death; caused at least $25,000 in property damage; or used or threatened to use force or violence.
- Specified sex crimes committed by a person who knew he or she was infected at the time with certain sexually transmitted diseases, including syphilis, gonorrhea, or HIV, the virus which causes AIDS.
- Violent felonies committed against a person age 62 or older.
- Child sexual assault or child abuse while responsible for the welfare of the child.
- Homicide or injury by intoxicated use of a motor vehicle, particularly if a minor under 16 years of age or an unborn child was in the person's motor vehicle at the time.
- Criminal delivery or distribution of, or possession with intent to deliver or distribute, a controlled substance to an inmate of a prison or jail or to a passenger on a public transit vehicle.

Penalty Enhancers; Minimum Sentences. Previously, numerous crimes carried penalty enhancers which permitted the judge to increase the penalties if the crimes were committed

under certain circumstances. Act 109 repealed most of the enhancers but requires the court to consider those that were repealed as aggravating factors when deciding sentences. Those penalty enhancers that are retained include: use or possession of a dangerous weapon when committing a crime; distribution of controlled substances within 1,000 feet of a school, park, correctional institution, or other facilities; committing a violent crime in a school zone; distribution of a controlled substance to a person under 17 years of age; habitual criminality; and the commission of subsequent drug offenses. (Persons may be sentenced to state prison for misdemeanors due to the longer sentence resulting from penalty enhancers, in which case bifurcated sentences will apply.)

Act 109 retains the minimum sentence provisions for persistent repeaters ("two strikes" or "three strikes") and maintains the existing mandatory minimum penalties for repeat OWI (operating while intoxicated) offenders.

PETITIONS FOR SENTENCE ADJUSTMENT

An imprisoned felon may petition the sentencing court to adjust the confinement portion of the sentence if the conviction involved a crime other than a Class A or B felony. A petition may be filed if the inmate has served at least 85% of the confinement portion of the original sentence in the case of a Class C, D, or E felony or at least 75% of the incarceration sentence for a Class F or lesser felony. If the court makes an adjustment, the inmate will generally be released to extended supervision with the reduction in prison time added to the length of supervision, so that the total length of sentence remains the same.

Petitions for adjustment may be filed, beginning February 1, 2003, by any prisoner sentenced for a crime committed since the effective date of bifurcated sentencing (December 31, 1999). Only one petition may be filed per sentence. A prisoner has the right to be represented by legal counsel during the petition process, but indigent inmates are not entitled to help from the state public defender. Those convicted of crimes committed before December 31, 1999, may be eligible for parole consideration and are not permitted to petition under the sentence adjustment procedure.

An inmate may request sentence adjustment based on any of the following grounds: 1) the inmate has evidenced good conduct, progress in rehabilitation, or participation in educational, treatment, or other correctional programs; 2) there has been a change in law or procedure related to sentencing or revocation of extended supervision that takes effect after the inmate was sentenced and would have resulted in a shorter term of confinement if applicable when the inmate was originally sentenced; 3) the inmate is subject to a sentence of confinement in another state; 4) the inmate is in the United States illegally and the sentence adjustment will facilitate deportation; or 5) the sentence adjustment is otherwise in the interests of justice.

The court may reject the petition outright or hold it for further consideration. If held for consideration, the court must notify the district attorney of the inmate's petition, and, if the district attorney objects to sentence adjustment within 45 days of receiving notification, the court must deny the petition.

If the inmate seeking adjustment has been sentenced for one of several specified sex crimes, and the district attorney does not object to the petition within 10 days of receiving notice, the DA's office must notify the crime victim about the petition. If the victim objects to the adjustment within 45 days of the date on which the DA's office received notice of the petition, the court is required to deny the request. Crimes covered under this provision are second or third degree sexual assault, second degree sexual assault of a child, or soliciting a child for prostitution. (Sentences for more severe sex crimes are not eligible for adjustment petitions.)

If the court receives no objection from the district attorney or crime victim, the court may adjust the inmate's sentence if the court determines that doing so is in the public interest. The court must provide written reasons on the record for granting the sentence adjustment. There is no provision for appeal of denial of the petition.

GERIATRIC AND MEDICAL RELEASE

An elderly or seriously ill inmate serving a bifurcated sentence for other than a Class A or B felony may seek modification of the sentence and be released from confinement if the inmate: 1) is 65 years of age or older and has served at least 5 years of the prison portion of the bifurcated sentence; 2) is 60 years of age or older and has served at least 10 years of the prison portion of the bifurcated sentence; or 3) has an incurable terminal medical condition with a life expectancy of 6 months or less.

If the correctional institution's program review committee determines that the public interest would be served by modification of the inmate's sentence, it refers the petition to the sentencing court through DOC, which requests the court to conduct a hearing on the matter. The district attorney or any victim of the inmate's crime has the right to attend the hearing and provide statements. The inmate has the burden of proving, by the greater weight of the credible evidence, that sentence modification would be in the public interest. If the court agrees, it can modify the sentence by releasing the inmate to extended supervision within 30 days and correspondingly lengthening the term of supervision so that the total length of the original bifurcated sentence does not change.

An inmate may appeal a court's decision to deny a petition, and the state may appeal a decision to grant the petition. The appellate court may reverse the decision only if it determines that the sentencing court erroneously exercised its discretion. A prisoner has the right to be represented by legal counsel during the petition process, and indigent inmates may be eligible for help from the state public defender. If an inmate's petition is denied by either the program review committee or the court, another petition cannot be filed for one year.

CRIMINAL PENALTIES REVIEW COMMITTEE

Act 109 also created the Joint Review Committee on Criminal Penalties to review, upon request, bills that propose a new crime or revise the penalty for an existing crime. The committee, which is made up of legislators and specified other members, has 30 days to review each bill and hold hearings if it chooses. In its report, it must address the fiscal effects of the bill and determine whether the proposed changes conform with existing criminal statutes. Other standing committees and the house of origin cannot act on the bill until the committee reports on the proposal or 30 days have elapsed without a report.

FOR MORE INFORMATION

Relevant sections of the Wisconsin Statutes may be downloaded from: www.legis.state.wi.us/rsb/stats.html. Key sections include: 302.113 (9g), petitions for geriatric and medical release; 939.50, felony classifications and penalties; 973.01, the structure of bifurcated sentences; 973.017, use of sentencing guidelines and consideration of aggravating and mitigating factors; and 973.195, sentence adjustment petitions.

For questions about the sentence adjustment petition process, contact the Department of Corrections, at (608) 240-5000. To obtain information on legal assistance for geriatric and medical sentence adjustment petitions, contact the State Public Defender at (608) 266-0087.

Basford, Sarah

From: Ramirez, Adrienne
Sent: Friday, February 27, 2009 12:19 PM
To: LRB.Legal
Subject: Draft Review: LRB 09-0934/1 Topic: Increase penalties for 4th and subsequent OWI

Please Jacket LRB 09-0934/1 for the ASSEMBLY.