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**MAJOR CRIME LEGISLATION, OTHER THAN 1993 WISCONSIN ACT 98,
ENACTED DURING THE FALL 1993 LEGISLATIVE SESSION
(1993 WISCONSIN ACTS 92, 94, 96, 97 AND 118)**

Information Memorandum 94-2

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U.S. Department of Justice
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**Wisconsin Legislative Council Staff
One East Main Street, Suite 401
Madison, Wisconsin
Telephone: (608) 266-1304**

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Information Memorandum 94-2*

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ENACTED DURING THE FALL 1993 LEGISLATIVE SESSION
(1993 WISCONSIN ACTS 92, 94, 96, 97 AND 118)**

INTRODUCTION

This Information Memorandum describes *major* crime legislation, other than 1993 Wisconsin Act 98 (referred to as "the Omnibus Crime Package" and analyzed in Information Memorandum 94-1), enacted into law during the Fall 1993 Legislative Session (i.e., 1993 Wisconsin Acts 92, 94, 96, 97 and 118).

Copies of all acts referred to in this Information Memorandum may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400.

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* This Information Memorandum was prepared by Don Salm, Senior Staff Attorney, Legislative Council Staff.

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PART I
1993 WISCONSIN ACT 91,
RELATING TO OLEORESIN OF CAPSICUM
("PEPPER SPRAY") AND TEAR GAS

This Part of the Memorandum analyzes 1993 Wisconsin Act 91, relating to oleoresin of capsicum (commonly known as "pepper spray") and tear gas, granting rule-making authority and providing a penalty. *Act 91 has a delayed effective date, taking effect on October 1, 1994* (the first day of the 10th month after the publication of the Act).

A. BACKGROUND

Under *current law* (i.e., the law until October 1, 1994, the effective date of Act 91), no person may sell, possess, use or transport any tear gas bomb, hand grenade, projectile or shell or any other container of any kind or character into which tear gas or any similar substances is used or placed for use to cause bodily discomfort, panic or damage to property. This provision *prohibits*, among other things, the sale, possession, use or transport of *oleoresin of capsicum (pepper spray)* in this state. A person violating this prohibition is guilty of a *Class E felony*, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed two years, or both. This prohibition *does not apply* to the sale, possession, modification, use or transportation of any such containers to or by any armed forces or National Guard personnel in the line of duty, any civil enforcement officer of the state or of any city or county, or any person duly authorized by the chief of police of any city or the sheriff of any county to sell, possess, modify, use or transport those weapons or containers [s. 941.26, Stats.].

B. 1993 WISCONSIN ACT 91

1993 Wisconsin Act 91 *exempts "pepper spray"* from the general prohibition against using tear gas or any similar substance to cause bodily discomfort, panic or property damage and provides specific restrictions on its use, sale and possession.

1. Exception for Pepper Spray

Under Act 91, the current prohibitions do not apply to any device or container that contains a combination of oleoresin of capsicum (a type of plant product containing resin and oil) and inert ingredients (hereafter, "pepper spray") but does not contain any other gas or substance that will cause bodily discomfort.

2. Improper Use of Pepper Spray

a. Intentional use against another person. Under Act 91, whoever *intentionally* uses a pepper spray device or container to cause bodily harm or bodily discomfort to another, is guilty of a *Class A misdemeanor* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both). This prohibition against intentional use *does not apply* to any of the following:

- (1) Any person acting in *self-defense or defense of another*, as allowed under s. 939.48, Stats.
- (2) Any peace officer acting in his or her official capacity.
- (3) Any armed forces or National Guard personnel acting in the line of duty.

b. Intentional use against a peace officer. Act 91 specifies that any person who *intentionally* uses a pepper spray device or container to cause bodily harm or bodily discomfort to a person who the actor knows, or has reason to know, is a *peace officer* who is acting in an official capacity, is guilty of a *Class D felony* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed five years, or both).

c. Use or threatened use during commission of another crime. Act 91 also specifies that whoever *uses* a pepper spray device or container *during his or her commission of another crime* to cause bodily harm or bodily discomfort to another or who *threatens to use* the device or container *during his or her commission of another crime* to incapacitate another person, is guilty of a *Class E felony* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed two years, or both).

3. Sales of Pepper Spray Devices

Act 91 places various restrictions on sales of pepper spray devices:

a. Leaving container in accessible place. Any person who offers for sale a device or container of pepper spray *and* who leaves in his or her place of business an unsold device or container in a place where customers have ready access to the device or container is subject to a *Class C forfeiture* (a forfeiture of not more than \$25).

b. Sale to underage person; defense. Any person who sells or distributes a device or container of pepper spray to a person who *has not attained 18 years of age*, is subject to a *Class C forfeiture* (a forfeiture of not more than \$25). However, a person who proves all of the following by a preponderance of the evidence, has a *defense to prosecution* under this prohibition:

- (1) That the purchaser or distributee falsely represented that he or she had attained the age of 18 and presented an identification card.

(2) That the appearance of the purchaser or distributee was such that an ordinary and prudent person would believe that the purchaser or distributee had attained the age of 18.

(3) That the sale was made in good faith, in reasonable reliance on the identification card and the appearance of the purchaser or distributee and in the belief that the purchaser or distributee had attained the age of 18.

c. **Intentional offers to sell.** Any person who *intentionally* offers for sale a device or container of pepper spray in a place where customers have direct access to the device or container is guilty of a **Class A misdemeanor** (punishable by a fine of not more than \$10,000 or imprisonment for not more than nine months, or both).

d. **Failure to meet safety criteria set forth in rules.** Any person who *intentionally* sells a pepper spray device or container that does not meet the safety criteria provided in the Department of Justice (DOJ) rules is guilty of a **Class A misdemeanor**. Under Act 91, the DOJ is required to promulgate rules providing safety criteria for pepper spray devices or containers. In promulgating the rules, the DOJ is required to do all of the following:

- (1) Consider recommendations of law enforcement agencies, and manufacturers of pepper spray devices or containers.
- (2) Provide allowable amounts of oleoresin of capsicum, inert ingredients and total ingredients for a pepper spray device or container.
- (3) Provide a maximum effective range for a pepper spray device or container.
- (4) Provide other requirements to ensure that a pepper spray device or container is effective and appropriate for self-defense purposes.

The requirement that the seller meet the safety criteria under the DOJ rules *does not apply* to sales of devices or containers for use by peace officers, armed forces or National Guard personnel.

e. **Intentional sale without proper label and safety instructions.** A person who *intentionally* sells a pepper spray device or container without providing the purchaser with all of the following, is guilty of a **Class A misdemeanor**:

- (1) A *proper label* on the device or container.
- (2) *Written safety instructions* for using the device or container.
- (3) A package that contains a clear, highlighted message to the purchaser, cautioning him or her to read and follow the safety instructions.

The DOJ is required to promulgate rules providing the requirements for labeling, packaging and written safety instructions under items a to c, above.

4. Age of Possession

Under Act 91, any person who has *not attained the age of 18 years* and possesses a pepper spray device or container, is subject to a *Class E forfeiture* (a forfeiture of not more than \$25).

PART II

1993 WISCONSIN ACT 92, RELATING TO CARJACKING

This Part of the Memorandum analyzes 1993 Wisconsin Act 92, relating to taking a vehicle without the consent of the owner ("carjacking"), seizure and forfeiture of a motor vehicle having an altered or obliterated identification number and providing penalties. *Act 92 took effect on December 25, 1993.*

A. BACKGROUND

1. "Life Means Life" Parole Eligibility Statute

Under s. 973.014, Stats., when a court sentences a person to life imprisonment (the penalty for Class A felonies) for a crime committed on or after July 1, 1988, the court must make a parole eligibility determination regarding the person and choose one of the following options:

a. The person is eligible for parole under the general parole provisions in s. 304.06 (1), Stats. (i.e., for a life sentence, generally after 13 years and four months).

b. The person is eligible for parole on a date set by the court (sometimes referred to as the "Life Means Life" provision). Under this provision, the court may set any later date than that provided in the general parole provisions in s. 304.06 (1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06 (1). For example, an offender could be sentenced to life imprisonment with no possibility of parole for 30 years.

The crimes for which a person must be sentenced to life imprisonment (Class A felonies under the Criminal Code) are: (a) first-degree intentional homicide [s. 940.01 (1), Stats.]; (b) taking, and refusing to release prior to arrest, hostages with intent to influence a person to perform or not to perform some action demanded by the actor [s. 940.305, Stats.]; (c) kidnapping with intent to cause another to transfer property in order to obtain release of the victim [s. 940.31 (2), Stats.]; (d) tampering with "household products" (e.g., food, drugs or cosmetics) resulting in the death of another person [s. 941.327 (2) (b) 4, Stats.]; (e) treason; and (f) as discussed in Section B, 1, c, below, "carjacking" under certain circumstances [s. 946.01, Stats.].

In a recent Wisconsin Supreme Court case, State v. Borrell, 482 N.W. 2d 883 (1992), the Court held that the "Life Means Life" statutory provision does not violate the constitutional doctrine of separation of powers or a defendant's constitutional right to due process, including the right to counsel at sentencing.

2. Taking and Driving or Driving or Operating Vehicle Without the Consent of the Owner; "Joyriding Exception"

Under current law, a person who *intentionally takes and drives* any vehicle without the consent of the owner is guilty of a **Class D felony** (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed five years, or both). "*Drive*" is defined for purposes of this prohibition to mean the exercise of physical control over the speed and direction of a vehicle while it is in motion. The term "*vehicle*," for purposes of the Criminal Code [chs. 939 to 951, Stats.], is defined to mean any self-propelled device for moving persons or property or pulling implement from one place to another, whether such device is operated on land, rails, water or in the air (i.e., includes, among other devices, motor vehicles, motorboats, snowmobiles and all-terrain vehicles) [s. 939.22 (44), Stats.].

Current law also provides that a person who intentionally drives or operates any vehicle without the consent of the owner is guilty of a **Class E felony** (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed two years, or both). For purposes of this prohibition, "operate" is defined to include the physical manipulation or activation of any controls of a vehicle necessary to put it in motion [s. 943.23 (1) (c) and (3), Stats.].

The law prior to Act 92 provided for a so-called "*joyriding*" exception to these prohibitions, specifying that whoever violated these prohibitions and abandoned a vehicle without damage within 24 hours was guilty of a **Class A misdemeanor** (punishable by a fine of not more than \$10,000 or imprisonment of not more than nine months, or both) [s. 943.23 (4), Stats.].

B. 1993 WISCONSIN ACT 92

1. Prohibitions; Penalties

1993 Wisconsin Act 92 creates new prohibitions in s. 943.23, Stats., relating to so-called "carjacking." Under the Act:

a. **Basic "carjacking" offense.** Any person who, *while possessing a dangerous weapon and by the use of, or threat of the use of, force or the weapon against another*, intentionally takes any vehicle without the consent of the owner is guilty of a **Class B felony** (punishable by imprisonment not to exceed 20 years). Currently, "dangerous weapon" is defined, for purposes of the entire Criminal Code, to mean any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which in the manner it is used, or intended to be used, is calculated or likely to produce death or great bodily harm [s. 939.22 (10), Stats.].

b. **Causing great bodily harm during carjacking.** Any person who violates item a, above, and causes great bodily harm to another is guilty of a **Class B felony** (punishable by imprisonment not to exceed 20 years) and *must be sentenced to not less than 10 years of imprisonment, unless the sentencing court otherwise provides*. If the court places the person on probation or imposes a sentence less than the 10-year presumptive minimum sentence, the court must state its reasons

for doing so on the record. Currently, "great bodily harm" is defined, for purposes of the entire Criminal Code, to mean bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury [s. 939.22 (14), Stats.].

c. *Causing death during carjacking.* A person who violates item a, above, and causes the death of another is guilty of a **Class A felony** (punishable by mandatory life imprisonment). Thus, the violator is subject to the "Life Means Life" provision in current law, discussed in Section A, 1, above.

d. *Passenger during carjacking.* A person who knows that the owner does not consent to the driving or operation of a vehicle and intentionally accompanies, as a *passenger* in the vehicle, a person while he or she violates item a, b or c, above, or current s. 943.23 (2) or (3), Stats. (described in Section A, above), is guilty of a **Class A misdemeanor** (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both).

2. Repeal of "Joyriding" Exception

Act 92 repeals the current "joyriding" exception in s. 943.23 (4), Stats. (i.e., a violator would be subject to the same penalty whether or not he or she abandoned the vehicle without damage within 24 hours).

3. Alteration or Obliteration of Vehicle Identification Number

Under *current law*, persons who intentionally alter or obliterate a vehicle identification number may, upon conviction, be fined not more than \$5,000 or imprisoned for not more than five years, or both [s. 342.30 (1) and (3) (a), Stats.].

Under *Act 92*, if a law enforcement agency finds a vehicle or part of a vehicle on which the identification number has been removed, altered or obliterated or made impossible to read, the law enforcement agency may seize the vehicle or part of a vehicle. If the identification number *cannot* be identified, the seized vehicle or vehicle part is *presumed to be contraband*. If the identification number can be identified, the agency may return the vehicle to the registered owner. With one exception, the district attorney must institute forfeiture proceedings under s. 973.076, Stats., regarding any vehicle or vehicle part that is seized under this new provision and not returned to the owner. The *exception* specifies that if the district attorney brings a *criminal action* arising out of the seizure, the district attorney may not institute forfeiture proceedings before there is a final determination in the criminal action.

Act 92 provides that this seizure and forfeiture provision does not apply to the obliteration of an identification number that occurs in the process of crushing a vehicle or vehicle part for scrap (i.e., salvage yard demolition).

4. Other Provisions

Among other things, Act 92 specifies that these new felonies are felonies for purposes of the definition of "racketeering activity" in the Wisconsin Organized Crime Control Act [ss. 946.80 to 946.88, Stats.]; are compensable acts for recovery under ch. 949, Stats. (Crime Victims Compensation); and are "serious crimes" for purposes of s. 969.08, Stats., relating to alteration or revocation of the conditions of release (bail).

5. Initial Applicability

The provisions in Act 92 first apply to offenses occurring on the effective date of the Act (i.e., December 25, 1993).

PART III

1993 WISCONSIN ACT 94, RELATING TO DISCHARGING A FIREARM FROM A VEHICLE

This Part of the Memorandum analyzes 1993 Wisconsin Act 94, relating to discharging a firearm from a vehicle and providing penalties. *Act 94 took effect on December 25, 1993.*

Current law contains a number of provisions prohibiting the unsafe use of a firearm. *1993 Wisconsin Act 94* creates a new provision, specifying that whoever intentionally discharges a firearm *from a vehicle while on a highway or on a vehicle parking lot that is open to the public* under any of the following circumstances is guilty of a *Class C felony* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed 10 years, or both):

- a. The person discharges the firearm at or toward another person.
- b. The person discharges the firearm at or toward any building or other vehicle.

"Highway" has the meaning in s. 340.01 (22), Stats., which defines the term as follows:

...all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01 (1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

The Act specifies that these prohibitions do not apply to any of the following who, in the line of duty, discharges a firearm from a vehicle:

- a. A peace officer.
- b. A member of the U.S. Armed Forces.
- c. A member of the National Guard.

The Act also provides an exception for a disabled hunter who holds an appropriate hunting permit and is hunting from a standing vehicle in accordance with s. 29.09 (9), Stats.

The Act specifies that:

- a. The state does not have to negate any exception described above;
- b. Any party that claims such an exception is applicable has the burden of proving the exception by a preponderance of the evidence (the lowest burden of proof);
- c. The driver of the vehicle may be charged and convicted for a violation according to the criteria under s. 939.05, Stats. (*parties to a crime*); and
- d. A person charged with a violation of this new prohibition has a *defense* of privilege or self-defense or defense of others in accordance with s. 939.48, Stats.

Act 94 includes this new offense in the definition of "racketeering activity" in the Wisconsin Organized Crime Control Act and in the definition of "serious crime" in s. 969.08, Stats., relating to revocation of a defendant's bail for committing a serious crime while on conditional release.

PART IV

1993 WISCONSIN ACT 96, RELATING TO STALKING AND HARASSMENT

This Part of the Memorandum analyzes 1993 Wisconsin Act 96, relating to stalking, harassment and providing penalties. *Act 96 took effect on December 25, 1993.*

A. BACKGROUND

As discussed below, current law provides various penalties for persons who harass or threaten others under the specified circumstances.

1. The Criminal Code Harassment Statute [s. 947.013, Stats.]

a. Forfeiture Offense

Under current law, whoever, with intent to harass or intimidate another person, does any of the following is subject to a *Class B forfeiture* (a forfeiture not to exceed \$1,000; this is not a criminal offense):

(1) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.

(2) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose. "Course of conduct" is defined to mean a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose [s. 947.013 (1) (a) and (1m), Stats.].

b. Misdemeanor and Felony Offenses

Legislation enacted by the 1991-92 Legislature (1991 Wisconsin Act 194) criminalized the violation of the Criminal Code harassment statute under specified circumstances. Under s. 947.013 (1r), Stats., violation of s. 943.013 (1m) under *all of the following circumstances* is a *Class A misdemeanor* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both):

(1) The act is accompanied by a *credible threat* that places the victim in reasonable fear of death or great bodily harm. "Credible threat" is defined to mean a threat made with intent and apparent ability to carry out the threat. "Great bodily harm" is defined [for purposes of the entire Criminal Code, chs. 939 to 951, Stats.] to mean bodily injury which creates a substantial risk of

death, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

(2) The act occurs *while the actor is subject to an order or injunction* under s. 813.12 (domestic abuse restraining orders and injunctions), 813.122 (child abuse restraining orders and injunctions) or 813.125 (harassment restraining orders and injunctions), Stats., that prohibits or limits his or her contact with the victim.

Current law also specifies that whoever violates the new criminal harassment provision created in 1991 Act 194 is guilty of a *Class E felony* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed two years, or both) if the person has a prior conviction under the new provision involving the same victim and the present violation occurs within seven years of the prior conviction [s. 947.013 (1t), Stats.]. The Class E felony also applies if the person has a prior conviction which resulted in a Class E felony under the circumstances described in this paragraph. Thus, if the person had been found guilty of a Class A misdemeanor or a Class E felony under the 1991 Wisconsin Act 194 harassment provision and then commits another violation of this provision within seven years of the prior conviction, the person is guilty of a Class E felony.

2. Other Related Offenses

Current law also provides for harassment restraining orders and injunctions in s. 813.125, Stats., and prohibits the use of a telephone to frighten, intimidate, threaten, abuse or harass another person under s. 947.012, Stats.

B. 1993 WISCONSIN ACT 96

1993 Wisconsin Act 96 creates the new crime of "*stalking*." Under Act 96, whoever meets *all of the following criteria* is guilty of a *Class A misdemeanor* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both):

1. The actor intentionally engages in a course of conduct directed at a specific person that would cause a *reasonable person* to fear *bodily injury* to himself or herself or a member of his or her immediate family or to fear the *death* of himself or herself or a member of his or her immediate family. "*Course of conduct*" is defined to mean "repeatedly" (i.e., defined as "on 2 or more calendar days") maintaining a visual or physical proximity to a person. "*Immediate family*" is defined to mean a spouse, parent, child, sibling or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

2. The actor *has knowledge* or *should have knowledge* that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family.

3. The actor's acts *induce fear* in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family.

If a person violates the above-described prohibitions against stalking under *any* of the following circumstances, the person is guilty of a *Class E felony* (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed two years, or both):

1. The act *results in bodily* harm to the victim.

2. The actor has a *previous conviction* under either the new Class A misdemeanor stalking offense or the new Class E felony stalking offense against the same victim and the present violation occurs *within seven years* after the prior conviction.

Act 96 specifies that the stalking prohibitions *do not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others under the State and U.S. Constitutions*, including, but not limited to, any of the following:

1. Giving publicity to and obtaining or communicating information regarding any subject, whether by advertising, speaking or patrolling any public street or any place where any person or persons may lawfully be.

2. Assembling peaceably.

3. Peaceful picketing or patrolling.

Act 96 specifies that this provision relating to constitutionally protected activity does not limit the activities that may be considered to serve a legitimate purpose under the new stalking law.

Act 96 also specifies that:

1. The new stalking law *does not apply* to conduct arising out of or in connection with a *labor dispute*. "Labor dispute" is defined to include any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

2. The provisions of the new stalking statute are *severable* (that is, if any provision of the statute is invalid or if any application of the statute is invalid, that invalidity will not affect other provisions or applications which can be given effect without the invalid provision or application). For example, if part of the law is held to be unconstitutional, the remainder of the new law stays in effect if the remainder is meaningful without the invalid provision or application.

Act 96 specifies that for the three-year period following the effective date of the new law, the DOJ is required to gather and maintain information on arrests made and judgments of conviction

entered regarding violations of the new stalking law or s. 947.013, Stats., the current harassment law. Annually, the DOJ is required to provide a detailed report on the information obtained to the Legislature. The Act specifies that this "stalking and harassment information" provision *does not apply after October 1, 1997*. It should be noted that this section created in Act 96 also includes a definition of "law enforcement agency," but that the term "law enforcement agency" does not appear in the Act. It is unclear why that term is defined in the Act.

PART V

1993 WISCONSIN ACT 97, RELATING TO MANDATORY MINIMUM SENTENCES FOR CERTAIN REPEAT CRIMINAL OFFENDERS, INPUT IN THE PAROLE DECISION-MAKING PROCESS AND ADMISSIBILITY OF EVIDENCE REGARDING THE MANNER OF DRESS OF A COMPLAINING WITNESS

This Part of the Memorandum analyzes 1993 Wisconsin Act 97, relating to mandatory minimum sentences for certain repeat criminal offenders; input in the parole decision-making process; notification to crime victims and protected persons; admissibility of evidence regarding the manner of dress of a complaining witness; granting rule-making authority; and providing a penalty. *Act 97 took effect on December 25, 1993.*

A. REPEAT OFFENDERS OF SERIOUS SEX CRIMES OR VIOLENT CRIMES; MANDATORY MINIMUM IMPRISONMENT

Current law specifies various crimes and penalties applicable to people convicted of committing those crimes. *1993 Wisconsin Act 97* provides that people who commit *repeat* serious sex crimes (certain types of sexual assault) or *repeat* violent crimes (certain homicides) must be sentenced to *at least five years imprisonment*.

Under Act 97:

1. Serious sex crimes. If a person has *one or more prior convictions* for a *serious sex crime* and subsequently commits a serious sex crime, the court *must* sentence the person to not less than *five* years imprisonment. "Serious sex crime" means first- or second-degree sexual assault as set forth in s. 940.225 (1) or (2) (the general sexual assault statute) or 948.02 (1) or (2), Stats. (sexual assault of a child). The Act specifies that: (a) other than this mandatory minimum, the currently applicable penalties for the crime apply (subject to any current applicable) penalty enhancement; and (b) the court may *not* place the defendant on *probation*.

2. Repeat serious violent crimes. If a person has *one or more prior convictions* for a *serious violent crime* or a *crime punishable by life imprisonment* and subsequently commits a serious violent crime, the court *must* sentence the person to not less than *five* years imprisonment. "Serious violent crime" is defined to mean a violation of s. 940.03 (felony murder) or 940.05 (second-degree intentional homicide), Stats. Crimes punishable by life imprisonment are the Class A felonies in the Criminal Code: first-degree intentional homicide under s. 940.01; kidnapping under certain circumstances under s. 940.31 (2); tampering with household products where death results under s. 941.327 (2) (b) 4; and treason under s. 946.01, Stats.

Act 97 specifies that with reference to these new mandatory minimum penalties: (1) the current penalties for the crime apply (subject to any current applicable penalty enhancement); and (2) the court may *not* place the defendant on *probation*.

These provisions in Act 97 *first apply* to crimes committed on the effective date of the new law (i.e., December 25, 1993) do *not* preclude the counting of convictions for crimes committed prior to the effective date of the new law as prior convictions under these new provisions.

B. NOTIFICATION TO CRIME VICTIMS AND PROTECTED PERSONS

Under *current law*, the Department of Corrections (DOC) provides notice of certain events or rights to crime victims.

1993 Wisconsin Act 97 requires DOC to make a reasonable effort to provide notification of the following to the victims of certain crimes (or to a member of the victim's family) if the person can be found and has requested notification: parole releases, confinement of a prisoner under the Community Residential Confinement Program (CRCP) or entrance of a prisoner, probationer or parolee in the Intensive Sanctions Program (ISP). Items 1 to 3, below, are the notice provisions applicable to a CRCP confinement, but, as noted in item 4, below, similar provisions are applicable to parole releases and participation in the ISP.

1. Notice to Victim or Family Member Required

Under Act 97, before a prisoner is confined under the CRCP for a violation of s. 940.03 (felony murder), 940.05 (second-degree intentional homicide), 940.225 (1) or (2) (first- or second-degree sexual assault under the general sexual assault statute) or 948.02 (1) or (2) (first- or second-degree sexual assault of a child), Stats., the DOC *must make a reasonable effort* to notify the following person, if he or she can be found, in accordance with item b, below, and after receiving a completed card under item 3, below:

a. The victim of the crime committed by the inmate. "Victim" is defined to mean the person against whom the crime is committed; or

b. If the victim *died* as a result of the crime, an adult member of the victim's family. "Member of the family" is defined to mean: (1) the victim's spouse, child, sibling, parent or legal guardian; or (2) if the victim is *younger than 18 years old*, the victim's parent or legal guardian.

See item 4, below, for a description of the other circumstances under which the DOC is required to make a reasonable effort to notify a victim or family member under the Bill.

2. How Notice Is Sent

The DOC must make a reasonable effort to send the notice, postmarked at least seven days before a prisoner is confined under the CRCP, to the last-known address of the person under item 1, above.

3. "Request for Notification" Cards

The DOC is required to design and prepare cards for any person specified in item 1, above, to send to the DOC. The cards must have space for any such person to provide his or her name and address, the name of the applicable prisoner and any other information the DOC determines is necessary. The DOC must provide the cards, without charge, to district attorneys and the district attorneys must provide the cards, without charge, to persons specified in item a, above. These persons may send completed cards to the DOC. All DOC records or portions of records that relate to mailing addresses of these persons are not subject to inspection or copying under s. 19.35 (1), Stats. (the Open Records Law).

4. Intensive Sanctions Program; Release on Parole

The Act also provides similar victim notification procedures:

a. Regarding *participants in the ISP* under s. 301.048, Stats. As soon as possible after a prisoner, probationer or parolee who has violated any of the crimes set forth in item 1, above, enters the ISP, the DOC *must make a reasonable effort* to provide the notice in accordance with the procedures set forth in items 1 to 3, above. Under the ISP, DOC provides a participant with component phases based on public safety considerations and the participant's need for punishment and treatment. These phases may include placements in a community.

b. *Prior* to release of a prisoner *on parole* after a conviction for first-degree intentional homicide, s. 940.01, Stats., or any of the crimes set forth in item 1, above. Again, the procedures in items 1 to 3, above, are, in general, applicable to this notice requirement.

C. VICTIM INPUT IN PAROLE DECISION-MAKING PROCESS

Under *current law*, if a perpetrator of a crime is sentenced to state prison, the victim, a family member of the victim if the victim died as a result of the crime or a parent or guardian of a child victim of the crime, may provide a *written statement* that must be considered by the Parole Commission when it decides whether to grant to the perpetrator a release on parole [s. 304.06 (1), Stats.].

In addition to the current right to provide written statements, Act 97 specifies that the victims have the right to have direct input in the parole decision-making process in accordance with rules promulgated by the Parole Commission. The Act specifies that the Parole Commissioner's rules must provide a procedure to allow any person who is a victim, or a family member of a victim, to have direct input in the parole decision-making process if the crime involved first-degree or second-degree intentional homicide, felony murder or a serious sexual assault [i.e., sexual assaults under s. 940.225 (1) or (2) or 948.02 (1) or (2), Stats.].

D. STUDIES ON NOTICE TO PERSONS PROTECTED BY RESTRAINING ORDER OR INJUNCTION

Act 97 requires:

1. The DOC to meet with interested persons to study *different possible procedures* for providing *notice of the release on parole or placement in a community* of a prisoner who has violated s. 940.01 (first-degree intentional homicide), 940.03, 940.05 (second-degree intentional homicide), 940.225 (1) or (2) (first- or second-degree sexual assault) or 948.02 (1) or (2) (first- or second-degree sexual assault of a child) to a person who is protected against that prisoner by a domestic abuse restraining order or injunction, child abuse restraining order or injunction or harassment restraining order or injunction.

2. The Department of Health and Social Services (DHSS) to meet with interested persons to study *different possible procedures* for providing *notice of the release from commitment or custody or placement in a community* of a *delinquent child or client subject to commitment* to a person who is protected against that child or client by a domestic abuse restraining order or injunction, child abuse restraining order or injunction or harassment restraining order or injunction. The study relates only to those delinquent children or committed persons who violated or were alleged to have violated s. 940.01, 940.03, 940.05, 940.225 (1) or (2) or 948.02 (1) or (2), Stats.

Within 90 days after the effective date of the Act, the DOC and the DHSS must each report its recommendations to the appropriate standing committees of the Legislature in the manner provided under s. 13.172 (3), Stats.

E. ADMISSIBILITY OF EVIDENCE OF MANNER OF DRESS

Under *current* s. 972.11 (2), Stats., referred to as the "Rape Shield Law," if a defendant is accused of committing sexual assault [s. 940.225 or 948.02, Stats.], sexual exploitation of a child [s. 948.05, Stats.] or incest with a child [s. 948.06, Stats.], evidence relating to the prior sexual conduct of the complaining witness is generally inadmissible.

Act 97 specifies that if the defendant is accused of a crime under s. 940.225, 948.02, 948.05 or 948.06, Stats., evidence of the manner of dress of the complaining witness at the time when the crime occurred is admissible only if: (1) it is relevant to a contested issue at a trial; and (2) its probative value *substantially outweighs* all of the following:

- a. The danger of unfair prejudice, confusion of the issues or misleading the jury.
- b. The considerations of the undue delay, waste of time or needless presentation of cumulative evidence.

The Act requires the court to determine the admissibility of this "manner of dress" evidence upon pretrial motion before it may be introduced at trial.

The Act specifies that the "manner of dress" provision *first applies* to criminal actions commenced on the effective date of the Act (i.e, December 25, 1993).

PART VI

**1993 WISCONSIN ACT 118, RELATING TO METHCATHINONE
AND PROVIDING PENALTIES**

This Part of the Memorandum analyzes 1993 Wisconsin Act 118, relating to methcathinone (street name "cat") and providing penalties. *Act 118 took effect on December 29, 1993.*

**A. PENALTIES FOR THE ILLEGAL MANUFACTURE, DELIVERY OR POSSESSION WITH
INTENT TO MANUFACTURE OR DELIVER METHCATHINONE**

Under *the law prior to Act 118*, any person who illegally manufactured or delivered, or illegally possessed with intent to manufacture or deliver, methcathinone was subject to a fine of not more than \$15,000 or imprisonment for not more than five years, or both.

Under *Act 118*, a methcathinone violator is subject to the same penalties applicable, under current law, to any person who illegally manufactures or delivers, or illegally possesses with intent to manufacture or deliver, phencyclidine (PCP), amphetamine or methamphetamine [with reference to these penalties, see Section C, below, on presumptive minimums under ch. 161, Stats.]. These penalties are set forth in the table below:

PENALTIES UNDER 1993 WISCONSIN ACT 118
FOR ILLEGAL MANUFACTURE AND DELIVERY OF, OR
POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER, METHCATHINONE

<i>OFFENSE</i>	<i>AMOUNT</i>	<i>PENALTY* (FINE/PERIOD OF IMPRISONMENT)**</i>
MANUFACTURE OR DELIVERY OF METHCATHINONE	3 grams or less	\$1,000 to \$200,000 (<u>may</u> be imprisoned up to 5 years)
	More than 3 grams to 10 grams	\$1,000 to \$250,000 (6 months to 5 years)
	More than 10 grams to 50 grams	\$1,000 to \$500,000 (1 to 15 years)

OFFENSE	AMOUNT	PENALTY* (FINE/PERIOD OF IMPRISONMENT)**
MANUFACTURE OR DELIVERY OF METHCATHINONE (CONT.)	More than 50 grams to 200 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 200 grams to 400 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 400 grams	\$1,000 to \$1,000,000 (10 to 30 years)
POSSESSION OF METHCATHINONE WITH INTENT TO MANUFACTURE OR DELIVER	3 grams or less	\$1,000 to \$100,000 (<u>may</u> be imprisoned up to 5 years)
	More than 3 grams to 10 grams	\$1,000 to \$200,000 (6 months to 5 years)
	More than 10 grams to 50 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 50 grams to 200 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 200 grams to 400 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 400 grams	\$1,000 to \$1,000,000 (10 to 30 years)

* Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods set forth in the table (but see Section C, below, on "presumptive" minimums).

** Upon a second or subsequent offense, the minimum and maximum fines and periods of imprisonment are doubled.

The current Controlled Substances Act [ch. 161, Stats.] classifies methcathinone as a Schedule I controlled substance, which means that methcathinone has a high potential for abuse and has no medical use in treatment or lacks accepted safety for use in treatment under medical supervision [ss. 161.13 and 161.14, Stats.].

B. ILLEGAL POSSESSION OF METHCATHINONE

Under the *law prior to Act 118*, a person who illegally possessed methcathinone was subject to a fine of not more than \$500 or imprisonment for not more than 30 days, or both.

Under *Act 118*, a methcathinone violator is subject to the same penalties applicable to illegal possession of PCP, amphetamine or methamphetamine (i.e., the person may be fined up to \$5,000

or imprisoned up to one year, or both). Upon a second or subsequent offense, the person *may* be fined or imprisoned, or both, up to twice the amount of the first offense.

C. "PRESUMPTIVE" MINIMUM: COURT AUTHORITY TO DEVIATE FROM MANDATORY MINIMUM SENTENCES

Under *current law*, any minimum sentence under ch. 161, Stats., is a "presumptive" minimum. A court may impose a sentence which is less than a "presumptive" minimum or place the person on probation only if: (1) it finds that the best interest of the community will be served and the public will not be harmed; and (2) it places the reasons on the record. Thus, the minimum penalties are not, in fact, mandatory minimums, but presumptive minimums [s. 161.438, Stats.]. This "presumptive" minimum provision in current law *is applicable* to the methcathinone sanctions in *Act 118*, as described in Section A, above.

D. INITIAL APPLICABILITY

Act 118 specifies that the new provisions *first apply* to offenses committed on the effective date of Act 118 (i.e., December 29, 1993), but does not preclude the counting of other offenses as prior offenses for sentencing a person.

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