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# D.W.I. Work Group

## Report to the Legislature October 2000

Prepared by the Minnesota County Attorney's Association

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**Members of the D.W.I. Work Group:**

**Co-Chairs: Senator Dave Johnson, Minnesota Senate  
Commissioner Sheryl Ramstad Hvass, Department of Corrections  
Representative Rich Stanek, Minnesota House of Representatives**

**Members: Captain Mike Asleson, Minnesota State Patrol  
Boyd Beccue, Kandiyohi County Attorney  
Commissioner Tony Bennett, Ramsey County  
Sheriff Steve Borchardt, Olmsted County  
Deb Dailey, Minnesota Sentencing Guidelines Commission  
Judge Kathleen Gearin, Ramsey County  
Judi Gordon, Create Inc.  
James Hankes, Chief Public Defender  
Commissioner David Harms, Wabasha County  
Don Ilse, Anoka County Corrections  
Amy Klobuchar, Hennepin County Attorney  
Daniel Lew, Assistant Public Defender  
Representative Tim Mahoney, Minnesota House of Representatives  
Senator Thomas Neuville, Minnesota Senate  
Chris Schill, Stearns County Community Corrections  
Jerry Soma, Anoka County Human Services  
Chief Deputy John Stanoch, Minnesota Attorney General's Office  
Steven Thies, Redwood Falls City Attorney  
Commissioner Charlie Weaver, Department of Public Safety  
Commissioner Pam Wheelock, Department of Finance**

## Senate File 2677 - Section 6, DWI Felony Work Group

- 70.23 Sec. 6. [WORKING GROUP ON DWI FELONY.]
- 70.24 Subdivision 1. [MEMBERSHIP.] (a) A driving while impaired
- 70.25 working group is created consisting of the following individuals
- 70.26 or their designees:
- 70.27 (1) two members of the senate, one from the majority caucus
- 70.28 and one from the minority caucus, chosen by the subcommittee on
- 70.29 committees of the senate committee on rules and administration;
- 70.30 (2) two members of the house of representatives, one from
- 70.31 the majority caucus and one from the minority caucus, chosen by
- 70.32 the speaker of the house;
- 70.33 (3) the commissioner of corrections;
- 70.34 (4) the commissioner of public safety;
- 70.35 (5) the commissioner of finance;
- 70.36 (6) the attorney general;
- 71.1 (7) the chief justice of the Minnesota supreme court;
- 71.2 (8) the executive director of the sentencing guidelines
- 71.3 commission;
- 71.4 (9) two county attorneys, one from a metropolitan county
- 71.5 and one from a nonmetropolitan county, chosen by the Minnesota
- 71.6 county attorney's association;
- 71.7 (10) one city attorney, chosen by the league of Minnesota
- 71.8 cities;
- 71.9 (11) two public defenders, one from a metropolitan county
- 71.10 and one from a nonmetropolitan county, chosen by the state
- 71.11 public defender;
- 71.12 (12) one sheriff, chosen by the Minnesota sheriff's
- 71.13 association;
- 71.14 (13) two county commissioners, one from a metropolitan
- 71.15 county and one from a nonmetropolitan county, chosen by the
- 71.16 association of Minnesota counties;
- 71.17 (14) one head of a community corrections agency, chosen by
- 71.18 the chairs of the senate crime prevention and judiciary budget
- 71.19 division and the house judiciary finance committee;
- 71.20 (15) one probation officer, chosen by the Minnesota
- 71.21 association of community corrections act counties; and
- 71.22 (16) one representative of a chemical dependency treatment
- 71.23 program, chosen by the commissioner of human services.
- 71.24 (b) The working group may choose a chair from among its
- 71.25 members.
- 71.26 Subd. 2. [STUDY AND RECOMMENDATIONS REQUIRED.] (a) The
- 71.27 working group shall study and make recommendations on the
- 71.28 implementation of a felony-level impaired driving penalty,
- 71.29 including but not limited to:
- 71.30 (1) the number of prior offenses within a ten-year time

71.31 period that should occur before a felony-level impaired driving  
71.32 penalty is appropriate;

71.33 (2) the most cost-effective manner for dealing with  
71.34 treatment, probation, and incarceration issues;

71.35 (3) the circumstances under which stayed sentences for  
71.36 felony-level impaired driving offenses are appropriate;

72.1 (4) the degree to which, if at all, felony-level impaired  
72.2 driving offenses should be part of the sentencing guidelines  
72.3 grid;

72.4 (5) the circumstances under which, if at all, mandatory  
72.5 prison sentences for felony-level impaired driving offenses are  
72.6 appropriate and, if so, recommended sentence lengths;

72.7 (6) appropriate incarceration, treatment, and supervision  
72.8 options for felony-level impaired driving offenders;

72.9 (7) the statutory maximum sentence appropriate for  
72.10 felony-level impaired driving offenses; and

72.11 (8) the impact on prisons, jails, and community corrections  
72.12 agencies of the recommended alternatives.

72.13 (b) The working group shall study how other states address  
72.14 repeat impaired driving offenders, including how the crimes and  
72.15 penalties are statutorily defined, how these offenders are  
72.16 incarcerated and supervised, how their chemical dependency  
72.17 treatment needs are addressed, and any research on the  
72.18 effectiveness of these measures.

72.19 Subd. 3. [REPORT.] By September 1, 2000, the working group  
72.20 shall forward its final report to the chairs and ranking  
72.21 minority members of the senate and house of representatives  
72.22 committees and divisions having jurisdiction over criminal  
72.23 justice policy and funding.

72.24 Subd. 4. [PLAN FOR PLACEMENT AND SUPERVISION OF FELONY DWI  
72.25 OFFENDERS.] (a) The commissioner of corrections, in consultation  
72.26 with the commissioner of human services, shall develop a  
72.27 correctional plan to respond to the recommendations submitted by  
72.28 the working group under subdivision 3. The plan shall address  
72.29 the following matters and shall outline the fiscal implications  
72.30 of each:

72.31 (1) the placement and management of felony-level impaired  
72.32 driving offenders who would be committed to the commissioner's  
72.33 custody, including an identification of the facilities in which  
72.34 these offenders would be confined, such as state prisons, other  
72.35 state-owned or state-operated residential facilities, and  
72.36 private facilities that currently are not part of the state  
73.1 correctional system;

73.2 (2) the specific measures the commissioner would undertake  
73.3 to respond to the chemical dependency treatment needs of  
73.4 offenders committed to the commissioner's custody, including how

73.5 these measures would comply with the treatment standards used in  
73.6 other public or private treatment programs;  
73.7 (3) the placement and management in local correctional  
73.8 facilities of felony-level impaired driving offenders whose  
73.9 sentences would be stayed, including an analysis of current jail  
73.10 resources, the need for expanded capacity, and the availability  
73.11 of private facilities; and  
73.12 (4) the supervision of felony-level impaired driving  
73.13 offenders in the community, including the provision of private  
73.14 treatment and other services.  
73.15 (b) By December 1, 2000, the commissioner shall forward the  
73.16 plan to the chairs and ranking minority members of the senate  
73.17 and house of representatives committees and divisions having  
73.18 jurisdiction over criminal justice policy and funding.

Both houses of the Minnesota Legislature passed felony DWI provisions during the 2000 legislative session. In the end, however, the Legislature created a DWI working group and directed that group to address several questions.

The task force met on four occasions over the summer and fall of 2000. The work group touched on the several legislative requests outlined in the statute at various points in all four meetings. These discussions are summarized as follows:

**1. The Number of Prior Offenses Within a 10 Year Time Period That Should Occur Before a Felony Level Impaired Driving Penalty is Appropriate.**

The work group reviewed the number of offenses required for felony treatment in last year's bills. The original bills called for felony penalties on the fourth offense within 10 years. Statistics developed by the Minnesota Department of Public Safety suggested 1317 Minnesota drivers committed their fourth or greater offense in 1998.

Near the end of the 2000 legislative session, the Legislature amended the felony DWI section to make a fifth DWI within 10 years a felony. Again, statistics developed by the Department of Public Safety suggested that 511 Minnesota drivers committed their fifth or greater DWI within 10 years in 1998. Thirty-eight other states create felony penalties for DWI. With a few exceptions, the felony is predicated on the number of priors within a set number of years:

		Priors			
		2	3	4	5
Look Back Period	Less than Five Years	0	0	1	0
	Five to Nine Years	1	9	4	2
	Ten Years	1	7	4	0
	Twelve Years	0	1	1	0
	Forever	2	0	5	0

The work group recognized a strong legislative desire to maintain a standard 10 year look back period. The group notes, however, that the popular 5 year look back period used in many other states dramatically drops the number of felonies. For example, only 363 Minnesota drivers committed a fourth or greater offense, in five years, in 1998.

**2. The Circumstances Under Which Stayed Sentences For a Felony Level Impaired Driving Offenses Are Appropriate.**

The original felony DWI bills provided a 60 month sentence for a fourth time DWI within 10 years. This sentence, however, is stayed provided the offender serves six month in a local jail or workhouse and underwent treatment. Later amendments stripped the local incarceration requirement and restored present local incarceration provisions. Other

amendments allowed defendants committed to the Department of Corrections conditional release if they completed a state run treatment program and served at least one year of their sentence. The stayed prison sentence was also reduced to 36 months.

The work group heard from a variety of local correctional officers and treatment on various programs already in place. There is no statewide mandate or standard for treatment of chronic DWI offenders. Minn. Stat. § 169.1265 provides for pilot programs of intensive probation for DWI offenders. The task force heard from programs operating under that statute and other programs.

The group was told repeatedly that intensive, long-term supervision (both before and after treatment) was crucial to successful management of the chronic offender. Much discussion centered on the probability that many chronic offenders would choose local workhouse time over long-term treatment and supervision. The group generally agreed that there is a real need to impose but stay sentences that provide sufficient incentive for the offender to choose treatment and supervision.

Right now, most chronic offenders end up serving about six months in local correctional facilities. Local officials believe this is appropriate, but also believe that a significant increase in the remaining stayed time will force offenders to choose and comply with treatment and supervision programs. Unfortunately present law only allows for eight months local time (out of twelve months) on a gross misdemeanor sentence. Thus, after a six month pre-treatment term, only two months remain as incentive to cooperate with a treatment program. The worst offenders may face "stacked" workhouse terms because they likely drove without a license or without insurance. A few offenders may have some time stayed from prior convictions available for probation revocation. Such arrangements, however, are hit and miss and not uniformly applied. Longer felony terms, although stayed, provide substantially greater leverage and could enhance the likelihood of successful long-term management of chronic offenders.

Local law enforcement officials express concern that local facilities are stretched to the limit and cannot handle additional long executed local sentences. Officials from greater Minnesota (including county attorneys from greater Minnesota) also indicated that it is difficult to provide intensive supervision in counties where offenders are scattered over a large geographic area.

**3. The Degree to Which, If At All, Felony Level Impaired Driving Offenses Should Be Part of the Sentencing Guidelines Grid.**

The 2000 Felony DWI Bill contained language significantly exempting felony DWI from the Minnesota Sentencing Guidelines. The drafters apparently reasoned that the mandatory but stayed sentence of 60 months (later amended to 36 months) superceded the need for the

guidelines grid. Later amendments stripped this provision leaving the bill silent on ranking on the Minnesota Sentencing Guidelines. The work group learned that placing a felony DWI on the guidelines grid could increase a felony DWI bill's bed impact. For example, if a DWI were placed at Level V and the offender's criminal history score is 4 or greater, the presumptive sentence is actually longer than 36 months. Because DWI offenders tend to repeat their offense, it is reasonable to suggest that a large number of offenders will eventually surpass the 36 months provided in the bill.

On the other hand, felony DWI bill proponents strongly suggest that ranking a felony DWI offense lower than Level 5 will make the felony penalty illusory. Repeat DWI offenders already face a potential one year local workhouse penalty. A Level I or II ranking will result in a nearly identical one year and one day penalty for most offenders. Proponents suggest that it is disingenuous to adopt a new statute that simply adds one day to the penalty. Likewise, a year and a day stayed sentence adds little leverage for a district judge or local correctional official trying to manage a chronic offender. Short workhouse stints will likely eat up most, if not all, of the stayed prison time.

Finally, the group engaged in some discussion recognizing the huge gap that exists between the present Level VI 21 month stayed offense and the present Level VII 48 month executed sentence line. If the Legislature elects to rank felony DWI there may be value in creating a new 36 month line that may be stayed or executed depending on the circumstances. Deb Dailey, Executive Director, pointed out that the guidelines are extremely useful to gather information on sentencing practices. No matter what form felony DWI takes, it will be a work in progress. Everyone agrees felony DWI costs are hard to measure. Unless DWI sentences are collected on guidelines worksheets, it will be difficult to measure the true cost of the first few years of enforcement.

**4. The Circumstances Under Which, If At All, Mandatory Prison Sentences For Felony Level Impaired Driving Offenses Are Appropriate, And, If So, Recommended Sentence Lengths.**

The working group recognized that the term mandatory minimum can be misleading. The original bill called for a mandatory sentence length but did not require execution of that sentence. Rather, the drafters expected most sentences would be stayed and the stayed sentence used as an incentive to enter treatment and obey long-term probationary supervisory terms.

Presentation by treatment providers and other professionals confirmed the wisdom of this view. The group was repeatedly told that a "consequences only" approach will not yield long-term success. The value of a prison sentence is found in the potential consequence that backs up long-term supervision.



Several working group members questioned whether long-term supervision was worth the cost. Members reasoned that by the time an offender reached the fourth conviction there was little hope of reform and that we ought to simply pay for as much incapacitation by incarceration as we can afford. Other members reminded the group that potential stayed prison time substantially raised the stakes for chronic offenders. While chronic offenders may learn to “work” a local correctional system with work release, furloughs, and electronic home monitoring, prison time meant wholesale disruption of their lives. A substantial number of these chronic offenders lead relatively functional lives in the form of close family ties, jobs, and other community involvement. The risk of prison could act as a very real deterrent by severing many of those ties.

The need for meaningful supervision and consequences led many members of the work group to remind the Legislature not to pass a “hollow” felony. For example, the Sheriffs Association has and will support a felony DWI bill. As custodians of local lockups, however, the sheriffs have long sought additional funds for expanded capacity. Creating a new felony with no new ability to jail these offenders could be seen as a change in name only with little real impact on these offenders. The sheriffs urge the Legislature to fund the local costs associated with a felony DWI.

Sentence length, reviewed earlier in this report, was also discussed by the group. If a felony DWI is enacted, the potential sentence length should reflect two goals. First, the sentence should represent a logical next step in the continuum of penalties that already exist. If a first DWI is punishable by 90 days, and a second, third, or fourth punishable by one year, subsequent DWI’s ought to carry a proportionally longer penalty. Likewise, the in and out nature of the chronic offender means judges need plenty of leverage. There should be a substantial period of time left once a judge has chewed up a full year of local time attempting to manage a chronic offender under community supervision.

##### **5. The Impact on Prisons, Jails, and Community Corrections Agencies of the Recommended Alternatives.**

The original DWI bill containing a 60 month prison sentence, 6 month mandatory local sentencing, and automatic revocation sanctions provided bed impact estimates ranging from 260 to 1200 beds. State and local fiscal impact ranged into the tens of millions of dollars. Subsequent amendments reduced the state impact to under ten million dollars and virtually eliminated local costs.

Nevertheless, local correctional officials expressed concerns that felony probationers were more expensive to local correction agencies than gross misdemeanants. It is probably impossible to quantify the difference. The difference is likely ameliorated by existing mandatory minimums for repeat offenders and the obvious cost of revolving door convictions for out-of-control chronic offenders. Likewise, local costs must be discounted by those prisoners transferred to state supervision after revocation of a stayed state sentence.

State bed impacts are also difficult to measure. A fourth time DWI (within ten years) creates 1317 offenders; a fifth time offense creates 511 offenders. How many of these offenders will end up in a state facility is open to question. During the last legislative session much discussion centered on a potential 20% revocation rate. This was largely based on the revocation rate generally associated with other chronic property rates such as aggravated forgery. Some committee members, however, warned that this figure could be higher given the known repeat rate for DWI offenders now. Anoka County, for example, reported a 40% violation rate for its intensive supervision program. Of course, the violation rate and the prison commit rate is not the same. One judge suggested a more realistic rate may be 33%. A variety of factors could drive this figure both up and down. DWI offenders tend to have more significant ties to the community, jobs, and family support – all factors traditionally associated with placing and keeping an offender on probation even if a new violation occurs. The Austin decision from the Minnesota Supreme Court suggests prison is a last resort for probation violations. Given the ties to the community many offenders have, judges may be reluctant to send offenders to prison.

A more significant bed savings, however, exists in the late session amendment providing for early supervised release of those offenders who complete a state treatment program. Ultimately, such a program could cut the bed impact of a 36 month commit in half. The Department of Corrections provided information on a number of existing treatment programs run by the department. Conceivably, the Department of Corrections could provide a 200 bed capacity in an expanded program on the grounds of an existing facility.

## **6. The Public Defender Addendum**

Although not enthusiastic about the prospect of a new felony, the public defender members of the work group did make several observations. The public defenders suggested a 4th in 10 felony with a stayed penalty of 12 to 18 months, and local time of 180 days that could be discounted for participation in intensive probation. The public defenders felt that DWI's were the result of a condition that was treatable for many and that prison should be reserved for those unwilling to complete treatment. The public defenders encourage the use of "non-traditional" facilities such as Camp Ripley. Finally, the public defenders question the use of long sentences as a deterrent, but agree forced treatment does work.