SM-34 SENTENCING PROCEDURE, STANDARDS, AND SPECIAL ISSUES

This Special Material outlines the procedures and standards recommended for use at sentencing. It also discusses several issues of importance to sentencing.

CONTENTS

I. The Basic Requirements for the Sound Exercise of Discretion

In McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971), the Wisconsin Supreme Court held that a trial judge, when imposing a sentence upon a defendant, must on the record explain the reasons for the imposition of the particular sentence given as well as outline on the record the basic facts relied upon or taken into consideration during the sentencing deliberations.

As the McCleary court said at page 281, ". . . requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." The court then went on to say that a trial judge must ". . . state the facts on which he predicates his judgment, and . . . give the reasons for his conclusion."[1]

The sound exercise of discretion requires the consideration of a variety of factors (see the discussion at page 4, below). Of these, the primary factors "are the gravity of the offense, the character of the offender, and the need for protection of the public." Elias v. State, 93 Wis.2d 278, 286 N.W.2d 559 (1980). "In other words, a 'sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors.'" State v. Halbert, 147 Wis.2d 123, 128, 432 N.W.2d 633 (Ct. App. 1988), citing In re Judicial Administration: Felony Sentencing Guidelines, 120 Wis.2d 198, 201, 353 N.W.2d 793 (1984).

The sentencing court must not approach the sentencing "with an inflexibility that bespeaks a made-up mind," as shown by a trial court's statement that it never granted probation for drug offenses. State v. Halbert, supra at 128, citing State v. Martin, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981). Considering the sentencing decision before the sentencing hearing and reaching tentative conclusions about the sentence does not violate these principles. State v. Varnell, 153 Wis.2d 334, 450 N.W.2d 524 (Ct. App. 1989).

The cases attempting to articulate a rule against a "mechanistic sentencing approach," while technical to some extent, reflect an underlying sentencing principle of great importance. Making it clear that the sentencing court has considered all the facts of the individual case is extremely important to giving defendants, victims, and the public the sense that they have been treated fairly.

II. Sentencing Standards

A judge should always tailor the sentence to fit the particular circumstances of the case and the individual characteristics of the defendant. There are certain standards, however, which should be followed by the judge when deciding on a sentence.

A. The Minimum Amount of Confinement

In Neely v. State, 47 Wis.2d 330, 334, n. 8, 177 N.W.2d 79 (1970), and again in McCleary v. State, supra at 276, the Wisconsin Supreme Court quoted with approval Standard 2.2 of the ABA Standards Relating to Sentencing Alternatives and Procedures, which states:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.[2]

Further, in Bastian v. State, 54 Wis.2d 240, 247-49, n.1, 194 N.W.2d 687 (1972), the Wisconsin Supreme Court expressly adopted Standard 1.3 of the ABA Standards Relating to Probation:

> Criteria for granting probation.
> (a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.
> (b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.[3]

B. Repeal of the Wisconsin Sentencing Guidelines

Wisconsin employed a system of advisory sentencing guidelines from 1985 through 1995. 1995 Wisconsin Act 27 repealed the statutes that referred to the Sentencing Commission and the sentencing guidelines [§§ 15.104(17), 973.01, and 973.011-.012, 1993 Wis. Stats., were all repealed with an effective date: July 29, 1995.]

C. Factors to Consider

When imposing a sentence, judges should first outline on the record the basic facts taken into consideration in the sentencing deliberations. In State v. Tew, 54 Wis.2d 361, 367-68, 195 N.W.2d 615 (1972), the Wisconsin Supreme Court listed some of the factors which may be properly considered in sentencing:

- a past record of criminal offenses;
- a history of undesirable behavior patterns;
- the defendant's personality, character, and social traits;
- the results of a presentence investigation;
- the vicious or aggravated nature of the crime;
- the degree of the defendant's culpability;
- the defendant's demeanor at trial;
- the defendant's age, educational background, and employment record;
- the defendant's remorse, repentance, and cooperativeness;
- the defendant's need for close rehabilitative control; and
- the rights of the public.

Several additional factors have been recognized as appropriate considerations by case law or statutes:

- the effect of the crime on the victim (including rehabilitative needs);[4]
- the victim's statement (see § 972.14(3) discussed below);
- juvenile record;[5]
- read-ins;[6]
- false testimony during trial;[7]
- failure to name accomplice after disclosure of existence of co-conspirator;[8] and
- conduct relating to charges for which the defendant was acquitted.[9]

There are a number of factors that are not to be considered in imposing sentence:

- exercise of constitutional rights, such as the right to a trial,[10] the privilege against self-incrimination,[11] or the right to present a defense;[12]
- beliefs and associations protected by the First Amendment, unless a reliable connection is established between the criminal conduct and those beliefs and associations;[13]
- refusal to admit guilt;[14] and
- the amount of credit that will be due for pretrial confinement.[15]

The list of proper and improper factors suggests a potentially elusive distinction relating to the general proposition that it is proper to give favorable consideration to the remorse and cooperation that accompany a plea of guilty. The same principles that forbid penalizing the defendant for going to trial instead of pleading guilty, or for presenting a good faith, though unsuccessful, defense, are recognized as prohibiting the imposition of a harsher sentence solely because the defendant refuses to admit guilt. Thus, the defendant can be rewarded for showing remorse but is not to be penalized for refusing to admit guilt. This distinction was directly addressed by the Wisconsin Supreme Court in Scales v. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974). In Scales, the court acknowledged that a posttrial confession of guilt and an expression of remorse may be considered in mitigation of sentence but held that it does not follow that lack of remorse may properly be considered as a basis for an increased sentence. If the defendant has chosen to exercise the right against self-incrimination, the defendant may not be penalized for it, even after a jury's determination of guilt.[16]

D. Standards for Consecutive Sentences

Section 973.15(2) provides in part that "the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." Specific standards for deciding when sentences on multiple counts should be ordered to run consecutively to one another are not further addressed in the statutes and have not been adopted by the appellate courts. A summary of the law is provided in State v. Johnson, 178 Wis.2d 42, 51-2, 503 N.W.2d 575 (Ct. App. 1993):

> . . . [M]ore than fifteen years ago the supreme court "recommended" that the ABA standards for consecutive sentencing "be given consideration as a guideline" in Wisconsin. But the court has never pursued the matter further; indeed, it has repeatedly declined to adopt the standards. . . . [citations omitted]

> . . . thus, under existing law, whether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court's discretion.

There are a variety of technical constraints applicable to the imposition of consecutive sentences, most arising when periods of probation are also involved. Section 973.15(2)(a) provides that the court may provide that a sentence may be ordered to be consecutive "to any other sentence imposed at the same time or previously." Problems arise because ordering a term of probation has not been considered a "sentence." State v. Maron, 214 Wis.2d 384, 571 N.W.2d 454 (Ct. App. 1997); Prue v. State, 63 Wis.2d 109, 216 N.W.2d 43 (1974). Thus, for example, a term of imprisonment may not be made consecutive to a term of probation or to jail time served as a condition of probation. See State v. Maron, 214 Wis.2d 384, 394-5, and cases cited therein.

III. The Presentence Investigation Report

The presentence investigation report is not only of great value at sentencing, but also plays an important role after sentence is imposed. If the defendant is placed on probation, the report becomes the probation agent's primary source of information. The agent will use the report in determining what special conditions of supervision to impose and in determining what level of supervision is required. If the probationer violates the conditions of supervision, the information in the report may also influence the decision whether or not to pursue revocation proceedings.

If the defendant is sentenced to imprisonment or is incarcerated after probation revocation proceedings, the presentence report becomes part of the person's correctional treatment file and is consulted by corrections staff whenever decisions are made about how the person will serve the sentence and what the conditions of confinement will be. Decisions about security classification, institutional assignment, job assignment, and eligibility for educational, vocational, and treatment programs, are made with reference to the presentence report.

Perhaps most importantly, the presentence report becomes part of the file consulted by the parole board when parole release decisions are made. Even after the person is released on parole, the report may be used by the parole agent in determining conditions of parole, the level of supervision, and the need for pursuing revocation proceedings.

A defendant has the due process right to be sentenced on the basis of true and correct information and the presentence report is the primary means of communicating this information to the court. But neither due process nor the right to counsel under the 5th or 6th Amendment requires that counsel be allowed to be present when the defendant is interviewed by the presentence preparer. State v. Perez, 170 Wis.2d 130, 487 N.W.2d 630 (Ct. App. 1992) [re: a due process claim]; State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App.), cert. denied, 464 U.S. 834 (1983) [re: a 5th and 6th Amendment claim].

A. When to Order a Presentence Report

Wis. Stat. § 972.15(1) provides that after conviction, the court may order a presentence investigation, "except that the court may order an employe of the department to conduct a presentence investigation only after a conviction for a felony." Although this statute gives a trial court discretion not to order a presentence report in any particular case, the Wisconsin Supreme Court has urged and encouraged trial courts to use this sentencing aid. See Bruneau v. State, 77 Wis.2d 166, 174, 252 N.W.2d 347 (1977). The ABA Standards for Criminal Justice call for a presentence investigation and report in the following circumstances:

> . . . where incarceration for one year or more is a possible disposition, where the defendant is less than twenty-one years old, or where the defendant is a first offender, unless the defendant or defense counsel waives production of the report and the court specifically finds that it has sufficient information to exercise the discretion accorded to it.

Standard 18-5.1(b).

B. Defense Access to the Presentence Report

Section 972.15(2) provides:

> When a presentence investigation report has been received the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.

There has been disagreement about whether this statute required that the presentence report be personally disclosed to the defendant. Counsel clearly had the obligation to review the report with the defendant, but in some courts there was reluctance to disclose the report for the defendant's direct review. This situation has been clarified by the decision of the Wisconsin Court of Appeals in State v. Skaff, 152 Wis.2d 48, 447 N.W.2d 84 (Ct. App. 1989). The court held that § 972.15(2) should not be read to deny access to the represented defendant: "the legislature could not have intended that a defendant appearing without counsel had greater rights to his PSI than a defendant who appeared with counsel." 151 Wis.2d 48, 57. The court went beyond the statutory grounds, however, to hold that access is guaranteed by constitutionally-based due process considerations: "to deny Skaff timely access to his PSI, pursuant to court order, is to prejudicially deny him an essential factor of due process, i.e., a procedure conducive to sentencing based on correct information." 151 Wis.2d 48, 57.

The importance of defense review of the presentence report was emphasized in State v. Anderson, 222 Wis.2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998), where a case was remanded to the trial court for resentencing based on ineffective assistance of counsel:

> . . . Anderson disputed the important and relevant portions of PSI. Having done that, it was trial counsel's further duty to see that the accuracy of those matters was fully resolved by a proper hearing. Counsel did not do this. As a result, the trial court relied on certain of these disputed portions of the PSI without first resolving the accuracy of the allegations. We hold that Anderson was prejudiced by this process.

C. Discovering Errors in the Report

Defense counsel will often bring alleged errors in the report to the court's attention. If that is not done, the Committee believes that the court should ask counsel whether any errors were discovered. It should be counsel's responsibility to review the report carefully and thoroughly with the defendant to determine whether it contains errors that could be prejudicial to the defendant either at sentencing or in the correctional process.

D. Correcting the Inaccurate Report

If the importance of the presentence report after sentencing is acknowledged, and if one purpose of allowing the defendant access to the report is to afford the chance to discover and correct inaccuracies, it follows that any errors found in the report should be corrected. It may require some care and follow-through to assure that corrections are actually made. A simple statement from the court that certain information is in error and will not be relied upon is usually not sufficient to achieve actual correction of the report. Multiple copies are likely to be in existence and it may be advisable for the court to order directly that all copies be corrected in the manner designated by the court.

IV. Explaining the Sentence; a Suggested Format

A. In General

Before pronouncing sentence, the court must make two inquiries relating to the rights of victims at sentencing: the inquiry of the district attorney described in § 972.14(2m); and a determination whether a victim wishes to make a statement to the court. These obligations are discussed in Section V., below.

Pronouncing sentence typically begins by setting forth the factors considered on the record; the judge should then, based on these facts, explain and give reasons for the type of sentence or custody imposed upon the defendant. Ordinarily, the type of sentence or custody will consist of either probation, a fine, common jail confinement with or without Huber privileges, or imprisonment. The judge should explain why the type of sentence or custody imposed is deemed appropriate and why a less severe sentence is considered inappropriate.

Lastly, the judge should explain and give reasons for the length or duration of the custody imposed and the amount of the fine if a fine is part of the disposition. For example, if a maximum prison sentence is imposed, the judge should explain why the maximum sentence is appropriate and why a sentence of a lesser number of years is considered inappropriate. The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of lesser duration.

B. A Sentencing Format

The Committee believes that the requirements relating to the sound exercise of sentencing discretion can be carried out effectively if a format like the following is used to explain the court's sentencing decision.

Judges often rely on notes in preparing for sentencing and in articulating the rationale for the sentence imposed. Parties are not entitled to access to these notes in the context of postconviction proceedings.[17]

Before pronouncing sentence, the court should have made the inquiry of the district attorney described in § 972.14(2m) and ascertained whether a victim wishes to make a statement [discussed below]. The defendant and defense counsel should have reviewed the presentence report and the court should have asked whether there are any errors in the presentence report or any omissions of significant material. The oral pronouncement of sentence should then include the following:

1. Identify the offense or offenses for which sentence is to be imposed.
2. Identify the maximum penalty, including any penalty enhancers.
3. Identify the recommendations of the prosecutor, defense counsel, and the presentence report.
4. Identify information relating to impact of the crime on the victim.
5. Explain the general objectives that a criminal sentence may address:
   - protection of the community
   - punishment
   - rehabilitation of the defendant
   - deterrence of others
6. Identify the general objectives of greatest importance in this case.
7. Identify the factors that were considered in arriving at the sentence and indicate how they influenced the decision.
8. If probation is rejected, indicate why.
9. Conclude with the statement that based on all these factors, the designated sentence is imposed, stating clearly:
   - what the term of years is
   - how the sentence relates to other sentences imposed at the same time or previously (concurrent or consecutive)
   - the number of days sentence credit due under § 973.155
10. Inform the defendant of the restrictions on firearm possession under § 941.29.[18]
11. If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034[19] and sex offender reporting requirements under § 973.048.[20]
12. Advise the defendant of the right to seek postconviction relief.[21]

At the conclusion of the sentencing proceeding, the court should assure that the judgment of conviction accurately reflects the sentence imposed.

C. A Sample Sentencing Pattern

The following is a sentencing pattern that, in the Committee's judgment, employs a logical and complete sequence in covering all the essential steps in the sound exercise of sentencing discretion.

In the case of State versus _____, Case No. _____, the defendant has been convicted of the crime of _____ upon a (guilty verdict by the jury) (trial by the court) (plea of guilty). Defendant is now before the court for the purposes of sentencing.

The maximum penalty for _____ is _____. The presentence author recommends _____. The defendant requests _____.

On sentencing the following witnesses for the state appeared: _____ _____. The following witnesses for the defense appeared: _____ _____. (Identify letters or other material submitted to the court.) (Identify information relating to impact of the crime on the victim.) (No corrections to the presentence report were noted.) (Corrections to the presentence report are as follows: _____.)

(State summary of the offense.)

In deciding the defendant's sentence (disposition), the court considers the following:

(A) Seriousness of the offense
1. Dangerousness – actual/potential
2. Injuries
3. Effects of the crime – temporary/permanent
4. Amounts involved

(B) Character of the defendant
1. Age, education, and health of defendant
2. Record – juvenile record, adult record, and pending charges
3. Status – married, children
4. Demeanor, remorse, personality, truthfulness (defendant as a witness)

(C) Needs of society
1. Is defendant good risk?
2. Does community need protection?
3. Deterrent effect of sentence
4. Moral need for punishment

(a) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate period not more than _____ years, or
(b) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate term not more than _____ years, stayed for _____ years during which time you are on probation with the following terms.
(c) Sentence is withheld and you are hereby placed on probation for a period of _____ years under the following conditions.

Fine, if any, costs, and surcharges.

_____ is entitled to sentence credit under § 973.155 in the amount of _____ days. _____ is ordered to pay restitution in the amount of _____.

For felonies, advise the defendant that § 941.29 makes it a Class E felony for a person convicted of a felony to possess a firearm.[22]

If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034 and sex offender reporting requirements under § 973.048.[23]

Advise on the right to seek postconviction relief.[24]

V. Victim Participation in Sentencing

Considering the impact of the crime on the victim and allowing the victim to address the court are mandatory. Article I, § 9 of the Wisconsin Constitution provides in part that "This state shall ensure that crime victims have . . . the opportunity to make a statement to the court at disposition. . ." This right is implemented by two statutes imposing obligations on the court. One obligation is to inquire of the district attorney; the other obligation is to determine whether victims wish to provide information to the court.

A. Obligation to Inquire of the District Attorney

This obligation is imposed by § 972.14(2m), which reads as follows:

> Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing.

The reference to "s. 971.095(2)" is to the general duty of the district attorney to offer all victims "who have requested the opportunity an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations." The reference to "sub. (3)(b)" is to § 972.14(3)(b), which requires the district attorney to "make a reasonable attempt" to contact victims and inform them of their right to make a statement at sentencing.

Complete compliance with these obligations can, in the Committee's judgment, be achieved by asking the following questions of the district attorney:

- whether he or she has complied with the victim notice and consultation law – § 971.095(2); and

- whether he or she has made a reasonable attempt to contact victims of a crime to be considered at sentencing* to inform them of their right to make a statement in court or to submit a written statement to be read in court. [As required by § 972.14(3)(b)]; and

- whether any of the victims of a crime to be considered at sentencing requested notice of the date, time, and place of the sentencing hearing; and, if so,

- whether he or she provided to the victim notice of the date, time, and place of the sentencing hearing.

*"Crime considered at sentencing" is defined in § 972.14(1)(ag) as "any crime for which the defendant was convicted and any read-in crime. . . ."

B. Court Determination Whether Victims Wish to Provide Information

The second obligation is imposed by § 972.14(3)(a), which provides:

> Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the sentence.

Compliance with this obligation can, in the Committee's judgment, be achieved by addressing all those present in the courtroom and:

- asking whether any victim of a crime considered at sentencing wants to make a statement to the court; and

- stating that if a victim wants to make a statement, the court will allow an oral statement in court or the submission a written statement.

The application of § 972.14(3)(a) was originally limited to felony cases; that restriction was repealed by 1995 Wisconsin Act 77 [effective date: July 1, 1996].

Subsection (1)(b) of § 972.14 provides a cross-reference for the definition of "victim." "Victim" has the meaning provided in § 950.02(4), which is: "a person against whom a crime has been committed."

As the statute clearly states, the victim (or the victim's family member in a homicide case) must be allowed to make a statement at sentencing. The only limitation on the statement is that the statement must be relevant to the sentence. One type of information that appears clearly to be relevant is that relating to the impact of the crime on the victim or the victim's family.

First, "the vicious or aggravated nature of the crime" has long been considered to be one of the factors properly considered at sentencing. State v. Wells, 51 Wis.2d 477, 187 N.W.2d 328 (1971).

Further, several statutes allow, or even require, the court to consider victim impact information. One of the specified rights in § 950.04, titled, "Basic Bill of Rights for Victims and Witnesses," is that found in subsection (2m):

> To have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim of a felony and have the information considered by the court.

This right is implemented by two other provisions. Section 972.15, relating to the presentence report, includes subsec. (2m), which reads as follows:

> The person preparing the presentence investigation report shall attempt to contact the victim to determine the economic, physical and psychological effect of the crime on the victim. The person preparing the report may ask any appropriate person for information. This subsection does not preclude the person who prepares the report from including any information for the court concerning the impact of a crime on the victim.

The implementation is completed by subsec. (4) of § 973.013, which provides that "[i]f information under § 972.15(2m) has been provided in a presentence investigation report, the court shall consider that information when sentencing the defendant."

It is possible for sentencing proceedings to become highly emotional and for victim impact statements to contribute to that situation. To minimize potential problems, it may be helpful to remind those speaking on the victim's behalf that their comments are to be directed to the court, not to the defendant, and are to be delivered with due respect to the dignity and formality of the proceedings.

Consideration of victim impact information was challenged in State v. Horn, 126 Wis.2d 447, 461 (1985), where the defendant characterized it as "irrelevant, inflammatory and prejudicial." The court of appeals held there was no abuse of discretion in considering the victim impact information, noting that it is specifically authorized by § 972.15. Also see State v. Jones, 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989), holding that it is appropriate to consider the "rehabilitative needs of the victim" in imposing sentence. It is not error for the presentence report to go beyond impact information and refer to victims' wishes as to the specific sentence to be imposed; but, like recommendations from other sources, they will be accepted only if the court "can independently conclude that the recommended sentence is appropriate in light of the acknowledged goals of sentencing as applied to the facts of the case." State v. Johnson, 158 Wis.2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990).

The United States Supreme Court has considered the use of victim impact information in two death penalty cases. In Booth v. Maryland, 482 U.S. 496 (1987), the court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. Booth was overruled in Payne v. Tennessee, 501 U.S. 808 (1991):

> Victim impact statement is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing

> authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. . . .
>
> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

The Booth decision had not been applied to noncapital cases by the United States Supreme Court and the Wisconsin Court of Appeals has explicitly declined to extend Booth to noncapital cases. See State v. Scherreiks, 153 Wis.2d 510, 451 N.W.2d 759 (Ct. App. 1989). With its overruling by Payne, the Booth rationale clearly has no application to Wisconsin sentencing practice.

VI. The Defendant's Presence and Right to Allocution

Section 971.04(1)(g) provides that the defendant shall be present at "the pronouncement of judgment and the imposition of sentence." In State v. Koopmans, 210 Wis. 2d. 670, 563 N.W.2d 528 (1997), the court held that this provision is mandatory and nonwaivable in felony cases. It requires the defendant's presence at sentencing even if the defendant was present at the beginning of the trial but was voluntarily absent without permission of the court thereafter. See § 971.04(3). Subsection (2) of § 971.04 allows a defendant in a misdemeanor case to be excused from attendance at any or all stages of the proceedings, including sentencing. But the misdemeanor defendant may be excused only "with leave of the court," indicating this is a discretionary decision on the part of the trial judge.

Section 972.14(2) provides that before pronouncing sentence, the court shall afford the "defendant an opportunity to make a statement with respect to any matter relevant to sentence." It is important to afford defendants this right because it may be the only time during the entire proceeding when they have the chance to relate their side of the story. Along these lines, courts should be alert for statements made during "allocution" that may indicate that a guilty plea was not knowingly made. For example, assume that a defendant who has entered a guilty plea to burglary as a party to the crime states at sentencing that he should be given some leniency because he was asleep in the back seat of the car at the time of the crime and did not know his friends planned to commit a burglary. This indicates that the defendant did not understand the facts necessary to constitute the crime of burglary and casts doubt on the validity of the plea. This should have come up at the time the plea was accepted, but the opportunity for allocution may lead defendants to be more forthcoming about how their actions match up with the charge, and courts should be alert for statements at sentencing that cast doubt on the plea.

VII. Sources and Accuracy of Information

Subject to the general limitation that proper factors be considered, the sentencing court may rely on a broad range of information. Two of the potential problems that may arise represent opposite sides of the same coin: attempts by the parties to withhold information and attempts by nonparties to bring information to the judge's attention. An additional question is whether unconstitutionally obtained evidence may be considered.

A. Information from Nonparties

Recent developments emphasize the propriety of affording the victim a chance to be heard at sentencing, but what about unsolicited advice from persons not directly concerned with the criminal case? A common manifestation of this problem is the correspondence people sometimes direct to the sentencing court. The Committee recommends that all correspondence of this type be filed and disclosed to the prosecutor and defense. The court should clearly indicate whether or not the information was relied on when sentence is imposed.

B. Plea Agreements Relating to Sentencing Information or Advocacy

Plea agreements relating to sentence recommendations are apparently quite common. For example, the defendant may agree to plead guilty to a crime with a 10-year maximum penalty in return for the prosecution agreement to recommend a sentence of 5 years. These agreements are considered to be legitimate as long as the defendant understands that the prosecutor's recommendation is not binding on the sentencing judge.

Recent Wisconsin cases illustrate a related type of plea agreement, one where the prosecutor agrees "not to oppose" a particular sentence or "to remain silent" at sentencing. The danger with these agreements is that they may result in concealing from the sentencing judge information which is highly relevant to sentencing. Wisconsin appellate courts have made it clear that it is improper to conceal relevant information from the sentencing judge and that plea agreements which purport to do so are invalid because they are contrary to public policy. A recent case illustrating this situation is State v. McQuay, 154 Wis.2d 116, 452 N.W.2d 377 (1990) [reversing 148 Wis.2d 823, 436 N.W.2d 905 (Ct. App. 1989)]. McQuay entered an "Alford" plea to 5 counts of sexual assault. The plea agreement called for the dismissal of 24 other sexual assault charges and further provided that they would not be considered at sentencing. The presentence report, however, contained 10 pages of information on the dismissed charges. The sentencing judge said he did not consider the 24 other charges, but noted that if he could "there wouldn't be enough years for this Court to give you." McQuay challenged the sentence on appeal, claiming the plea agreement was breached when the presentence report contained information on the dismissed charges. The court of appeals vacated the judgment on the grounds that the plea agreement not to reveal relevant information to the sentencing judge was void – it is "against public policy and cannot be respected by the courts." 148 Wis.2d 823, 826.

The Wisconsin Supreme Court reversed, disagreeing with the factual conclusion that the agreement had called for withholding information from the judge. The supreme court read the agreement as a promise by the prosecutor to recommend to the sentencing court that it not consider the dismissed counts in imposing sentence. As such, it was a valid agreement and was not breached. The supreme court did not disagree with the court of appeals' legal conclusion that an agreement to withhold information is void as against public policy.

State v. Jorgensen, 137 Wis.2d 163, 404 N.W.2d 66 (Ct. App. 1987), illustrates the same problem with respect to a plea agreement that called for the state to "remain silent" at sentencing. At the sentencing hearing, the prosecutor interrupted defense counsel to call attention to a "factual discrepancy" in defense counsel's description of the facts of the offense. The court of appeals found that this statement was not a breach of the plea agreement and also held that any plea agreement that would call for the prosecutor to remain silent, regardless of the accuracy of statements made at sentencing, would be unenforceable as violating public policy. [Also see State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987): plea agreement to remain silent was not breached when state corrected the defendant's misstatement about the disposition of a codefendant's case.]

The general rule is clear: the parties cannot agree to limit the information the sentencing judge will consider.

Another problem with agreements calling for the prosecutor to remain silent is the difficulty in determining whether the agreement is complied with when information is provided by another government-related source. For example, what if the prosecutor remains silent but the presentence report recommends a harsh sentence? This problem may relate more directly to withdrawal of a guilty plea than to imposition of sentence, but the sentencing court should be alert to indications that this problem may exist.

C. Considering Unconstitutionally Obtained Evidence

In State v. Rush, 147 Wis.2d 225, 432 N.W.2d 688 (Ct. App. 1988), the court of appeals held that evidence suppressed because it was seized in violation of the 4th Amendment may be considered at sentencing. "We see no basis for a claim that consideration of the suppressed evidence at sentencing will inspire or encourage illegal searches. . . . Applying the exclusionary rule to sentencing would also unduly restrict a trial court's access to a broad range of evidence in determining a proper sentence." 147 Wis.2d 225, 230.

A leading federal case, however, indicates that there may be situations where the Fourth Amendment exclusionary rule might be applied to sentencing. In Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), the court excluded illegally seized evidence at sentencing because the illegal search was conducted after the regular criminal investigation was finished for the purpose of finding contraband and enhancing the possibility of a heavier sentence. LaFave, Search and Seizure, § 1.6(f), p. 137 (West 1987).

It is not clear whether the Rush rule would be applied to statements obtained in violation of the 5th or 6th Amendment. There may be two aspects to this problem. The first question is whether the 5th or 6th Amendment limits on interrogation apply to presentence interviews conducted to obtain sentencing information.

In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court held that Miranda and the 6th Amendment required that a defendant be given warnings and enjoy the assistance of counsel at a psychiatric interview later used against the defendant at the penalty phase of a death penalty trial. In State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App. 1983), the defendant argued that Estelle requires the presence of counsel under the 6th Amendment and Miranda warnings at an interview preceding the preparation of the presentence report.

On the Miranda issue, the court of appeals distinguished Estelle and concluded that warnings are not necessary.

> Unlike the situation in Estelle, the purpose of a presentence investigation is not to generate evidence to be used by the state in proving an essential element of its case against the accused. Rather, presentence reports are designed to gather information concerning a defendant's personality, social circumstances and general pattern of behavior, so that the judge can make an informed sentencing decision. The interview does not involve the accusatorial atmosphere characterized by the stationhouse confrontation in Miranda or the psychiatric examination on "future dangerousness" at issue in Estelle. Therefore, the Miranda safeguards should not be required.

111 Wis.2d 380, 386.

Knapp's argument based on the 6th Amendment right to counsel was also rejected, the court holding that Estelle did not require the presence of counsel, just the opportunity to get advice before the interview occurred.

Therefore, under Knapp, there can be no 5th or 6th Amendment violation at a presentence interview. There would be no grounds for arguing that an exclusionary rule based on the 5th or 6th Amendment could apply at the sentencing stage with respect to statements made during the presentence interview.

A second question is whether statements obtained outside a presentence interview, such as during a regular pretrial interrogation session, are admissible at sentencing if obtained in violation of 5th or 6th Amendment rights. Neither the United States Supreme Court nor the Wisconsin appellate courts have decided this question. Estelle v. Smith held that using such statements at sentencing was unconstitutional because they did incriminate the defendant in the sense of determining his punishment. Of course, Estelle v. Smith was a capital case, an important distinction that has been the basis for rules limited to the death penalty context.

VIII. Denying and Setting Parole Eligibility

There are three situations where a sentencing court is required or allowed to deny parole eligibility or to set a later parole eligibility date than called for by the generally applicable statute. This authority relates only to the "eligibility" date, that is, the date when the defendant may first be considered for parole release. The date of actual release on parole will continue to be determined by the Parole Commission.

A. Denying Parole for a "Persistent Repeater" – § 939.62(2m)

"Persistent repeater" is the term used to refer to those who are subject to imprisonment without the possibility of parole. The term originally applied only to those covered by the Wisconsin "three strikes" provision; 1997 Wisconsin Act 326 added certain offenders who have two convictions for certain child sex offenses.[25]

Subsection (2m)(a)2m. of § 939.62, originally enacted as part of the original "three strikes" provision, identifies the crimes that are considered to be "serious felonies." Subsection (2m)(b)1. provides that a person is a "persistent repeater" if he or she "has been convicted of a serious felony on 2 or more separate occasions at any time preceding the serious felony for which he or she presently is being sentenced. . . ."

Subsection (2m)(a)1m. of § 939.62, created by Act 326, identifies the crimes that are considered to be "serious child sex offenses." Subsection (2m)(b)2. provides that a person is a "persistent repeater" if he or she "has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced. . . ."

If the person qualifies as a "persistent repeater" under either of these standards, the sentence for the serious felony or serious child sex offense for which he or she is presently being sentenced "is life imprisonment without the possibility of parole." § 939.62(2m)(c).

The constitutionality of the statute's original "three strikes" provisions was upheld in State v. Lindsey, 203 Wis.2d 423, 554 N.W.2d 215 (Ct. App. 1996).

The "persistent repeater" allegation must be included in the charging document and proven in the same manner as a regular repeater allegation. See, § 973.12(1). If it is properly alleged and proven, the sentence of life without parole is mandatory; there is no exercise of discretion on the part of the sentencing court.

Even though the life without parole sentence is mandatory, the defendant must still be accorded the statutory right to allocution. State v. Lindsey, 203 Wis.2d 423, 446.

B. Setting Parole Eligibility in Class A Felonies – § 973.014

The authority for setting the parole eligibility date for persons convicted of Class A felonies was created by 1987 Wisconsin Act 412, with an effective date of July 1, 1988. The primary provision is § 973.014,[26] which, as amended by 1995 Wisconsin Act 48 provides as follows:

> 973.014 Sentence of life imprisonment; parole eligibility determination; extended supervision eligibility determination. (1) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under § 304.06(1).
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in § 304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under § 304.06(1).
>
> (c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995, but before December 31, 1999.
>
> . . .
>
> (2) When a court sentences a person to life imprisonment under s. 939.62(2m)(c), the court shall provide that the sentence is without the possibility of parole or extended supervision.[27]

Subsection (1)(c) was created in 1995 to make it clear that a court could flatly deny parole eligibility. The original version of § 973.014 lacked a grant of that specific authority; the Wisconsin Court of Appeals held that the sentencing court was required to set a date certain and could not deny eligibility outright. State v. Setagord, 187 Wis.2d 340, 523 N.W.2d 124 (Ct. App. 1994). On remand in the Setagord case, the sentencing court then set a parole eligibility date that exceeded the defendant's life expectancy. A second appeal followed. The Wisconsin Supreme Court held that "§ 973.014(1)(b) unambiguously grants the circuit court discretion to impose a parole eligibility date beyond a defendant's expected lifetime." State v. Setagord, 211 Wis.2d 397, 565 N.W.2d 506 (1997). With the creation of sub. (1)(c) courts can now provide that a sentence is to be without the possibility of parole and need not resort to the strategy of setting a date that the defendant could not be expected to reach.

Subsection (2) refers to the sentencing of "persistent repeaters" under § 939.62(2m), which requires a mandatory sentence of life imprisonment without the possibility of parole. ["Persistent repeater" is the formal title for Wisconsin's "three strikes" law.]

Section 973.014 is silent regarding criteria for making the parole eligibility decision. The Wisconsin Supreme Court has held that the "factors that a sentencing court considers when imposing a sentence are the same factors that influence the determination of parole eligibility." State v. Borrell, 167 Wis.2d 749, 774, 482 N.W.2d 883 (1992), cited with approval in State v. Setagord, 211 Wis.2d 397, 416, 565 N.W.2d 506 (1997). Thus, it appears to the Committee that a court should refer to the regular criteria applicable to sentencing and try to relate them to the period of time that ought to elapse before the defendant sees the parole board rather than to the usual questions of prison or probation and, if prison, how long a term.

Note that the statute requires a specific finding in every Class A felony case. Unless the court orders that the defendant shall not be eligible for parole under sub. (1)(c), a determination must be made that parole eligibility will be as provided in § 304.06(1) or that eligibility will be at a later date than would be provided by following § 304.06(1). Section 304.06(1) establishes regular parole eligibility for a

Class A felony at about 13 years, 4 months – 20 years, less the 1/3 reduction under § 302.11(1) (for what used to be called "good time").

Credit for presentence confinement under § 973.155 is not required to be awarded against a parole eligibility set by the court under § 973.014. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 223 (Ct. App. 1993). State v. Seeley, 212 Wis.2d 75, 567 N.W.2d 897 (Ct. App. 1997).

C. Setting Parole Eligibility in "Serious Felonies" – § 973.0135

A provision similar to § 973.014 is found in § 973.0135, Sentence for certain serious felonies; parole eligibility determination. This provision requires the court to set a parole eligibility date for certain offenders in other than Class A felonies. The statute applies to a person who is being sentenced for a "serious felony" and who has previously been convicted of a "serious felony" and sentenced to more than one year of imprisonment. Crimes that qualify as a "serious felony" are specified in sub. (1)(b). They are the same as those specified as "serious felonies" under § 939.62(2m)(a)2m. for purposes of the "persistent repeater" or "three strikes" law.

Section 973.0135 applies to sentences imposed for crimes committed on or after April 21, 1994, and requires the court to make a parole eligibility determination by choosing one of two options set forth in sub. (2):

> (a) The person is eligible for parole under s. 304.06(1).
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06(1) and may not set a date that occurs later than two-thirds of the sentence imposed for the felony.

This section does not apply if the current "serious felony" is a crime punishable by life imprisonment; in that situation, § 973.014 will apply. The effect of § 973.0135(2)(b) is to allow a court to set a parole eligibility date that falls at a point after the regular eligibility date [25% of the sentence imposed] and not later than the date for mandatory release [two-thirds of the sentence imposed]. Regardless of the action taken by the sentencing court as to parole eligibility, persons convicted of a "serious felony" are now subject to only a "presumptive" mandatory release date. The parole commission decides whether to deny presumptive mandatory release. See § 302.11(1g)(b).[28]

IX. Stay of Execution of Sentence

Section 973.15(8) specifies the situations where execution of a sentence may be stayed:

> (8) (a) The sentencing court may stay execution of a sentence of imprisonment or to the intensive sanctions program only:
>
> 1. For legal cause;
> 2. Under § 973.09(1)(a); or
> 3. For not more than 60 days.
>
> (b) If a court sentences a person under s. 973.03(5)(b), this subsection applies only to the first period of imprisonment.

"Legal cause" under sub. (a)1. has been interpreted to mean for the purpose of allowing the defendant to pursue within the Wisconsin court system some relief against the sentence or conviction. Reinex v. State, 51 Wis. 152 (1881); Weston v. State, 28 Wis.2d 136, 135 N.W.2d 820 (1965). A stay to allow the defendant's release while a federal habeas corpus petition is pursued is not authorized in Wisconsin. State v. Shumate, 107 Wis.2d 460, 319 N.W.2d 834 (1981).

The "for legal cause" basis for staying execution of sentence was applied in State v. Szulczewski, 216 Wis.2d 494, 574 N.W.2d 660 (1998), in a case where a person already subject to a commitment as not guilty by reason of mental disease or defect was convicted of a crime and faced criminal sentencing. The trial court sentenced the person to five years in prison and ordered that the sentence begin immediately, concluding that immediate commencement of the criminal sentence was required by § 973.15. The supreme court held that the commitment could provide "legal cause" for stay of execution of sentence under § 973.15(8)(a)1. The sentencing court may exercise discretion in determining whether to stay execution of the new prison sentence, balancing the purposes of the commitment with the traditional purposes of criminal sentencing: deterrence, rehabilitation, retribution, and segregation.

Subsection (a)3. was created in response to State v. Braun, 100 Wis.2d 77, 301 N.W.2d 180 (1981), which held that in the absence of special statutory authorization, Wisconsin courts lacked authority to grant a delay to allow a defendant to put his affairs in order. Subsection (a)3. apparently authorizes that type of stay, although it would be limited to 60 days. The Attorney General has advised that it is not permissible to stay a jail sentence beyond the 60 day limit recognized in sub. (a)3. because of jail overcrowding. OAG 39-87, July 13, 1987.

X. Resentencing After a Successful Appeal

In State v. Carter, 208 Wis.2d 142, 560 N.W.2d 256 (1997), the Wisconsin Supreme Court clarified the standard that applies when it is necessary to resentence a defendant who has successfully appealed the initial conviction or sentence. A sentencing court in that situation is to "consider all information relevant about a defendant, including information about events and circumstances either that the sentencing court was unaware of at the initial sentencing or that occurred after the initial sentencing." 208 Wis.2d 141, 146. The decision resolved a conflict between two decisions of the court of appeals: State v. Pierce, 117 Wis.2d 83, 342 N.W.2d 776 (Ct. App. 1983), held that an increased sentence could be supported by reference to the fact that the defendant had been arrested for two batteries committed after the initial sentencing; State v. Solles, 169 Wis.2d 556, 485 N.W.2d 457 (Ct. App. 1992), held that a resentencing court could not consider information favorable to the defendant that occurred after the initial sentence was imposed. Carter overruled Solles.

The Carter decision also rejected the distinction proposed by the state that would have treated differently cases where the entire conviction was reversed and cases where just the sentence was vacated. Carter held that both cases are to be treated the same: when resentencing is required for any reason, the initial sentencing is a nullity and ceases to exist. The court's role is the same at resentencing as at the initial sentencing and the court should have complete, accurate and current information. 208 Wis.2d 141, 154.

Carter leaves intact the basic principle applicable to resentencing after successful appeal: the defendant is not to receive a harsher sentence as punishment for the successful exercise of the right to appeal. Due process principles protect against vindictiveness by requiring that a harsher sentence must be

"based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 208 Wis.2d 141, 148, quoting North Carolina v. Pearce, 395 U.S. 711, 726 (1969). Also see State v. Stubbendick, 110 Wis.2d 693, 329 N.W.2d 399 (1983).

COMMENT

SM-34 was originally published in 1976 and revised in 1990 and 1991. This revision was approved by the Committee in February 1999 and involved a general updating and the addition of new material at sections II.D., V., VIII., IX., and X.

1. The American Bar Association Standards for Criminal Justice were reenacted in a second edition in 1980. This provision was reenacted as Standard 20-2.3(c), with the exception of the last sentence which was deleted.

2. The equivalent provision in the second edition of the ABA Standards (see note 1, supra) is Standard 18-2.2(a), Sentencing Alternatives and Procedures:

> (a) The sentence imposed in each case should call for the minimum sanction which is consistent with the protection of the public and the gravity of the crime. In determining the gravity of the offense and the public's need for protection, sentencing authorities best serve the public interest and the appearance of justice when they give serious consideration to the goal of sentencing equality and the need to avoid unwarranted disparities.

The revised standard deletes reference to "the rehabilitative needs of the defendant" as a criteria for deciding when confinement is called for. See note 3, below.

3. This standard was revised in the 1980 edition of the ABA Standards and is found in part in Standard 18-2.5(c):

> (c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the defendant selection of total confinement in a given case are:
>
> > (i) Confinement is necessary in order to protect the public from further serious criminal activity by the defendant; or
> > (ii) Confinement is necessary so as not to unduly depreciate the seriousness of the offense and thereby foster disrespect for the law.
>
> On the other hand, neither community hostility to the defendant nor the apparent need of the defendant for rehabilitation or treatment provides acceptable reasons for imposing a sentence of total confinement.

Former Standard 1.3(b) appears at Standard 18-2.3(vi) of the second edition, without change.

4. Sections 973.013(4) and 972.15(2m); State v. Jones, 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989). See Sec. V., this Special Material.

5. Sections 48.35(1)(b) and 938.35(1)(a); Lange v. State, 54 Wis.2d 569, 196 N.W.2d 680 (1972); State v. Johnson, 105 Wis.2d 657, 314 N.W.2d 897 (Ct. App. 1982).

6. Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971).

7. United States v. Grayson, 438 U.S. 41 (1978). Grayson reaffirmed that it is not permissible to impose an added term for suspected perjury. However, the defendant's false testimony is considered relevant to the defendant's prospects for rehabilitation and therefore may be relied on by the sentencing judge to determine the appropriate sentence. The Wisconsin rule appears to be the same. See Lange v. State, cited above, note 5, and Zastrow v. State, 62 Wis.2d 381, 215 N.W.2d 426 (1974).

8. State v. Olson, 127 Wis.2d 412, 380 N.W.2d 375 (Ct. App. 1985). Also see Roberts v. United States, 445 U.S. 552 (1980), where the court held that a defendant's refusal to name his suppliers in a drug conspiracy was properly considered at sentencing. In Roberts, the defendant made no claim before the sentencing judge that his refusal was based on concerns of self-incrimination or fears of physical retaliation. Had it been, the argument would have "merited serious consideration. . . . But the mere possibility of unarticulated explanations or excuses for antisocial conduct does not make that conduct irrelevant to the sentencing decision." 445 U.S. 552, 559.

9. In State v. Bobbitt, 178 Wis.2d 11, 503 N.W.2d 11 (Ct. App. 1993), the defendant was tried on charges of attempted first degree intentional homicide while armed, robbery, and false imprisonment. The jury acquitted him of the attempted homicide charge and convicted him on the others. In sentencing, the court referred to the violence that accompanied the robbery; the violence had been the basis for the attempted homicide charge. The court of appeals concluded that "the trial court did not misuse its discretion when it considered the violent conduct surrounding the attempted homicide for which Bobbitt was acquitted." 178 Wis.2d 11, 18.

The Bobbitt result is consistent with statements in prior Wisconsin cases, but there was no express authority on the issue. [See, for example, State v. Marhal, 172 Wis.2d 491, 501-04, 493 N.W.2d 758 (Ct. App. 1992), concluding that there would have no error even if the trial court in that case had considered the defendant culpable of a more serious crime where the jury returned a verdict on a lesser included offense.] The United States Supreme Court has reached the same conclusion in a case challenging provisions of the Federal Sentencing Guidelines which allow consideration of acquittal conduct. United States v. Watts, 518 U.S. 148 (1997).

10. Hanneman v. State, 50 Wis.2d 689, 184 N.W.2d 896 (1971); Kubart v. State, 70 Wis.2d 94, 233 N.W.2d 404 (1975); Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966); and United States v. Wiley, 267 F.2d 453 (7th Cir. 1959), 278 F.2d 500 (7th Cir. 1960).

11. Scales v. State, 64 Wis.2d 485, 219 N.W.2d 286 (1974); Williams v. State, 79 Wis.2d 235, 255 N.W.2d 504 (1977).

12. See Kubart v. State, and United States v. Wiley, cited in note 10, supra. It is proper, however, to consider a wholly frivolous defense and the defendant's conduct at trial. Finger v. State, 40 Wis.2d 103, 161 N.W.2d 272 (1968); Lange v. State, cited in note 5, supra.

13. Several Wisconsin cases have discussed claims by defendants that the sentencing court improperly considered religious or political beliefs or associations. The general rule appears to be that beliefs and associations protected by the First Amendment may not be considered at sentencing unless a reliable connection is established between the criminal conduct and the defendant's beliefs and associations.

The United States Supreme Court addressed the issue in connection with capital sentencing in Dawson v. Delaware, 503 U.S. 159 (1992). Evidence was introduced relating to the defendant's membership in the Aryan Brotherhood, a white supremacist prison gang. The court did not hold that consideration of that evidence was banned in all cases, but found that the state had failed to show how it was connected to any matter relevant to sentencing.

The Wisconsin Court of Appeals has addressed this issue several times. In State v. Fuerst, 181 Wis.2d 903, 512 N.W.2d 243 (Ct. App. 1994), the court found that the sentencing court's remarks about the defendant's lack of religious beliefs and failure to attend church constituted an erroneous exercise of discretion. It is not improper "to include information about religious beliefs and practices in presentence reports as part of the description of the defendant's 'whole person,'" 181 Wis.2d 903, 913, but that information cannot be relied on in sentencing unless a relationship is established between those beliefs and the criminal conduct.

In State v. Marsh, 177 Wis.2d 643, 502 N.W.2d 899 (Ct. App. 1993), the defendant claimed his sentencing was tainted by the inclusion of evidence that he studied Odinism, the white supremacy religion of the Vikings, and possessed other material relating to the Ku Klux Klan, Nazi Germany, and the National Association for the Advancement of White People. The state conceded that some of this information was improperly considered because it was unrelated to the crime, but the court of appeals found it was harmless error.

In State v. J.E.B., 161 Wis.2d 655, 469 N.W.2d 192 (Ct. App. 1991), the court of appeals upheld the sentencing court's consideration of information showing that the defendant read books including graphic descriptions of adults having sexual contact with children. Although the books are presumably protected by the First Amendment, a sufficient relationship was shown between them and the defendant's criminal activity – sexual assault of a child.

Both Fuerst and J.E.B. apply a test articulated in United States v. Lemon, 723 F.2d 922, 936 (D.C. Cir. 1983): "due process at sentencing requires that before a court may consider a defendant's associations, there must be some identifiable link between those associations and the crime for which the defendant was convicted."

14. See note 16, below.

15. The intent of this statement is to emphasize that the sentence should not be structured as to negate the effect of § 973.155 which requires credit against the sentence for time spent in presentence confinement. The Wisconsin Supreme Court has identified the procedure that should be followed:

> . . . trial judges are first to determine and impose an appropriate sentence independently of any time previously served. Only then should time served be determined and become relevant to the

> final sentence imposed on the conviction. The time previously served should not be a factor in the exercise of sentencing discretion. . . .

State v. Walker, 117 Wis.2d 579, 586, 345 N.W.2d 413 (1984). Also see Struzik v. State, 90 Wis.2d 357, 279 N.W.2d 922 (1979), and Klimas v. State, 75 Wis.2d 244, 249 N.W.2d 285 (1977), requiring the same procedure.

Recent decisions of the Wisconsin Court of Appeals have continued to list "pretrial confinement" as one of the many permissible sentencing factors. See, for example, State v. Jones, 151 Wis.2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989), and State v. Larsen, 141 Wis.2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). However, these cases have not explicitly focused on the issue that is of concern here. They appear simply to have repeated the long list of permissible sentencing factors that can ultimately be traced to cases that preceded the clarification of the right to credit for presentence confinement and the jail credit statute. Thus, the procedure set forth in Walker ought to be followed. (Awarding credit for presentence confinement is discussed in SM-34A, Determining Sentence Credit Under § 973.155.)

16. Also see State v. Fuerst, 181 Wis.2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994), citing State v. Wickstrom, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) for the proposition that "a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence."

17. In State v. Panknin, 217 Wis.2d 200, 204, 579 N.W.2d 52 (Ct. App. 1998), the court concluded that "irreversible harm would be done to the judicial process by opening the private notes of the court to litigants." The court also suggested a method for handling notes:

> A judge's personal notes should not be placed in the clerk of court's file. It is too easy for a clerk to become distracted and forget to seal the notes; or, there is nothing preventing a person reviewing the file from opening sealed notes. A better practice is to keep a personal filing cabinet for notes in chambers. A court can use file folders labeled with the case number or keep notes on the computer's hard drive using the case number for the file name. The confidential nature of the notes is secure if the court keeps them in chambers and out of the public court file.

217 Wis.2d 200, 204, at footnote 2.

18. 1989 Wisconsin Act 142 (effective date: March 31, 1990), created § 973.033 to read:

> Sentencing; restriction on firearm possession. Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court shall inform the defendant of the requirements and penalties under s. 941.29.

Section 941.29 makes it a Class E felony for a convicted felon to possess a firearm.

19. Section 973.034 provides:

> Whenever a court imposes a sentence or places a defendant on probation regarding a conviction under s. 940.22(2) or 940.225(2)(c), if the victim is under 18 years of age at the time of the

offense, or a conviction under s. 948.02(2), 948.025(1), 948.05(1), 948.06 or 948.07(1), (2), (3) or (4), the court shall inform the defendant of the requirements and penalties under s. 948.13.

Section 948.13 makes it a Class C felony for a person previously convicted of a "serious child sex offense" to "engage in an occupation or participate in a volunteer position that requires him or her to work or interact primarily and directly with children under 16 years of age."

The requirement that courts inform defendants at sentencing and the new criminal offense under § 948.13 both apply to offenses committed on or after May 6, 1997, the effective date of 1995 Wisconsin Act 265 which created both statutes.

20. Section 973.048(1) provides that when a court sentences or places on probation a person convicted of a designated sex offense, "the court shall require the person to comply with the reporting requirements under s. 301.45. Subsection (2) of § 973.048 provides that when a person is sentenced or placed on probation for any violation of "ch. 940, 944 or 948 or ss. 943.01 to 943.15, the court may require the person to comply with the reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s. 301.45."

The reference to "s. 301.45" is to the statute requiring that sex offenders register with the department of corrections. The effective date of § 973.048 is June 1, 1997.

21. Section 973.18(2) requires that the trial judge personally inform the defendant at the time of sentencing of the right to seek postconviction relief and, if indigent, the right to the assistance of the state public defender. See SM-33, Information on Postconviction Relief.

22. See note 18, supra.

23. See notes 19 and 20, supra.

24. See note 21, supra.

25. The effective date of 1997 Wisconsin Act 326 was July 16, 1998. Section 15 of the Act provides that "the treatment of section 939.62(2m)(b)2. of the statutes first applies to serious child sex offenses committed on the effective date of this subsection, but does not preclude the counting of other serious child sex offenses as prior serious child sex offenses for sentencing a person as a persistent repeater under section 939.62(2m)(b)2. of the statutes, as created by this act."

26. The constitutionality of § 973.014 as originally enacted was upheld in State v. Borrell, 167 Wis.2d 749 482 N.W.2d 883 (1992).

27. The references restricting applicability to offenses committed " before December 31, 1999" recognize that the "truth in sentencing" system created by 1997 Wisconsin Act 283 is scheduled to take effect on that date. "Extended supervision" is a component of that system.

28. The provision for "presumptive" mandatory release was created at the same as § 973.0135. See 1993 Wisconsin Act 194. Both provisions apply to sentences for offenses committed on or after April 21, 1994.