



## Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

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May 26, 2009

Joint Committee on Finance

Paper #277

### **Bifurcated Sentence Modification (Corrections -- Sentencing Modifications)**

[LFB 2009-11 Budget Summary: Page 214, #4]

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#### **CURRENT LAW**

Under current law, felons sentenced to prison are given a bifurcated (two-part) sentence, under which a sentencing judge specifies an amount of time a convicted felon will serve in prison and an amount of time to serve in the community on extended supervision. The bifurcated sentencing structure is commonly known as "truth-in-sentencing."

An inmate may petition the sentencing court for release to extended supervision in the following incidences: (a) upon successful completion of the challenge incarceration program or the earned release program; (b) if certain conditions are met after serving 85% of the prison portion of the a sentence for a Class C to E felony; (c) if certain conditions are met after serving 75% of the prison portion of the sentence for a Class F to I felony; (d) for a crime other than a Class B felony, if the inmate is 65 years or older and has served at least five years of the prison portion of his or her sentence, or if the inmate is 60 years or older and has served at least ten years of the prison portion of his or her sentence; or (e) for a crime other than a Class B felony, if the inmate has a terminal condition.

#### **GOVERNOR**

Delete the provision that if certain conditions are met, an inmate may petition for release to extended supervision after serving 85% or 75% of the prison portion of the sentence ((b) and (c) summarized above). Instead, provide that the Department may modify an inmate's sentence and release the inmate to extended supervision if the person meets all of the following conditions: (a) the person is not serving time following a conviction for a felony assaultive crime; (b) the prison social worker or extended supervision agent of record has reason to believe that the person will not engage in assaultive activity if released; and (c) the release date is not more than 12 months before the person's extended supervision eligibility date. Require the

Department to promulgate rules for determining whether or not a bifurcated sentence should be modified.

Specify that, if the above conditions are met, the Department may modify the person's sentence. If the Department modifies the sentence, require the Department to notify the applicable court and district attorney's office. Specify that the Department must release the person within 30 days of modifying sentence, and must lengthen the term of extended supervision so that the total length of the sentence does not change.

In addition, modify current law to provide authority to the Department to modify certain older or terminally ill inmate's bifurcated sentence and release him or her to extended supervision, rather than the circuit court. Specify that the Department's decision may be appealed under judicial review. Specify that the venue to review a decision by the Department occur in the county where the person was last convicted of an offense or the county where the person is currently incarcerated. Specify that the provisions in this paragraph first apply to petitions that have not yet been referred by the Department's program review committee on the effective date of the bill.

## **DISCUSSION POINTS**

### **Current Law**

1. Current law provides for certain circumstances where an inmate may petition the court for modification of his or her bifurcated sentence. One circumstance is when an inmate, serving a sentence for a crime other than a Class B felony, meets one of the following criteria: (a) the inmate is 65 years of age or older and has served at least five years of the term of confinement of the bifurcated sentence; (b) the inmate is 60 years of age or older and has served at least 10 years of the term of confinement of the bifurcated sentence; or (c) the inmate has a terminal medical condition.

2. If an inmate meets one of the above criteria, he or she may petition the institutional program review committee requesting modification of the bifurcated sentence. The program review committee (PRC) is an institutional committee that reviews security classifications, institutional assignments, and programming for inmates. The PRC may deny the petition or may refer it to the sentencing court, if the committee determines that public interest would be served by modification of the sentence. If the petition is referred, the sentencing court is required to conduct a hearing, where the inmate has the burden of proving by the greater weight of the credible evidence that modification would serve public interest. If the inmate meets the burden of proof, the court is required to modify the inmate's sentence by releasing the inmate to extended supervision within 30 days after the date of the court issues its order. The term of extended supervision is lengthened so that the total length of the bifurcated sentence originally imposed does not change.

3. The state may appeal the court's decision to grant an inmate's petition to the appellate court. If the inmate's petition is denied, the inmate may appeal the decision. The appellate

court may reverse the decision only if it determines that the sentencing court erroneously exercised its discretion in granting or denying the petition.

4. Any petition that is denied by the PRC or court, may not be refiled within one year. Inmates eligible to seek modification have the right to be represented by counsel, including by the state public defender.

5. Another circumstance where an inmate may petition the court for modification of his or her bifurcated sentence is if: (a) the inmate has served at least 85% of the term of confinement for a Class C to E felony; or (b) the inmate has served at least 75% of the term of confinement for a Class F through I felony. Any one of the following is ground for a petition:

a. The inmate's conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since he or she was sentenced;

b. There was a change in law or procedure, effective after the inmate was sentenced, related to sentencing that would have resulted in a shorter term of confinement, if the change had been applicable when the inmate was sentenced;

c. The inmate is subject to a sentence of confinement in another state or the inmate is in the United States illegally and may be deported; or

d. The sentence adjustment is otherwise in the interested in justice.

6. A court may deny any petition it receives, or hold the petition for further consideration. If the court holds the petition for further consideration, the court must notify the district attorney of the inmate's petition. If the district attorney objects to adjustment of the sentence within 45 days of receiving the court's notification, the court must deny the petition. If the sentence is for certain sex offenses (second-degree sexual assault, third-degree sexual assault, second-degree sexual assault involving a person under 16 years of age, soliciting a child for prostitution, or sexual assault of a child placed in substitute care) and the district attorney does not object to the petition within 10 days of receiving notice, the district attorney is required to notify the victim of the offense of the inmate's petition. If the victim objects to the petition within 45 days of receiving notice, the court must deny the petition.

7. If the sentencing court does not receive an objection to the sentence adjustment, and the court determines that adjustment is in the public interest, the court may modify the sentence. If the sentence is modified the court must reduce the term of confinement by the amount of time remaining for confinement, less up to 30 days, and increase the term of extended supervision by the corresponding amount. If the court adjusts a sentence based on a change in law or procedure, and the total adjusted sentence length is greater than the maximum total sentence length that the inmate could have received under the change in law or procedure, the court may reduce the length of extended supervision so that the total adjusted sentence length does not exceed the maximum sentence length provided under the new law or procedure. If the adjusted term of extended

supervision is greater than the maximum term of extended supervision the inmate could have received under the change in law or procedure, the court may reduce the term of extended supervision so that the term does not exceed the maximum term.

### **Assembly Bill 75**

8. Assembly Bill 75 modifies the law related to modifications of sentences for inmates who are older or terminally ill by providing that the Department of Corrections, rather than the circuit court, receive and act on the petition. Under the bill, the Department's decision may be appealed under judicial review provided under Chapter 227 (Administrative Procedure and Review). The venue to review a decision by the Department would be the county in which the inmate was last convicted of an offense or the county where the person is currently incarcerated. The changes would first apply to petitions not referred by the program review committee on the effective date of the bill.

9. Related to sentence modifications for inmates having served 75% or 85% of the confinement portion of their sentences, the bill would delete these provisions. Instead, the bill would provide that the Department may release to extended supervision certain persons serving the confinement portion of their sentence if the person: (a) is not serving a sentence for a felony assaultive crime; (b) the prison social worker or extended supervision agent of record has reason to believe that the person will be able to maintain himself or herself while not confined without engaging in assaultive activity; and (c) the release to extended supervision date is not more than 12 months before the person's extended supervision eligibility date.

10. If the person meets the requirements for release to extended supervision, the Department may modify the person's sentence by reducing the term of confinement in prison in a manner that provides for the release of the person to extended supervision within 30 days after the date on which the Department modifies the sentence. The term of extended supervision must be lengthened so that the total length of the bifurcated sentence does not change.

11. If the Department modifies the person's sentence, the Department must notify: (a) the court that participated in the trial or that accepted the person's plea of guilty or no contest; and (b) the district attorney that participated in the trial or prepared for proceedings regarding the person's plea of guilty or no contest.

12. This provision, as with several other provisions in the bill, would modify current sentencing practices. It should be noted that a Legislative Council study committee, the Justice Reinvestment Initiative Oversight (JRIO) Committee, is currently working with the Council of State Governments on policy recommendations for revising Wisconsin's sentencing practices. The following section summarizes the work of the JRIO Committee thus far.

### **Justice Reinvestment Initiative Oversight Committee and Council of State Governments**

13. In 2008, Governor Doyle, Chief Justice Abrahamson, Senate President Risser, and

Assembly Speaker Huebsch requested technical assistance from the Council of State Governments (CSG) Justice Center to look at Wisconsin's criminal justice trends and develop policy options to avert spending on Corrections and reinvest in strategies to increase public safety. The CSG Justice Center administers the Justice Reinvestment Project, where CSG Justice Center staff "work closely with state policymakers to advance fiscally-sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer." In January, 2009, the Legislative Council established the Special Committee on Justice Reinvestment Initiative Oversight (JRIO Committee) to serve as the entity to which the CSG Justice Center reports.

14. The CSG Justice Center analyzed the state's criminal justice system, examining areas including crime, arrests, prison admissions, length of confinement and supervision time, probation and post-release supervision populations, recidivism rates, and behavioral health and unemployment. For a more detailed description of the work by the CSG Justice Center and the JRIO Committee, see budget paper #275, entitled "Sentence Adjustments for Class C through Class I Felonies."

15. Based on their analysis, the CSG Justice Center staff developed five policy recommendations focused on targeting resources and changing behavior. The CSG recommendations that appear to be relevant to the bifurcated sentencing modification are:

- **Maximum Term of Extended Supervision.** Amend statutory language to provide that the maximum term of extended supervision may not exceed 75% of the term of confinement, except for Class A, B, and C felonies, and sex offenses specified under the sex offender registry statute. Under current law, felony classifications provide for a maximum term of confinement and maximum term of extended supervision. Further, statutory language requires that the term of extended supervision not be less than 25% of the term of confinement set by the court. However, there is no corresponding requirement that the term of extended supervision not be more than a certain percentage of the term of confinement set by the court.

- **Risk Reduction Sentence.** Create a "risk reduction sentence," specifying that when a court sentences a person convicted of a felony to imprisonment in a state prison, the court may order the person to serve a risk reduction sentence if the court determines that a risk reduction sentence is appropriate and if the person agrees to: (a) cooperate in an assessment of the person's risk of reoffending; and (b) participate in any programming or treatment ordered by the Department to address issues raised in any risk assessment.

Require the Department to provide risk reduction programming and treatment for an inmate sentenced to a risk reduction sentence. Further, the Department must: (a) conduct a risk assessment to assess the person's risk of reoffending using a valid, reliable, and objective instrument; and (b) provide programming and treatment to the person to address risks and needs identified in the risk assessment.

If the Department determines that an inmate has successfully completed the assessment and treatment or programming required, the Department must release the inmate to extended

supervision after he or she has served 75% of the term of confinement portion of the sentence. The Department must notify the court at least 30 days before the inmate has served 75% of the term of confinement that the inmate successfully completed the requirements of the risk reduction sentence.

16. These recommendations are also relevant to another sentencing provision in AB 75 and are discussed in more detail in budget paper #275, "Sentence Adjustments for Class C through Class I Felonies."

17. While it appears that the above CSG recommendations do not directly conflict with the bifurcated sentencing modification, the cumulative effect of combining the recommendations with the AB 75 provision are not clear. Generally, the above CSG recommendations have the potential effect of shortening an offender's overall sentence, including time spent in prison, while the AB 75 provision provides for the potential for offenders to be released earlier from their sentences.

18. For example, under current law, an offender convicted of a Class G felony may be sentenced to a maximum of five years in prison and five years on extended supervision. Under the bill, if the bifurcated sentencing modification is applied, the offender could be released to extended supervision after serving four years in prison (provided he or she met the conditions for release), with extended supervision increasing to six years so the overall sentence length does not change. Under the CSG recommendations, the offender's extended supervision could not be set at more than 75% of his or her prison term (excluding sex offenses), so the offender's maximum sentence would be five years in prison and 3.75 years on extended supervision. Further, if the risk reduction sentence is applied, the offender's sentence would be 3.75 years in prison and 3.75 years on extended supervision. Applying the bifurcated sentencing modification to the CSG sentence, the offender could be released from prison after serving 2.75 years in prison, with extended supervision increasing to 4.75 years.

19. The work by CSG and the JRIO Committee have been independent and separate from the budget process and have not involved the sentencing modifications in the bill. There has been no indication of any intent either by the JRIO Committee or the Governor that the CSG recommendations and AB 75 provisions are meant to be combined and adopted together. Considering that the CSG recommendations and AB 75 provisions appear to have been intended to be adopted independently, and the potential for unintended interactions of combining them, the Committee may wish to remove the bifurcating sentencing modification from the bill. This would allow the JRIO Committee and CSG to continue to review and develop the policy recommendations without concern of potential conflicts with other new sentencing provisions. [Alternative 3]

20. Alternatively, if the Committee wished to pursue the bifurcated sentencing modification, the Committee could delay implementation of the provision for one year. This alternative would allow the Legislature time to conform any adopted CSG recommendations with the AB 75 provision, and allow the Department of Corrections time for planning and implementation of the modification. [Alternative 2]

## **ALTERNATIVES**

1. Approve the Governor's recommendation to allow the Department to modify an inmate's sentence and release the inmate to extended supervision if the person meets all of the following conditions: (a) the person is not serving time following a conviction for a felony assaultive crime; (b) the prison social worker or extended supervision agent of record has reason to believe that the person will not engage in assaultive activity if released; and (c) the release date is not more than 12 months before the person's extended supervision eligibility date. Require the Department to promulgate rules for determining whether or not a bifurcated sentence should be modified.

2. Specify that the effective date of the provision occurs one year after the day after publication of the bill.

3. Delete provision.

Prepared by: Chris Carmichael