



## Legislative Fiscal Bureau

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June 5, 2007

Joint Committee on Finance

Paper #120

### **Creation of Bureau of Criminal Justice Research (DOA -- Office of Justice Assistance and DOA -- General Agency Provisions)**

#### *Bill Section*

[LFB 2007-09 Budget Summary: Page 27, #17; and Page 36, #1]

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#### **CURRENT LAW**

The Sentencing Commission was created under 2001 Wisconsin Act 109, and is currently scheduled to sunset on December 31, 2007. The Sentencing Commission consists of 18 voting members and three non-voting members and is charged with adopting felony sentencing guidelines and other sentencing related responsibilities. The Sentencing Commission has revised felony sentencing guidelines for cases representing approximately 70% of the felony caseload, as well as producing a series of mandated and special reports and "snapshots" of Wisconsin's sentencing process. The Sentencing Commission is authorized 2.0 full-time equivalent positions (a director and deputy director) and is budgeted \$308,700 GPR in 2006-07.

#### **GOVERNOR**

*Elimination of the Sentencing Commission.* Delete the Sentencing Commission and its authorized staff of 2.0 GPR full-time equivalent positions and base funding of \$269,300 GPR annually.

*Creation of a Bureau of Criminal Justice Research in the Department of Administration's Office of Justice Assistance.* Provide \$1,044,300 GPR in 2007-08, \$1,308,100 GPR in 2008-09, and 8.0 GPR positions annually to create a Bureau of Criminal Justice Research in the Department of Administration's Office of Justice Assistance (OJA). The Bureau would assume many of the duties currently assigned to the Sentencing Commission. Under the recommendation: (a) \$269,300 GPR and 2.0 GPR positions annually would be transferred to

OJA from the Sentencing Commission; (b) \$400,000 GPR in 2007-08, and \$538,800 GPR in 2008-09, would be provided to OJA to create 6.0 additional positions in the Bureau; and (c) \$375,000 GPR in 2007-08, and \$500,000 GPR in 2008-09, would be provided for hardware and software costs for the new Bureau.

*Deleted Sentencing Commission Duties.* The following current law responsibilities of the Sentencing Commission would no longer be carried out by the recommended Bureau: (a) adopting advisory sentencing guidelines for felonies to promote public safety, to reflect changes in sentencing practices, and to preserve the integrity of the criminal justice and correctional systems; (b) providing information to judges and lawyers about the sentencing guidelines; and (c) publishing and distributing to all circuit court judges hearing criminal cases an annual report regarding its work, which must include all sentencing guidelines and all changes in existing sentencing guidelines adopted during the 12 months preceding the report.

*Transferred Sentencing Commission Duties.* The duties that the Bureau would assume from the Sentencing Commission include: (a) monitoring and compiling data regarding sentencing practices in the state; (b) providing information to the Legislature, state agencies, and the public regarding costs to and other needs of the Department of Corrections that result from sentencing practices; (c) studying whether race is a basis for imposing sentences in criminal cases, and submitting a report and recommendations on this issue to the Governor, Legislature, and the Supreme Court; (d) assisting the Legislature in assessing the cost of enacting new or revising existing statutes affecting criminal sentencing; (e) submitting reports to all circuit court judges and the Legislature at least semiannually which contain statistics regarding criminal sentences imposed in the state; and (f) studying how sentencing options affect various types of offenders and offenses.

*Report on Standard Sentences.* The bill would require the Bureau to prepare a report containing statewide statistics on standard sentences for each felony offense and how the standard sentences of each circuit court compare to the statistics on the sentences for its respective region and the state. The report must be distributed to the Governor, the Director of State Courts, and appropriate legislative standing committees no later than the first day of the 12th month after the bill's effective date, and biennially thereafter.

*Justice System Research and Data Analysis.* Under current law, OJA must serve as a clearinghouse of justice system data and information and conduct justice system research and data analysis. Under the bill, this responsibility would become the responsibility of OJA's Bureau of Criminal Justice Research.

*Staff Director.* Require the Executive Director of OJA to appoint a staff director outside of the classified service. Place the staff director in executive salary group 2 (ESG-2). The current salary range for an ESG-2 is \$60,905 to \$94,403 annually. Specify that the salary of the deputy staff director (currently in the Sentencing Commission) be established by the Executive Director and that the position would be unclassified.

## DISCUSSION POINTS

1. The provisions of the bill would delete the Sentencing Commission on the effective date of the bill, and prior to its currently scheduled sunset date (December 31, 2007). The Sentencing Commission consists of 18 voting members including: (a) one majority party member and one minority party member from each house of the Legislature; (b) seven gubernatorial appointees; (c) the Attorney General, or his or her designee; (d) the State Public Defender, or his or her designee; (e) two circuit court judges appointed by the Supreme Court; (f) one crime victim representative appointed by the Attorney General; (g) one prosecutor appointed by the Attorney General; and (h) one private practice criminal defense attorney, appointed by the criminal law section of the State Bar of Wisconsin. The Sentencing Commission also consists of the following three nonvoting members: (a) the Secretary of the Department of Corrections, or his or her designee; (b) the Chairperson of the Parole Commission, or his or her designee; and (c) the Director of State Courts, or his or her designee. Under current law, the Commission is provided 2.0 positions (a director and a deputy director). The Sentencing Commission provides expertise on Wisconsin criminal law, as well as experience and knowledge of the practical operation of Wisconsin's criminal justice system. In addition, the Commission includes policymakers whose responsibility it is to shape Wisconsin's criminal justice system.

2. In its place, the bill would create a Bureau of Criminal Justice Research in OJA consisting of 8.0 positions, including: (a) 1.0 director; (b) 1.0 deputy director; (c) 1.0 information technology manager; (d) 2.0 information systems business automation specialists; and (e) 3.0 program and planning analysts. The provisions of SB 40 would transfer many of the current law responsibilities of the Sentencing Commission to the new Bureau.

3. As of January 1, 2007, there are 584 separate felony offenses under Wisconsin law. When determining a convicted defendant's sentence under any of 584 separate felony offenses, a court must consider a number of factors including: (a) the statutory parameters that establish the possible incarceration, extended supervision, and fine amount for the convicted offense; (b) any sentencing guidelines developed by the Sentencing Commission; (c) the application of aggravating and mitigating factors under s. 973.017 of the statutes to the particular felony conviction, including protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant; (d) the possible application of "two strikes" law; and (e) the possible application of "three strikes" law.

4. Any analysis of sentencing data is complicated not only by the need to understand Wisconsin criminal law, but by the need to understand the process by which this law is applied to a given case. In making a sentence determination a court may consider such things as: (a) the record developed during trial; (b) victim statements to the court; (c) a presentence investigation report developed by the Department of Corrections; (d) a report prepared by the Office of the State Public Defender (SPD) to be considered at sentencing; and (e) read-in crimes (any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing, and which the court does subsequently consider).

5. Before a defendant is sentenced, a victim is entitled to make a statement to the court. A judge may request a presentence investigation report be prepared by Corrections before imposing

a felony sentence. A Corrections presentence investigation report may provide information regarding the defendant's: (a) criminal history; (b) family background; and (c) relevant personal history. The SPD report may provide information on: (a) the education, employment, and social history of the convicted individual; (b) what positive factors exist in the individual's life that may help the individual to make more positive choices in the future; and (c) sentencing and rehabilitative options the court may consider, including an assessment of available community-based treatment programs that could assist the individual to address behavioral problems that may have contributed to the criminal conduct.

6. Any comparison of criminal cases is also complicated by subjective valuations of how to appropriately weigh various factors to reach a just outcome. Arguably, the makeup of the current Sentencing Commission is designed to address this issue by including in the Commission: (a) victim perspectives; (b) perspectives from the criminal justice system professionals, including the prosecution, the defense, and the judiciary which imposes sentence; and (c) perspectives from all three branches of state government, which all play an important role in shaping Wisconsin's criminal justice system. It could be argued that current law acknowledges these limitations in comparing felony sentences, as any sentencing guidelines developed by the Sentencing Commission are advisory only.

7. The bill provisions would transfer the following Sentencing Commission duties to the new Bureau: (a) monitoring and compiling data regarding sentencing practices in the state; (b) providing information to the Legislature, state agencies, and the public regarding costs to and other needs of the Department of Corrections that result from sentencing practices; (c) studying whether race is a basis for imposing sentences in criminal cases, and submitting a report and recommendations on this issue to the Governor, Legislature, and the Supreme Court; (d) assisting the Legislature in assessing the cost of enacting new or revising existing statutes affecting criminal sentencing; (e) submitting reports to all circuit court judges and the Legislature at least semiannually which contain statistics regarding criminal sentences imposed in the state; and (f) studying how sentencing options affect various types of offenders and offenses.

8. In carrying out these responsibilities, it could be difficult for the staff of the new Bureau (1.0 director, 1.0 deputy director, 3.0 IT positions, and 3.0 program and planning analysts) to replace the Sentencing Commission in regards to: (a) its knowledge of Wisconsin criminal law; (b) its knowledge of the practical operation of Wisconsin's criminal justice system; (c) the various perspectives represented on the Commission in providing a balanced analysis of sentencing data; and (d) Commission resources to draw on in assessing possible costs associated with sentencing law changes.

9. On the other hand, until any recommended Bureau would be staffed it could be premature to assess its aptitude to undertake these transferred functions. In addition, Bureau staff could consult with individuals currently represented on the Sentencing Commission in carrying out its work.

10. The provisions of SB 40 would transfer Sentencing Commission data collection responsibilities to the recommended Bureau. Under the bill, it would now be the responsibility of

the Bureau to monitor and compile data regarding sentencing practices in the state. In addition, it would now be the responsibility of the Bureau to submit reports at least semiannually to all circuit court judges and to the Chief Clerk of each house of the Legislature, containing statistics regarding criminal sentences imposed in Wisconsin. Each report must have a different focus and need not contain statistics regarding every crime. Each report, however, must contain information regarding sentences imposed statewide and in each of the following geographic areas: (a) Milwaukee County; (b) Dane and Rock Counties; (c) Brown, Outagamie, Calumet, and Winnebago Counties; (d) Racine and Kenosha Counties; and (e) all other counties.

11. The provisions of the bill would also create a new reporting requirement for the recommended Bureau. Under SB 40, the Bureau would be required to prepare a report containing statewide statistics on standard sentences for each felony offense and how the standard sentences of each circuit court compare to the statistics on the sentences for its respective region and the state. The report would have to be distributed to the Governor, the Director of State Courts, and appropriate legislative standing committees no later than the first day of the 12<sup>th</sup> month after the bill's effective date, and biennially thereafter.

12. In a letter to the Co-Chairs of the Committee dated April 16, 2007, the Director of State Courts expressed concerns regarding this new reporting requirement. Court officials indicated that:

"Logically, one assumes greater detail provides better results. As the Sentencing Commission learned, this assumption often proves incorrect when analyzing data, as is the case with providing sentencing trends by individual courts. When an attempt is made to separate sentencing practices for each felony offense type by 72 different counties, the size of each data group quickly diminishes. There are a wide range of fact patterns seen by the courts for each felony offense type. The smaller sample sizes and wide range of fact situations produce less reliable results and can be very misleading."

13. In many smaller counties there might be very few convictions, even over a two-year timeframe, for many of the 584 separate felony offenses. As a result, the meaningfulness and appropriateness of comparing such a small number of convictions to other courts could be questioned. On the other hand, the Bureau could make efforts to caveat the data in its reports to address these concerns.

14. In the absence of the creation of a second court system database, it is anticipated that the data that would have to be compiled and analyzed by the Bureau would have to come from the circuit court automation programs (CCAP). Court officials indicate that CCAP was developed as a case management tool to permit county court staff to more efficiently manage and track the civil and criminal caseload of the circuit courts. As CCAP is a case management tool and not a sentencing information database, there is a significant amount of data that may be relevant to an analysis of sentences statewide that is not entered into the system because it is not relevant to the system's role to assist in the management of circuit court caseload. As a result, much of the testimony and introduced evidence regarding the commission of a crime is not entered into CCAP. A judge's detailed findings on various aggravating and mitigating factors that influenced the

sentence the defendant received are also not entered into CCAP. In addition, information provided to the court in pre-sentence investigation reports, as well as victim impact statements can influence the sentence a defendant receives in a particular case. Again, this information is not available in CCAP. [Pre-sentence investigation reports are prepared by Corrections in many felony cases and provide information on the crime and the offender's background and generally include a sentencing recommendation.] When determining a sentence, a court may also consider "read-in crimes." CCAP will note that there were "read-in-crimes" but does not provide any information on the nature of these crimes or how they were weighed by the court at sentencing.

15. Under the recommendations in the bill, no funding would be provided to the courts to modify CCAP to more broadly collect sentencing data. Much of the sentencing data may be difficult to summarize in small computer fields or check boxes. Court officials have expressed reservations as to whether CCAP could ever be re-programmed to serve as a sentencing database. Court officials have expressed the opinion that any such CCAP re-design effort would be costly. In addition, court staff has expressed the concern that such a system re-design to collect sentencing data would place an enormous additional workload on county court staff to enter sentencing data into the system. The recommendation under the bill provides no additional resources to county court staff to effectuate the collection of sentencing data.

16. Under the bill, there would likely be a need to provide for a data exchange between CCAP and the information technology system developed by OJA to receive and analyze the data. It should be noted, however, that there currently exists no business plan for development of an IT system at OJA to receive and analyze sentencing data.

17. In its recently completed audit of information technology projects, the Legislative Audit Bureau noted that state agencies have experienced a wide variety of difficulties in completing complex and costly IT projects within budget and as scheduled. These difficulties include: (a) inadequate planning, including underestimating a project's complexity and failing to adequately define the final desired functions of the program; (b) unanticipated costs; and (c) delays in implementation.

18. Concerns could be raised that there is a risk of project failure associated with the envisioned Bureau of Criminal Justice Research as: (a) required functionality of any OJA IT system to receive and analyze criminal data has not been developed; (b) the complexity of any required interface with CCAP has not been determined; and (c) an analysis of how CCAP may need to be modified has not been undertaken.

19. On the other hand, the administration indicates that, "Part of the responsibilities of the new bureau is the development of business requirements to direct data collection and data sharing efforts. It is imperative that professionals staffing the new bureau are involved in establishing these practices to ensure effectiveness and timeliness in getting the bureau off the ground. We recognize that establishing these requirements will be a very important step in establishing the bureau. Once the business requirements are documented, the staff can then document what needs to be delivered in terms of establishing the data warehouse and from that point develop a project plan on the steps and resources needed to achieve it."

20. The criminal penalty provisions of state law generally identify a maximum fine and incarceration period for each class of misdemeanor and felony created in statute. These criminal provisions permit the: (a) Legislature and the Governor to create a sentencing range for various criminal law violations to reflect their views of the severity of the various offenses; and (b) courts to consider the facts of each case when determining an appropriate sentence, including: (1) the relative gravity of the offense; (2) the impact of the crime on the victim; (3) the rehabilitative needs of the defendant; and (4) the defendant's history. When imposing sentence for a felony, a court must also consider any sentencing guidelines developed by the Sentencing Commission.

21. An important responsibility of the Sentencing Commission is to adopt advisory sentencing guidelines for felonies in order to: (a) promote public safety; (b) reflect changes in sentencing practices; and (c) preserve the integrity of the criminal justice and correctional systems. As a part of this responsibility, the Sentencing Commission is required to: (a) provide information to judges and lawyers about the sentencing guidelines; and (b) publish and distribute to all circuit court judges hearing criminal cases an annual report regarding its work, which must include all sentencing guidelines and all changes in existing sentencing guidelines adopted during the 12 months preceding the report.

22. The provisions of the bill would eliminate the Sentencing Commission and its responsibility to adopt these sentencing guidelines. If the Committee adopts this change, a technical amendment would also be necessary to eliminate the requirement that courts consider these sentencing guidelines when imposing a felony sentence.

23. Gubernatorial appointees, as well as representatives from both parties from both houses of the Legislature, represent 11 of the 18 votes on the current Sentencing Commission. These members help shape Commission recommendations regarding advisory sentencing guidelines for felonies. Under the provisions of the bill, the Governor and the Legislature would lose their role in shaping felony-sentencing guidelines (which courts are currently required to consider).

24. The Sentencing Commission provides the Governor and the Legislature a means to influence felony-sentencing policy, while still providing the courts discretion to consider the facts of each case when imposing sentence. As a result, the Committee could consider maintaining the Sentencing Commission and its role in adopting felony-sentencing guidelines.

25. On the other hand, the Committee could delete the Sentencing Commission, as the Governor and the Legislature would still have a role in felony sentencing through such means as the modification of fine or imprisonment length maximums for the various felony classifications.

26. It may be worth noting that under 1997 Wisconsin Act 283, the Legislature enacted legislation which abolished parole and instead created a "truth-in-sentencing" system. Act 283 also created a Criminal Penalties Study Committee. While the Criminal Penalties Study Committee recommended 6.0 GPR positions (1.0 GPR unclassified executive director, 1.0 GPR unclassified deputy director, and 4.0 GPR classified positions) to staff the Sentencing Commission, the Sentencing Commission received 2.0 GPR positions (1.0 executive director and 1.0 deputy director).

27. Under current law, the Sentencing Commission would sunset on December 31, 2007. In its place, the bill would provide \$1,044,300 GPR in 2007-08, \$1,308,100 GPR in 2008-09, and 8.0 GPR positions annually to create a Bureau of Criminal Justice Research in OJA. The new Bureau would be staffed with the following positions: (a) 1.0 director; (b) 1.0 deputy director; (c) 1.0 information technology manager; (d) 2.0 information systems business automation specialists; and (e) 3.0 program and planning analysts. Under the recommendation: (a) \$269,300 GPR and 2.0 GPR positions (the director and deputy director positions) annually would be transferred to OJA from the Sentencing Commission; (b) \$400,000 GPR in 2007-08, and \$538,800 GPR in 2008-09, would be provided to OJA to create 6.0 additional positions in the Bureau; and (c) \$375,000 GPR in 2007-08, and \$500,000 GPR in 2008-09, would be provided for hardware and software costs for the new Bureau.

28. In lieu of the recommendations under SB 40, the Committee could consider: (a) repealing the sunset of the Sentencing Commission; (b) restoring \$269,300 GPR and 2.0 GPR positions annually in base resources to the Sentencing Commission; and (c) providing \$775,000 GPR in 2007-08, and \$1,038,800 GPR in 2008-09, to the Joint Committee on Finance GPR supplemental appropriation for possible future release to the Sentencing Commission (the recommended GPR funding for the Bureau in addition to Sentencing Commission base resources). If the Committee places funding in its supplemental appropriation, the Sentencing Commission could submit a plan to the Committee regarding how it would utilize these resources to increase the number of felonies for which it provides sentencing recommendations or carry out its other responsibilities.

29. Alternatively, the Committee could consider adopting the recommendations of SB 40 to create a Bureau of Criminal Justice Research under OJA. This alternative would provide additional resources to expand the research and analysis of sentencing data.

30. Finally, the Committee could also consider maintaining current law. Under this alternative, the Sentencing Commission would sunset on December 31, 2007. The Committee could adopt this alternative with the expectation that the Legislature would analyze the work of the current Sentencing Commission, and consider how it wishes to proceed through separate legislation.

## **ALTERNATIVES TO BILL**

1. Approve the Governor's recommendations to: (a) eliminate the Sentencing Commission; (b) create a Bureau of Criminal Justice Research in the Department of Administration's Office of Justice Assistance (OJA); (c) delete the current law requirement that the Sentencing Commission adopt advisory sentencing guidelines for felonies; (d) transfer other Sentencing Commission duties to the Bureau; (e) require the Bureau to prepare a report containing statewide statistics on standard sentences for each felony offense and how the standard sentences of each circuit court compare to the statistics on the sentences for its respective region and the state; and (f) transfer the current law duty of OJA to the Bureau to serve as a clearinghouse of justice system data and information, and conduct justice system research and analysis.

ALT 1	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
GPR	\$0	0.00	\$1,813,800	6.00

2. Delete the current law requirement that circuit court judges must consider any felony sentencing guidelines developed by the Sentencing Commission when imposing sentence. *[This alternative may be selected in addition to Alternative 1.]*

3. Delete the provision and instead: (a) repeal the sunset provision for the Sentencing Commission of December 31, 2007; and (b) restore \$269,300 GPR and 2.0 GPR positions annually in base resources to the Sentencing Commission.

ALT 3	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
GPR	-\$1,813,800	- 6.00	\$0	0.00

4. Provide \$775,000 GPR in 2007-08, and \$1,038,800 GPR in 2008-09, to the Joint Committee on Finance GPR supplemental appropriation for possible future release to the Sentencing Commission to permit the Commission to increase the number of felonies for which it provides sentencing recommendations or carry out its other responsibilities. *[This alternative may be selected in addition to Alternative 3.]*

ALT 4	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
GPR	\$0	0.00	\$1,813,800	6.00

5. Delete provision. Under this alternative, the Sentencing Commission will sunset under current law on December 31, 2007.

ALT 5	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
GPR	-\$2,217,800	- 8.00	-\$404,000	- 2.00

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