



2005 SENATE BILL 408

October 31, 2005 - Introduced by Senators DARLING, ZIEN, A. LASEE, ROESSLER, LAZICH, LASSA, GROTHMAN and KANAVAS, cosponsored by Representatives SUDER, HONADEL, KLEEFISCH, VAN ROY, JESKEWITZ, NISCHKE, J. FITZGERALD, GRONEMUS, MONTGOMERY, MURSAU, TURNER, ALBERS, LOTHIAN, SHERIDAN, HINES, WOOD, McCORMICK, GUNDERSON, LAMB, NASS, PETTIS, PRIDEMORE, MUSSER, LEMAHIEU, HUNDERTMARK, MOULTON and STONE. Referred to Committee on Judiciary, Corrections and Privacy.

1 **AN ACT** *to renumber and amend* 939.623, 939.624 and 948.02 (1); *to amend*
2 939.30 (2), 939.31, 939.32 (1) (a), 948.025 (1) (a), 973.01 (2) (a), 973.01 (2) (b) 1.,
3 973.01 (2) (d) (intro.), 973.01 (2) (d) 1., 973.01 (3) and 973.014 (1g) (a) 1.; and *to*
4 **create** 939.617 and 948.02 (1) (b) of the statutes; **relating to:** a mandatory
5 term of confinement and the maximum term of imprisonment for certain child
6 sex offenses and providing penalties.

Analysis by the Legislative Reference Bureau

Under current law, a court has broad discretion in structuring a sentence for a person convicted of a crime. In general, the court may place the person on probation or sentence the person to jail or, if the offense is a felony, to prison; the court may impose a fine; or it may do both. The court also has broad discretion in determining the length of any sentence that it imposes and, if the person is sentenced to prison, how much of the sentence is to be served in prison (the term of confinement) and how much is to be served in the community (the term of extended supervision).

The court's discretion, however, is limited by statutes that set maximum penalties for crimes, including sex offenses. In general, if a person is convicted of first-degree sexual assault of a child (having sexual contact or sexual intercourse with a child who is less than 13 years old) or repeated acts of first-degree sexual assault of the same child (both of which are Class B felonies), the maximum sentence length is 60 years, and the maximum initial term of confinement is 40 years. If a

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person is convicted of second-degree sexual assault of a child (a Class C felony involving having sexual contact or sexual intercourse with a child who is less than 16 years old), the maximum sentence length is 40 years, and the maximum initial term of confinement is 25 years.

In a limited number of cases, the court's discretion is also limited by statutes that set minimum sentences. In sex offense cases, two such statutes may be relevant. First, if a person is convicted of first- or second-degree sexual assault (having sexual contact or sexual intercourse with a person without that person's consent under certain aggravating circumstances) after having been convicted of such an offense previously, the court must sentence the person to prison, and the initial term of confinement must be at least three and a half years. Second, if a person is convicted of a second serious child sex offense under the "two-strikes" statute, the person must be sentenced to life imprisonment without the possibility of release to parole or extended supervision.

Under this bill, if a person is convicted of first-degree sexual assault of a child or repeated acts of first-degree sexual assault of the same child, the court must sentence the person to prison, and, unless the exemption described below applies, the initial term of confinement must be at least 25 years. In addition, the bill changes the law regarding having sexual contact or sexual intercourse, through a threat or use of force or violence, with a person who is less than 16 years old. Under the bill, that offense is reclassified as first-degree sexual assault of a child.

The bill also specifies circumstances under which the minimum term of confinement requirement does not apply. Under the bill, the court may impose a shorter sentence, upon the defendant's request, if it finds, by clear and convincing evidence, that: 1) the violation did not involve sexual intercourse by use or threat of force or violence; 2) the violation did not involve sexual intercourse with a victim who was less than 12 years old; 3) at the time of the offense, the defendant was less than 19 years old and no more than 5 years older than the victim; and 4) it is not necessary, in the interest of public protection, for the court to impose the mandatory minimum term of confinement. The bill specifies that: 1) the court must hold a hearing if the defendant files a motion asking for the exemption; 2) the victim must be provided an opportunity to make or submit a statement regarding the motion; and 3) the court may require the defendant to be examined by a physician, a psychologist, or another expert to help the court determine whether it would be in the interest of public protection for the court to impose the mandatory minimum term of confinement.

The bill also changes the maximum term of imprisonment for first-degree sexual assault of a child and for repeated acts of first-degree sexual assault of the same child. Under the bill, those offenses remain Class B felonies, but the court may sentence the person to a term of imprisonment of any length (subject to the minimum term of confinement), including life imprisonment.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 939.30 (2) of the statutes is amended to read:

2 939.30 (2) For a solicitation to commit a crime for which the penalty is or may
3 be life imprisonment, the actor is guilty of a Class F felony. For a solicitation to
4 commit a Class I felony, the actor is guilty of a Class I felony.

5 **SECTION 2.** 939.31 of the statutes is amended to read:

6 **939.31 Conspiracy.** Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41
7 (1x), whoever, with intent that a crime be committed, agrees or combines with
8 another for the purpose of committing that crime may, if one or more of the parties
9 to the conspiracy does an act to effect its object, be fined or imprisoned or both not
10 to exceed the maximum provided for the completed crime; except that for a
11 conspiracy to commit a crime for which the penalty is or may be life imprisonment,
12 the actor is guilty of a Class B felony.

13 **SECTION 3.** 939.32 (1) (a) of the statutes is amended to read:

14 939.32 (1) (a) Whoever attempts to commit a crime for which the penalty is or
15 may be life imprisonment is guilty of a Class B felony.

16 **SECTION 4.** 939.617 of the statutes is created to read:

17 **939.617 Mandatory minimum sentence for child sex offenses. (1)** If a
18 person is convicted of a violation of s. 948.02 (1) or 948.025 (1) (a), the court shall
19 impose a bifurcated sentence under s. 973.01. The term of confinement in prison
20 portion of the bifurcated sentence shall be at least 25 years. Otherwise the penalties
21 for the crime apply, subject to any applicable penalty enhancement.

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1 (2) This section does not apply if s. 939.62 (2m) (c) applies.

2 (3) (a) Subsection (1) does not apply to a violation of s. 948.02 (1) (a) or 948.025
3 (1) if all of the following apply:

4 1. The violation did not involve sexual intercourse by use or threat of force or
5 violence.

6 2. The violation did not involve sexual intercourse with a victim under the age
7 of 12 years.

8 3. At the time of the violation, the person had not attained the age of 19 years
9 and was not more than 5 years older than the child.

10 4. It is not necessary, in the interest of public protection, for the court to impose
11 the sentence described in sub. (1).

12 (b) If a defendant believes that par. (a) 1. to 4. applies, he or she may request
13 that the court make a determination of whether he or she satisfies those criteria. To
14 make such a request, the defendant shall file a motion before sentencing and shall
15 send a copy of it to the district attorney. The district attorney shall make a reasonable
16 attempt to contact the victim of the crime to inform the victim of his or her right to
17 make or provide a statement under par. (d).

18 (c) A court shall hold a hearing on a motion filed by a person under par. (b). The
19 district attorney may appear at the hearing.

20 (d) Before deciding a motion filed under par. (b), the court shall allow the victim
21 of the crime to make a statement in court at the hearing under par. (c) or to submit
22 a written statement to the court. A statement under this paragraph must be relevant
23 to whether the person satisfies the criteria specified in par. (a).

24 (e) 1. Before deciding a motion filed under par. (b), a court may request the
25 defendant to be examined by a physician, psychologist, or other expert approved by

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1 the court. If the defendant refuses to undergo an examination requested by the court
2 under this subdivision, the court shall deny the motion without prejudice.

3 2. If a defendant is examined by a physician, psychologist, or other expert under
4 subd. 1., the physician, psychologist, or other expert shall file a report of his or her
5 examination with the court, and the court shall provide copies of the report to the
6 defendant and, if he or she requests a copy, to the district attorney. The contents of
7 the report shall be confidential until the physician, psychologist, or other expert has
8 testified at the hearing held under par. (c). The report shall contain an opinion
9 regarding whether it would be in the interest of public protection for the court to
10 impose the sentence described in sub. (1) and the basis for that opinion.

11 3. A defendant who is examined by a physician, psychologist, or other expert
12 under subd. 1. is responsible for paying the cost of the services provided by the
13 physician, psychologist, or other expert, except that if the defendant is indigent the
14 cost of the services provided by the physician, psychologist, or other expert shall be
15 paid by the county. If the person claims or appears to be indigent, the court shall refer
16 the person to the authority for indigency determinations under s. 977.07 (1), except
17 that the person shall be considered indigent without another determination under
18 s. 977.07 (1) if the person is represented by the state public defender or by a private
19 attorney appointed under s. 977.08.

20 (f) At the hearing held under par. (c), the defendant has the burden of proving
21 by clear and convincing evidence that he or she satisfies the criteria specified in par.

22 (a). In deciding whether the defendant has satisfied the criterion specified in par. (a)
23 4., the court may consider any of the following:

24 1. The ages, at the time of the violation, of the defendant and of the child with
25 whom the defendant had sexual contact or sexual intercourse.

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1 2. The relationship between the defendant and the child with whom the
2 defendant had sexual contact or sexual intercourse.

3 3. Whether the violation resulted in bodily harm, as defined in s. 939.22 (4), to
4 the child with whom the defendant had sexual contact or sexual intercourse.

5 4. Whether the child with whom the defendant had sexual contact or sexual
6 intercourse suffered from a mental illness or mental deficiency that rendered the
7 child temporarily or permanently incapable of understanding or evaluating the
8 consequences of his or her actions.

9 5. The probability that the defendant will commit other violations in the future.

10 6. The report of the examination conducted under par. (e).

11 7. Any other factor that the court determines may be relevant to the particular
12 case.

13 **SECTION 5.** 939.623 of the statutes is renumbered 939.618, and 939.618 (title),
14 as renumbered, is amended to read:

15 **939.618** (title) ~~Increased penalty;~~ Mandatory minimum sentence for
16 repeat serious sex crimes.

17 **SECTION 6.** 939.624 of the statutes is renumbered 939.619, and 939.619 (title),
18 as renumbered, is amended to read:

19 **939.619** (title) ~~Increased penalty;~~ Mandatory minimum sentence for
20 repeat serious violent crimes.

21 **SECTION 7.** 948.02 (1) of the statutes is renumbered 948.02 (1) (intro.) and
22 amended to read:

23 948.02 (1) ~~Whoever has~~ does any of the following is guilty of a Class B felony,
24 except that, subject to s. 939.617 (1), if applicable, and notwithstanding the

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1 maximum term of imprisonment specified in s. 939.50 (3) (b), the person may be
2 sentenced to a term of imprisonment of any length, including life imprisonment:

3 (a) Has sexual contact or sexual intercourse with a person who has not attained
4 the age of 13 years is guilty of a Class B felony.

5 **SECTION 8.** 948.02 (1) (b) of the statutes is created to read:

6 948.02 (1) (b) Has sexual contact or sexual intercourse with a person who has
7 not attained the age of 16 years by use or threat of force or violence.

8 **SECTION 9.** 948.025 (1) (a) of the statutes is amended to read:

9 948.025 (1) (a) A Class B felony if at least 3 of the violations were violations of
10 s. 948.02 (1), except that, subject to s. 939.617 (1), if applicable, and notwithstanding
11 the maximum term of imprisonment specified in s. 939.50 (3) (b), the person may be
12 sentenced to a term of imprisonment of any length, including life imprisonment.

13 **SECTION 10.** 973.01 (2) (a) of the statutes is amended to read:

14 973.01 (2) (a) *Total length of bifurcated sentence.* Except as provided in par. (c),
15 the total length of the bifurcated sentence may not exceed the maximum period of
16 imprisonment specified in s. 939.50 (3), if the crime is a classified felony, or the
17 maximum term of imprisonment provided by statute for the crime, if the crime is not
18 a classified felony, plus additional imprisonment authorized by any applicable
19 penalty enhancement statutes. This paragraph does not apply to a crime under s.
20 948.02 (1) or 948.025 (1) (a).

21 **SECTION 11.** 973.01 (2) (b) 1. of the statutes is amended to read:

22 973.01 (2) (b) 1. For a Class B felony, other than a felony under s. 948.02 (1) or
23 948.025 (1) (a), the term of confinement in prison may not exceed 40 years.

24 **SECTION 12.** 973.01 (2) (d) (intro.) of the statutes is amended to read:

