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FROM: Ben Kempinen
Clinical Professor
University of Wisconsin Law School

TO: Legislative Council Study Committee on the Review of Criminal Penalties

As the work of our study committee comes to an end I believe we should recommend to the legislature additional study of issues raised during our tenure that have state wide importance but did not fit within our limited charge.

In a sense this study committee's focus – the minor offense – is unique. More often than not legislative and public attention is focused on the serious offense or offender. However, the majority of criminal cases – consistently nearly 70% over the past several years – are misdemeanors. Although individually they may appear insignificant in the aggregate they consume more resources and affect a larger portion of our communities than do felony level offenses. As a consequence, the manner in which these offenses are defined, processed, and punished has a profound impact on Wisconsin offenders, victims, their families and communities, the police, prosecutors, trial judges, court personnel, defense attorneys, and other system shareholders involved in the criminal justice process, and of course, the taxpayer.

To my knowledge, this study committee was among the first to focus on this important but often overlooked class of crimes. Although fidelity to our charge caused us to narrow our focus there are important issues regarding the minor offense that merit further consideration. At a minimum, they include:

(1) *Financial Consequences of Conviction – Expanded Options for Trial Courts and Offenders*

Apart from any fine or restitution ordered, all persons convicted of a misdemeanor in Wisconsin are required by statute to pay certain fees and surcharges. The minimum amount due is $443; if there are specific charges with additional fees, surcharges, and assessments, or if the defendant is

convicted of multiple offenses, or if costs are imposed,[1] the amount due will be greater. It is not uncommon for a defendant in a minor case to leave court owing in excess of $1000, with little realistic chance of paying.

The statutes provide limited options for indigent defendants; community service is permitted only as a substitute for fines.[2] The only response for non-payment expressly included in the statutes is committing the defendant to jail.[3] In many counties warrants are issued for non-paying defendants who are then committed to jail for varying lengths of time. If the individual is able but unwilling to pay this may be an appropriate sanction; if they are indigent and unable to pay it not constitutional. Under either circumstance, it is costly to local taxpayers, offenders and their families.

Local prosecutors, judges, and court personnel recognize the difficulty indigent defendants face when ordered to pay significant sums of money. In most counties, payment plans are arranged and managed by the clerks of courts – another cost to local taxpayers, and in some, courts suspend or waive certain surcharges or fees for pragmatic and fairness reasons.

Several judges and prosecutors have suggested statutory revisions that would (1) permit community service for any non-restitution financial responsibility and (2) provide explicit authority to suspend payment in situations where the defendant lacks any realistic chance of compliance.

(2) *Expansion of Expungement and Conditional Plea Authority*

At present, prosecutors and judges must decide if expungement is appropriate at the time of sentencing.[4] The same statute also imposes limits on what offenses this option may be applied to.

Similarly, a former practice in many counties involved conditional pleas of guilty. Under this approach, a person would plead guilty to a felony level offense, and, if certain future conditions were satisfied, have the conviction replaced by a misdemeanor. This generally applied with young offenders with no prior record, a supportive family, but who committed a serious offense. It was an attractive option to many prosecutors because it allowed for an immediate conviction and posed no risk of having to try a case months or years after the incident. If the defendant completed the conditions of the agreement, the charge would be changed to a misdemeanor. If not, the felony conviction would remain. In *State v. Dawson*, 2004 WI App. 173 (2004), the

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[1] Wis. Stat. § 973.06.

[2] Wis. Stat. § 973.05.

[3] Wis. Stat. § 973.07.

[4] Wis. Stat. §973.015(1m)(a).

Wisconsin Court of Appeals concluded that the current statutory scheme did not allow conditional pleas. Several prosecutors have suggested this removed a valuable tool for resolving certain cases and that it might properly be included as a dispositional option.

(3) *Diversion and a Victim's Right to Restitution*

Nearly all Wisconsin counties have some form of diversion program. Defendants who successfully complete the program avoid having a criminal record and prosecutors save the time and effort of a formal prosecution. At present, our statutory treatment of diversion authority is inconsistent and cobbled together in several overlapping and inconsistent statutes.[5] To the extent that expanded use of this option for low risk minor offenses is cost effective there is merit to providing a more helpful statutory structure for the creation and operation of such programs.

There is also a question about a victim's right to restitution in the context of diversion programs[6] given that a judge's authority to order restitution is limited to cases in which the defendant is convicted and many diverted offenders avoid conviction.[7] Although payment of restitution is typically a condition of an informal diversion agreement, enforcement of such agreements can be more difficult than in situations where there is a judgment of conviction which incorporates a restitution order. Improvement of our statutory treatment of this issue would serve the interests of Wisconsin victims.

(4) *Misdemeanor Options for First Offense Drug Possession Cases*

Wisconsin has seen an explosion of heroin and methamphetamine abuse. Related problems have touched communities throughout the state as users come from all economic, ethnic, and racial backgrounds. For some first-time offenders, an arrest for possession of heroin or methamphetamine may be their only exposure to the criminal justice system. At present, first offense possession of either heroin or methamphetamine is a Class I felony.[8] A number of prosecutors have suggested a misdemeanor option for first offenses would be a useful tool to avoid marking a young person irrevocably as a felon.

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[5] *See*, e.g., Wis. Stat. §§ 938.245; 967.055(3); 971.29; 971.37; 971.38; 971.40, and 971.41.

[6] A Wisconsin crime victim's right to restitution is protected by statute, Wis. Stat. §950.04(1v)(q) and by the state constitution, Wis. Const. Art. I, sec. 9m.

[7] Wis. Stat. §973.20(1r).

[8] Wis. Stat. §§ 961.14(3) (k), 961.41(3g) (am), 961.14(5) (b), 961.41(3g) (g).

These are but a few of the issues that arise on a daily basis throughout Wisconsin in the administration of our criminal justice system. I note that Deputy State Public Defender Michael Tobin has raised others and I imagine many of the experienced members of our committee may believe additional issues with the minor offense merit further attention.

Continuing our work can help improve the delivery of cost effective public safety to all members of our communities. For these reasons, I respectfully suggest we recommend further study of the minor offense as part of our committee's final report to the legislature.