



DOC Changes its Pre-Sentence Investigation Process by Developing Truth-in-Sentencing Recommendation Grids

By: Michael Lew, Assistant Chief, Division of Community Corrections*
Eric Kim, Supervisor, Division of Community Corrections*

2001 Wisconsin Act 109 made major revisions to the statutes affecting the Department of Corrections (DOC), Truth in Sentencing (TIS) and criminal penalties. In this article, we will discuss some of the changes made by the DOC to guide its agents when making pre-sentence investigation (PSI) recommendations as a result of the TIS legislation.

Background of Felony Classification System and Penalty Changes

Act 109 created a new felony classification system. All felonies are now classified within classes A through I, replacing the old A through E classification system. Some Class A misdemeanors were reclassified as felonies and some felonies were reclassified as misdemeanors. Some crimes were adjusted upward in the system (to a higher felony class) and some were adjusted lower. Unclassified felonies were eliminated along with the presumptive and mandatory minimum penalties attached to them. The lengths of extended supervision (ES) were limited to specific maximum terms.

Act 109 also recreated the Sentencing Commission and charged that body with the task of promulgating new advisory sentencing guidelines. Until that is completed, the temporary sentencing guidelines developed by the Criminal Penalties Study Committee are available to the courts.



***Michael Lew** is currently an Assistant Chief in the Wisconsin Division of Community Corrections. He has previously held positions as Administrative Officer in the WDCC managing the high risk and sex offender programs, as Field Supervisor in Rock, Green, Grant, Iowa, Lafayette, Richland, and Dane counties, as Halfway House and Residential Program Coordinator in the Division, as Assistant to the Secretary of the Department, and as Adult Services Specialist in the Division of Adult Institutions. He serves on the Governor's Pardon Advisory Board and the UW-Platteville Criminal Justice Advisory Board. He is also Chairman of the Board of the Summit Credit Union. In the last few years, he has served in the faculty of the Corrections Training Center and has been active in several Department initiatives including the Sex Offender Supervision manual. He chaired the workgroup that developed the DCC Sentencing Grid system and has presented before the Sentencing Commission and several conferences.



***Eric Kim** has been an employee of the Department of Corrections since January 1995 when he started as a Probation/Parole Agent in Racine in the Division of Intensive Sanctions. Eric took a position in March of 1998 as a Probation/Parole Agent responsible for the Geographical Information System (GIS specialist) with the Pilot Racine Area Project. In July 2000, he was promoted to Corrections Field Supervisor and has been responsible for supervising a Probation/Parole Unit since then but continues to provide services to the Department in the area of the Geographical Information System. He provides additional expertise in the area of Information Technology and served a key role on the Division of Community Corrections Truth in Sentencing Committee developing and implementing the database system that captures the risk scores, DCC recommendations, and sentences.

The legislation also provided for the operation of a “Earned Release Program” for sentenced inmates who met certain statutory and administrative requirements. (See the Fall 2002 issue of the *Wisconsin Defender* for more information about the Earned Release Program <http://www.wisspd.org/html/publications/docs/WdefFall03.pdf>.) Early release is an option for inmates that successfully complete the program (in addition to the existing Challenge Incarceration Program) upon the order of the sentencing court.

As a result of 1997 Wisconsin Act 283, the legislation that created the original TIS provisions, the total lengths of imprisonment (which combines the confinement time (CT) with the extended supervision (ES) time) were increased by 50% or one year whichever was greater. Parole was eliminated and all new offenders were subject to the CT/ES bifurcated sentence. There were additional technical and substantive provisions of Acts 283 and 109 but they will not be discussed in this article unless they relate specifically to the pre-sentence process.

Guidance to the Department of Corrections

Clearly, the TIS legislation was designed to bring certainty to sentencing. At the same time, the TIS legislation substantially increased the total potential penalty for most offenses. However, the TIS legislation did not require the imposition of longer prison sentences nor did it suggest that offenders be confined for periods longer than under prior law.¹

While looking at a process to guide agents in formulating PSIs within the context of Acts 283 and 109, the DOC focused on the following nine principles:

- Insure that the process conformed to the DOC’s Mission Statement.
- Insure that the process incorporated the Division of Community Corrections’ *Statement of Principles*
- Insure that the process provided for public trust and confidence in the recommendations
- Promote consistency in sentencing recommendations across the state
- Implement the goal of certainty of sentencing
- Promote efficient and effective use of correctional resources
- Maintain consistency with advisory sentencing guidelines and subsequent guidelines promulgated by the sentencing commission
- Provide agent staff with an easily understood system of making sentencing recommendations
- Promote elemental fairness in sentencing recommendations

Because of the significant ranges of penalties and the heightened importance given to the initial sentence under TIS, the DOC decided to develop specific recommendation grids for each felony classification within the context of an overall structure that would be both internally and externally consistent. It was also important to stress to DOC staff that these guidelines were for use by *agents* to make recommendations. They are not intended to replace the temporary advisory sentencing guidelines developed for the courts or the work of the Sentencing Commission.

Development of Pre-Sentence Recommendation Grids

Sentencing decisions are extremely complex. Therefore, the PSI grid process was designed to assist DOC staff in making informed, reasoned sentencing recommendations by incorporating the following three elements of risk:

1. The felony classification as a result of the charging and conviction process

Clearly the more serious the offense, the higher the felony class of the conviction. The grids were therefore designed to increase penalty recommendations as the felony class increased.

2. **The relative seriousness of the instant offense compared to other similar crimes—mitigation and aggravation**

The agent is asked to use the criteria contained in Act 109 as well as additional criteria formulated by the DOC to make an assessment of mitigation or aggravation. The agents are trained to normally assess the crime as Neutral and to make sure that crimes are compared to like crimes. For example, a sexual assault would be compared only to other sexual assaults to determine if it is *more* aggravated than other sexual assaults. It would not be compared to a burglary.

3. **The actuarial risk of the offender as determined by a validated risk instrument**

The offender is then evaluated with a risk instrument that has been normed against 44,000 Wisconsin offenders. It is the same instrument (the risk portion of the Risk/Needs instrument) that has been used by Wisconsin agents for many years.

The Process

The PSI is a document for the court. The PSI is prepared exactly as it has been with the agent staff gathering, collating, and analyzing information. It is to be prepared with the same attention to detail and written in the same format, as was the case prior to the implementation of the grid. The difference is that after collecting the information, the agent will utilize a **grid chart** to make sentencing recommendations and will also make recommendations on eligibility (but not acceptance into) the Challenge Incarceration Program and the Earned Release Program.

In order to utilize the grids (see Tables 1 and 2 which follow), the agent must perform the following tasks:

1. **Determine the date of the crime.** Because statutory provisions for crimes committed between 12/31/99 and 2/1/03 (TIS I) are different than those committed on or after 2/1/03 (TIS II), there are two different grids and the agent must identify the appropriate grid. In addition, a complicating factor is that TIS I crimes continue to include unclassified offenses with mandatory and/or presumptive minimum sentences. These crimes are not subject to the grid process.
2. **Determine the offense class in the correct grid.** The agent selects the appropriate felony classification for each conviction included in the PSI order. It must be one of the classes B-E for TIS I or B-I for TIS II. The grids are not used for class A felonies in either scheme or for unclassified offenses in TIS I.
3. **Determine the seriousness of the particular offense within that offense class.** Agents start with the presumption that the offense is neutral and review possible criteria for aggravation in comparison with similar offenses. This is an agent/supervisor judgment. It is not merely an accumulation of aggravated or mitigating factors. Factors may be found in the *TIS Act 109 Implementation Booklet*.²
4. **Complete the Risk Assessment.** The DOC developed a form (DOC2244) that collects information about the offender, the risk score, and the recommendation and sentencing data. The risk score is used with the grid.
5. **Locate the correct cell (box) in the sentencing grid.** At this point, the agent knows the felony classification, the level of aggravation/mitigation, and the level of risk (lower, medium, higher). The agent selects the appropriate felony class grid and goes to the cell where the level of aggravation and the level of risk meet. That cell will be color-coded and contain a number.

If the cell is **yellow**, the agent will normally recommend probation. If it is **blue** (*Editor's Note: The blue cells in the grids may appear purple on some computer systems.*), there is an option of probation or imprisonment. If it is **red** (*Editor's Note: The red cells in the grids may appear orange*

on some computer systems.), the presumption is imprisonment. The numbers in the blue and red cells refer to the expected length of confinement time that the agent will recommend if the agent recommends prison. The number in the yellow cell refers to the maximum confinement the agent should recommend as a condition of probation, as an imposed and stayed sentence or, if the presumption of probation is overridden by management, in prison.

6. **If confinement time is recommended, the agent must select the ES recommendation.** The agent looks at the **green** cell corresponding to the yellow, blue, or red cell. The number contained in the appropriate green cell describes the length of ES to correspond to the previously determined CT.

If the grid guidance results in a recommendation for probation, the numbers within the grid do not specify the length of probation. The length of probation must be at least one year not to exceed the maximum confinement time specified for that felony classification or 3 years whichever is longer. For example, for a class D felony (TIS II), the maximum length of probation is 15 years. For a class I felony, the maximum length of probation is 3 years (since 3 years is longer than the maximum confinement time of 1.5 years).

Operational Example

1. The offender is convicted of robbery. We determine that this is a TIS II offense because it was committed on March 30, 2003. We select the TIS II grid.
2. We determine that this is a Class E felony. Using the first column in the grid, we find that this offense class has a maximum CT of 10 years and a maximum ES of 5 years.
3. Based upon our analysis of the offense we determine that the offense (not the offender) is aggravated (for our example it is because the offender was masked and there was a frightened victim). Therefore, we select “Aggravated” within the Class E felony grid.

OFFENSE CLASS	Confinement			Extended Supervision: Greater of 25% of Confinement or: 5y Max
	Mitigated	Neutral	Aggravated	
E (Max=10CT)				
Lower Risk	1y	2-3y	4-5y	1-2y
Medium Risk	1y	3-4y	5-7y	2-3y
Higher Risk	1y	4-5y	7-10y	3-4y

4. Based on the score of the sentencing risk instrument, we determine the level of offender (not offense) risk. For example, if the score is 13 points, the offender is “medium risk.” The agent then finds the nexus of the aggravated column with the medium risk row within the Class E grid. In this example, it is a red-colored cell with the 5-7 number. The expectation is that the agent would recommend 5-7 CT on a bifurcated sentence. The agent would then find the corresponding green cell for a medium risk case (in this case 2-3 years) and that would be the expected ES recommendation.

OFFENSE CLASS	Confinement			Extended Supervision: Greater of 25% of Confinement or: 5y Max
	Mitigated	Neutral	Aggravated	
E (Max=10CT)				
Lower Risk	1y	2-3y	4-5y	1-2y
Medium Risk	1y	3-4y	5-7y	2-3y
Higher Risk	1y	4-5y	7-10y	3-4y

If the offense had been Neutral, we would have used the same process except that the grid would have given the agent the option of recommending prison or probation. If prison was recommended, the CT would be 3-4 years with 2-3 years of ES. Note that the ES recommendations will always meet the 25% statutory minimum of the CT.

The grid recommendations may be exceeded only with the approval of the Regional Chief or Assistant Chief.

If the crime is a sex offense and the risk instrument shows low risk, the agent may ask that a specific sex offender risk instrument such as the RRASOR or STATIC 99 be completed. If either of these instruments show greater risk, the agent may use that finding in the place of the regular instrument.

It should be noted that the grids make exceptions for aggravated offenses committed by higher risk offenders. In these cases, imprisonment is either presumed or an option and the CT recommendation is increased.

Evaluation

The system includes an evaluation component. Each form completed by the agent will indicate the grid recommendation, the DOC recommendation (if different from the agent's) and the sentencing outcome. These documents are entered into a database and will indicate to the DOC whether the grids indeed provide accepted guidance to the agents as measured by differences between the recommendations and the judicial outcomes. In addition, the DOC will be able to identify areas around the state that have substantially different outcomes. This information will help the DOC refine the system in the future.

Summary

The DOC pre-sentence investigation recommendation grids were designed to implement the intent and provisions of the TIS legislation. The grids were designed to assist *agents* make professional, consistent, and rational recommendations on sentencing to the courts recognizing that the PSIs are but one source for the court to consider. These recommendations are not considered judicial guidelines nor are they designed to replace the advisory guidelines being developed by the Sentencing Commission.

The DOC grids are based on 3 measures of risk:

1. Risk as measured by the charging, prosecution, and conviction process (felony class)
2. Risk as measured by the agent reviewing the crime in comparison with similar crimes (mitigation/aggravation)
3. Risk as measured by an actuarial validated risk instrument

The DOC grids attempt to integrate certain principles such as elemental fairness and consistency across geographical boundaries while recognizing certain historical sentencing practices. The grids are designed to implement the goal of certainty in sentencing without increasing the length of confinement, a goal described in the legislation. The grids are designed to be clear to the agents using them and clear to the consumers of the PSIs. Finally, the DOC has incorporated an evaluative mechanism to aid in refining the system.

Endnotes

¹ Hammer, Thomas, Professor, Marquette Univ. Law School, "Truth In Sentencing Part II: 2001 Wisconsin Act 109—Crimes and Their Penalties", Presentation at the 2002 Office of the Wisconsin State Public Defender Conference, Sept 26-27, 2002.

² *Wisconsin Department of Corrections TIS ACT 109 Implementation Guide* for DOC personnel. Jan., 2004. (Training guide used in conjunction with Agent Training.) ■

Bifurcated Sentence Recommendation Grid - TIS I
For Crimes Committed After Dec 31, 1999 and Prior to Feb 1, 2003

OFFENSE CLASS	Confinement			Extended Supervision: Greater of 25% of Confinement or: 20y Max
	Mitigated	Neutral	Aggravated	
B (Max=40CT)				
Lower Risk	1-2y	7-9y	13-16y	3-4y
Medium Risk	3-4y	9-13y	16-20y	5-6y
Higher Risk	5-7y	13-16y	20-40y	7-10y
BC (Max=20CT)				10y Max
Lower Risk	1y	4y	5-7y	2-3y
Medium Risk	2y	5y	7-9y	3-4y
Higher Risk	3y	5-7y	10-20y	4-5y
C (Max=10CT)				5y Max
Lower Risk	1y	2-3y	4-5y	1-2y
Medium Risk	1y	3-4y	5-7y	2-3y
Higher Risk	1y	4-5y	7-10y	3-4y
D (Max=5CT)				5y Max
Lower Risk	1y	1y	1-2y	1y
Medium Risk	1y	1y	1-2y	2-3y
Higher Risk	1y	1-2y	2-3y	3-4y
E (Max=2CT)				3y Max
Lower Risk	1y	1y	1y	1y
Medium Risk	1y	1y	1y	2y
Higher Risk	1y	1y	1-2y	2y

- Presumed Probation
- No presumption of Prison or Probation, based on circumstances
- Presumed Prison

TABLE 1

Bifurcated Sentence Recommendation Grid (TIS II) Crimes Committed on or after 02/01/03

OFFENSE CLASS	Confinement			Extended Supervision: Greater of 25% of Confinement or: 20y Max
	Mitigated	Neutral	Aggravated	
B (Max=40CT)				
Lower Risk	1-2y	7-9y	13-16y	3-4y
Medium Risk	3-4y	9-13y	16-20y	5-6y
Higher Risk	5-7y	13-16y	20-40y	7-10y
C (Max=25CT)				
Lower Risk	1-2y	5-6y	9-10y	3-4y
Medium Risk	2-3y	6-8y	10-11y	5-6y
Higher Risk	3-4y	9-10y	12-25y	7-8y
D (Max=15CT)				
Lower Risk	1y	3y	4-5y	2-3y
Medium Risk	2y	4y	5-7y	3-4y
Higher Risk	3y	4-5y	8-15y	4-5y
E (Max=10CT)				
Lower Risk	1y	2-3y	4-5y	1-2y
Medium Risk	1y	3-4y	5-7y	2-3y
Higher Risk	1y	4-5y	7-10y	3-4y
F (Max=7.5CT)				
Lower Risk	1y	1y	3-4y	1-2y
Medium Risk	1y	2y	4-5y	2-3y
Higher Risk	1y	3-4y	5-7.5y	3-4y
G (Max=5CT)				
Lower Risk	1y	1y	1-2y	1y
Medium Risk	1y	1y	1-2y	2-3y
Higher Risk	1y	1-2y	2-3y	3-4y
H (Max=3CT)				
Lower Risk	1y	1y	1-2y	1y
Medium Risk	1y	1y	1-2y	2y
Higher Risk	1y	1-2y	2-3y	2y
I (Max=1.5CT)				
Lower Risk	1y	1y	1y	1y
Medium Risk	1y	1y	1y	1y
Higher Risk	1y	1y	1-1.5y	2y

- Presumed Probation
- No presumption of Prison or Probation, based on circumstances
- Presumed Prison

TABLE 2