



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #590

Criminal Code Changes (Public Defender and DOT -- Motor Vehicles)

[LFB 2005-07 Budget Summary: Page 392, #2 and Page 488, #4 & #5]

CURRENT LAW

Office of the State Public Defender. The cost of providing constitutionally and statutorily required counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender (SPD). The SPD provides legal representation for indigent persons: (1) facing a possible sentence that includes incarceration; (2) involved in certain proceedings under the Children's and Juvenile Justice Codes (Chapters 48 and 938); (3) facing involuntary commitment; and (4) involved in certain post-conviction or post-judgment appeals. The SPD provides this counsel either through SPD staff attorneys or SPD-appointed private bar attorneys. The total adjusted base funding for all GPR state operations appropriations under the agency is \$75,176,300 GPR annually.

Operation After Revocation. An individual convicted of a first offense for operating a motor vehicle after revocation must be fined not more than \$2,500 or imprisoned for not more than one year in the county jail, or both.

Habitual Traffic Offender. A "habitual traffic offender" means any person, resident or nonresident, whose record, as maintained by the Department of Transportation (DOT), shows that the person has accumulated within a five-year period: (a) four or more specified major civil or criminal traffic violations; or (b) 12 or more convictions of moving violations of traffic regulations or of crimes in the operation of a motor vehicle that must be reported by court officials to DOT.

A "repeat habitual traffic offender" means any person, resident or nonresident, whose record, as maintained by DOT, shows that the person has been convicted either of two offenses under (b) above within one year of the issuance of an occupational license to the person, or of

one specified major traffic violation or four offenses under (b) above within three years of the issuance of an occupational license. With approval by a circuit court, an occupational license may be issued to a habitual traffic offender whose license has been revoked for at least two years.

The Secretary of DOT must revoke a person's operating privilege for a period of five years following a person's conviction which brings the person within the definition of a "habitual traffic offender" or "repeat habitual traffic offender."

GOVERNOR

SPD Private Bar Funding. Reduce the private bar and investigator reimbursement appropriation by \$379,700 GPR in 2005-06 and \$581,700 GPR in 2006-07 to reflect an anticipated reduction in workload associated with operation after revocation cases (-\$351,000 in 2005-06 and -\$527,000 in 2006-07) and habitual traffic offender cases (-\$28,700 in 2005-06 and -\$54,700 in 2006-07). This appropriation is used to reimburse private bar attorneys who accept assignment of defense cases for indigent persons qualifying for SPD representation.

Operation After Revocation. Reduce the first offense for operating after revocation to a civil (instead of a criminal) offense subject to a forfeiture of not more than \$600. However, offenses would remain subject to the current law criminal penalty if either: (1) the individual had been convicted of operating after revocation within the preceding five-year period; or (2) the license revocation resulted from an offense of operating under the influence of an intoxicant or other drug, or of operating a commercial motor vehicle with an alcohol concentration between 0.04 and 0.08. Specify that these changes would first apply to violations occurring after the effective date of the bill.

Habitual Traffic Offender. Redefine "habitual traffic offender" to mean any person, resident or nonresident, whose record, as maintained by DOT, showed that the person had accumulated within a five-year period: (1) four or more specified major civil or criminal traffic violations; or (2) 12 or more convictions of violations of Chapter 346 of the statutes ("Rules of the Road").

As a result, convictions for operating after suspension or operating after revocation would not be offenses triggering a finding that an individual was either a "habitual traffic offender" or "repeat habitual traffic offender." Specify that these changes would first apply to reports of convictions of violations received by DOT on the effective date of the biennial budget act, but would not preclude the counting of other violations as prior violations for purposes of revocation of operating privileges by DOT or review by a court.

DISCUSSION POINTS

1. Provisions of 1995 Wisconsin Act 27 (the 1995-97 biennial budget act) significantly revised the operation of the SPD and imposed a series of cost-cutting measures. Act 27 eliminated SPD representation in several categories of cases where there is no clear constitutional right to representation:

- All conditions of confinement cases.
- Situations where adults and juvenile persons, suspected of criminal or delinquent acts, have not yet been formally charged with a crime. [Representation was subsequently restored under 2001 Wisconsin Act 16, but with no additional funding.]
- Sentence modification actions filed outside of the statutory time limit for such actions.
- Probation and parole modification and revocation cases, unless such actions are contested and jail or prison time is sought.
- Appeals cases filed after the statutory time limit, unless the Court of Appeals extends the time limit.
- Contempt of court for failure to pay child or family support, if the matter was not brought by the state, and the judge or family court commissioner certifies that the person would not be incarcerated if found in contempt.
- Paternity actions, except actions to determine paternity where an initial blood test indicates a greater than 0%, but less than 99% probability of fatherhood.
- Representation for parents whose children are alleged to be in need of protection or services (CHIPS), except for parents who are themselves minors.

2. Apart from the remaining paternity cases for which there is only a negligible caseload, the SPD is budgeted funding to represent the indigent in categories of cases where representation is constitutionally required. While the SPD is constitutionally required to provide representation to the indigent in cases where they are charged with a criminal offense involving a possible sentence including incarceration, the SPD is not constitutionally required to provide representation to the indigent in cases where they are charged with a civil offense.

3. Under Assembly Bill 100, the Governor would make changes to the operating after revocation (OAR) and the habitual traffic offender (HTO) laws to reduce the criminal caseload of the SPD. In the case of the OAR law, civil penalties, instead of criminal penalties, would be imposed for certain OAR violations, thereby reducing the number of persons requiring representation for a criminal offense. In the case of the HTO law, changes would be made to reduce

the number of drivers whose licenses are revoked as habitual traffic offenders, thereby reducing the number that would subsequently be criminally charged for operating after a HTO revocation.

4. The bill would reflect savings in the SPD's private bar and investigator reimbursement appropriation to reflect the two policy changes. The savings attributable to the change to the OAR law would be \$351,000 GPR in 2005-06 and \$527,000 GPR in 2006-07, while the savings attributable to the change to the HTO law would be \$28,700 GPR in 2005-06 and \$54,700 GPR in 2006-07.

5. The OAR and HTO provisions in the bill are somewhat similar to provisions contained in Assembly Bill 256, which was introduced on March 18 and referred to the Committee on Criminal Justice and Homeland Security. AB 256 goes further than the Governor's recommendations by substituting civil penalties for all first-time OAR offenses (including those for which the underlying revocation is related to an OWI offense) and also all first-time violations of operating a commercial motor vehicle while disqualified or while ordered out-of-service. In addition, along with narrowing the definition of a "minor" offense under the HTO law, certain offenses would be removed from the list of "major" offenses (of which the accumulation of four convictions results in HTO status).

6. In both these cases, while the changes are intended to have the effect of reducing the number of indigent persons who are subject to criminal charges, it is important to recognize that persons who are not indigent would be equally affected. Consequently, while the intent of the policy is associated with its effect on indigent persons, the policy changes would have a broader impact. These policy changes are discussed separately below.

Operating After Revocation

7. Under current law, a license revocation is ordered for traffic offenses that are generally considered likely to result in death, injury, or serious property damage. Accordingly, the violation of a revocation order (operating after revocation) is subject to criminal penalties in recognition that any person who has been subject to a license revocation has exhibited driving behavior that seriously jeopardizes safety and, therefore, any attempt by that person to continue driving should be considered criminal behavior. Upon conviction on an operating after revocation charge, the court is required to impose a fine of up to \$2,500, a jail sentence of up to one year, or both.

8. A license suspension, on the other hand, is ordered for offenses that are considered to be a less immediate threat to safety, including some nondriving offenses. Because the offense resulting in the suspension is assumed to be less serious than an offense resulting in revocation, violations of a suspension order (operating while suspended) are considered to be civil violations. A court is required to impose a forfeiture of between \$50 and \$200 (and no jail sentence) for an operating while suspended conviction.

9. The bill would establish different penalties for violations of a revocation order

depending upon the underlying reason for the license revocation. A person convicted for operating after revocation would continue to be subject to current law criminal penalties if the underlying license revocation was the result of an offense involving operating while intoxicated and related impaired driving laws, or if the person had previously been convicted of operating after revocation within the previous five years. If the person's license had been revoked for any other offense and the person had not been convicted of OAR within the previous five years, the court would impose a forfeiture of up to \$600, but no jail term. Under current law, the other offenses that are subject to revocation include causing death or great bodily harm through the negligent or reckless operation of a motor vehicle (not involving alcohol), the commission of a felony where the operation of a motor vehicle is involved, failure to stop and render aid as required in the event of an accident resulting in death, injury, or serious property damage, and knowingly fleeing or attempting to elude a traffic officer. (Violations of a revocation order under the habitual traffic offender law are treated in a separate section of the statutes and would not be affected by the bill, although the conditions resulting in habitual traffic offender status would be changed, as described later in this paper.)

10. Under current law, all OAR convictions are subject to criminal penalties, as described above, but a judge may impose a range of fines and jail terms, depending upon a consideration of several factors, including the reason for which the convicted person's license was revoked. Under the bill, because certain OAR offenses would continue to be subject to criminal penalties while others would become subject to civil penalties, the former would be considered inherently more serious than the latter. Because alcohol-related offenses are generally considered by the public to be serious threats to safety, it may be widely accepted that the license restrictions placed on a driver convicted of such an offense be stricter than for other types of traffic convictions. It should be noted, however, that some other offenses that the public may consider just as serious, or more so, would be subject to license sanctions that are not as strict in the sense that a violation of those restrictions would be subject to lesser penalties. For instance, a person whose license is revoked for causing the death of a person as the result of the reckless operation of a motor vehicle (not involving alcohol) who subsequently is convicted of an OAR offense would be subject to less serious penalties than the person convicted of an OAR offense following a revocation for an OWI conviction that did not involve injury or death.

11. The distinction between operating after revocation and operating while suspended offenses was established by 1997 Wisconsin Act 84. Prior to that time, the relationship between the seriousness of a traffic offense and whether a license suspension or revocation was imposed was less clear. For instance, a person's license could be revoked for certain offenses not related to driving behavior, such as the repeated failure to pay a nondriving related forfeiture. Similarly, whether criminal or civil penalties applied for violating both types of license sanctions depended upon the type of offense that was the underlying reason for the license sanction.

12. In recognition that this lack of consistency created confusion for law enforcement officers and the courts, Governor Thompson appointed a task force to make recommendations regarding standards for the use of license sanctions as penalties, and the penalties for violating those sanctions. The task force's recommended standards were enacted as Act 84. The changes recommended in the bill to the treatment of OAR offenses would be the first exception made to

those standards since the passage of Act 84.

13. The reduction in the SPD's private bar and investigator reimbursement appropriation corresponding to the OAR change is based on an assumption that the number of first-offense OAR cases handled by the Office would decline by 25%. This estimate may overstate the savings since the types of revocations that would be excluded from the criminal penalties account for about 17% of all revocations. If this percentage were applied to the Office's first-time OAR caseload, then the savings would be \$238,900 GPR in 2005-06 and \$358,200 GPR in 2006-07, which is \$112,100 GPR less in 2005-06 and \$168,800 GPR less in 2006-07 than the savings reflected in the bill.

Habitual Traffic Offender Law

14. Currently, a person may be declared a habitual traffic offender for committing within a five-year period either four traffic offenses from a list of "major" offenses or 12 "minor" offenses, which are defined as any moving violations, violations of traffic regulations, or crimes involving the operation of a motor vehicle that are required to be reported on the driver record. The bill would modify the definition of a minor offense to include only violations under Chapter 346 of the statutes ("Rules of the Road"). The effect of this definitional change would be to exclude from consideration offenses such as vehicle registration and titling requirements, various driver licensing requirements and restrictions, including operating with a suspended or revoked license, certain vehicle equipment violations, and truck size and weight regulations.

15. The change to the definition of a minor offense in the HTO law is assumed to reduce the number of persons who would reach HTO status, which in turn would result in fewer persons being charged with operating a vehicle while revoked as a habitual traffic offender.

16. As with the change to the OAR law, the modification of the HTO law is included in the bill because of its effect on the number of indigent persons who are charged with a criminal offense, but since non-indigent persons would also be affected, the policy change has a broader impact that the Committee may want to consider independently from any fiscal effect.

17. By narrowing the definition of a minor offense, the recommended change would result in certain offenses no longer being deemed valid for determining habitual traffic offender status. Perhaps the most common offenses that would be excluded are the unlawful practices related to drivers' licenses, such as operating a motor vehicle while suspended, operating after revocation, or operating a vehicle in conflict with a license restriction. It could be argued that these offenses should be excluded since they do not necessarily involve dangerous driving behavior. For instance, driving with a suspended license involves breaking the rules of licensure, but could be done without jeopardizing safety.

18. Other excluded offenses, however, could have a more direct impact on safety. For instance, the failure to maintain operating brakes or other equipment violations may involve a disregard for the safety of others, and therefore, perhaps should be considered in determining habitual traffic offender status. The Committee could question whether these offenses should be

excluded.

19. The reduction in the SPD's private bar and investigator reimbursement appropriation corresponding to the HTO change is based on the assumption that the number of persons who reach habitual traffic offender status would be reduced by 50%. Consequently, because the number of HTO revocations would decline, it is assumed that the number of persons who are charged with operating after an HTO revocation would also decline.

Issuance of Worthless Checks

20. In lieu of or in addition to the Governor's recommended changes to the criminal code, the Committee may also wish to consider other possible criminal code changes in order to reduce the caseload of the SPD. One possible option might be to consider converting misdemeanor issuance of worthless checks to a civil offense. [In its agency budget request, the SPD proposed a similar change. Under its proposal, prior to charging certain individuals for an alleged first-offense misdemeanor issuance of a worthless check, a district attorney would have been required to either: (a) offer the opportunity to participate in a diversion program; or (b) assess a civil forfeiture under a stipulated finding of guilt under a non-criminal county ordinance.]

21. Under current law, persons issuing a check for not more than \$2,500 that the person does not intend to pay at issuance are guilty of a Class A misdemeanor. The same penalty applies regardless of whether the offense is a first or a subsequent offense for issuance of a worthless check of not more than \$2,500. The first or subsequent offenses for issuance of such a worthless check may also be punished as a civil forfeiture under a conforming county or municipal ordinance. [An individual is guilty of a Class I felony if the person issues more than one check within a 90-day period amounting in the aggregate to more than \$2,500 that the person intends will not be paid at the time of issuance.]

22. Also, under current law, the SPD is required to provide representation in cases where an individual issued a worthless check of not more than \$2,500 where the violation is charged as a misdemeanor criminal violation. However, the SPD is not required to provide representation where the violation is charged as a civil violation under county or municipal ordinance.

23. In 2003-04, the SPD closed 3,621 misdemeanor worthless checks cases. The annual private bar costs for such representation is estimated at \$514,300 GPR. In over 93% of these closed cases, the defendant was not required to serve any jail time. In such cases where no jail time was required, the defendant: (a) could have been found not guilty; (b) may have been found guilty, but punished with some combination of a fine, community service and/or probation; or (c) could have ultimately pled guilty to a civil violation for issuance of a worthless check under a conforming county or municipal ordinance. As municipal courts do not enter their case dispositions into the Circuit Court Automation Program (CCAP) system, it is unknown how many issuance of worthless check cases have been disposed of as civil ordinance violations in recent years.

24. The Committee could consider converting misdemeanor issuance of worthless check cases into civil cases as an appropriate modification to the criminal code since: (a) this conduct is already punished as a civil violation under current law under county and municipal ordinances; and (b) relatively few individuals charged with misdemeanor issuance of worthless checks under current law appear to be serving jail time. In addition, changing the law would preclude situations where the same conduct may be punished as either a civil or criminal law violation depending either on the specific circumstances of how an individual was charged or on the exercise of discretion by the prosecution or the court.

25. Nonetheless, it could also be argued that this type of change would be inappropriate change since: (a) it would limit prosecutorial and judicial discretion in addressing this prohibited conduct; and (b) it could decrease any deterrent effect that may be served by the misdemeanor status of this violation under current law.

26. If the Committee were to convert the misdemeanor issuance of worthless check violation into a civil violation, it is estimated that amounts appropriated to the SPD for this caseload under its private bar appropriation could be reduced by \$385,700 GPR in 2005-06 and \$514,300 GPR in 2006-07. Compared to the criminal code changes recommend by the Governor relating to operating after revocation and habitual traffic offenses, this alternative would require changes to the SPD private bar and investigator reimbursement appropriation of -\$6,000 GPR in 2005-06 and \$67,400 GPR in 2006-07 (for a biennial total of \$61,400 GPR).

27. Alternatively, the Committee could consider converting only first offense worthless check misdemeanors into civil violations. This type of change could be adopted on the rationale that sanctions should be greater for repeat offenders.

28. Based on a review of February 2005, SPD case openings, approximately 75% of the agency's caseload for worthless check misdemeanors represented first time offenders (that is, there were no prior worthless check misdemeanor convictions for the individual, although there may have been prior parallel county or municipal civil convictions). If the Committee were to convert only the first offense worthless check misdemeanor violation into a civil violation, it is estimated that the amounts appropriated to the SPD for such caseload under its private bar appropriation could be reduced by \$289,300 GPR in 2005-06 and \$385,700 GPR in 2006-07. This modification would represent a funding increase to the amounts recommended by the Governor of \$90,400 GPR in 2005-06 and \$196,000 GPR in 2006-07, for a biennial total of \$286,400 GPR.

ALTERNATIVES

A. Operation After Revocation

1. Approve the Governor's recommendation to reduce the private bar and investigator reimbursement appropriation of the Office of the State Public Defender by \$351,000 GPR in 2005-06 and \$527,000 GPR in 2006-07 to reflect an anticipated reduction in caseload associated with statutory changes to operation after revocation cases.

2. *[To be considered if Alternative 1 is selected.]* Provide an additional \$112,100 GPR in 2005-06 and \$168,800 GPR in 2006-07 to reflect that the first-offense operating after revocation (OAR) statutory changes would decrease the first-offense OAR caseload of the Office of the State Public Defender by 17% annually, not 25% annually as estimated under the bill. Under this alternative, the adjusted base funding to the private bar and investigator reimbursement appropriation would be reduced by \$238,900 GPR in 2005-06 and \$358,200 GPR in 2006-07.

<u>Alternative A2</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	\$280,900

3. Delete provision.

<u>Alternative A3</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	\$878,000

B. Habitual Traffic Offender

1. Approve the Governor's recommendation to reduce the private bar and investigator reimbursement appropriation of the Office of the State Public Defender by \$28,700 GPR in 2005-06 and \$54,700 GPR in 2006-07 to reflect an anticipated reduction in caseload associated with statutory changes to habitual traffic offender cases.

2. Delete provision.

<u>Alternative B2</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	\$83,400

C. Issuance of Worthless Checks

1. Decrease the private bar and investigator reimbursement appropriation by \$385,700 GPR in 2005-06 and \$514,300 GPR in 2006-07 to reflect an anticipated reduction in caseload to the Office of the State Public Defender associated with converting misdemeanor issuance of worthless check violations into civil violations.

<u>Alternative C1</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	- \$900,000

2. Decrease the private bar and investigator reimbursement appropriation by \$289,300 GPR in 2005-06 and \$385,700 GPR in 2006-07 to reflect an anticipated reduction in caseload to the Office of the State Public Defender associated with converting first offense misdemeanor issuance of worthless check violations into civil violations.

<u>Alternative C2</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	- \$675,000

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