



State of Wisconsin
2003 - 2004 LEGISLATURE

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**SENATE SUBSTITUTE AMENDMENT 1,
TO 2003 SENATE BILL 2**

March 26, 2003 - Offered by Senator A. LASEE.

1 **AN ACT** *to renumber* 939.50 (1) (a), 939.50 (3) (a) and 946.50 (1); *to renumber*
2 *and amend* 940.01 (1) (b); *to amend* 115.31 (2g), 118.19 (4) (a), 301.048 (2)
3 (am) 2., 302.11 (1), 303.065 (1) (b) 2., 304.02 (5), 304.06 (1) (b), 304.071 (2),
4 938.355 (4) (b), 938.538 (3) (a) 1m., 939.30 (2), 939.31, 939.32 (1) (a), 939.50 (2),
5 939.60, 939.62 (2m) (a) 2m. c., 939.62 (2m) (c), 939.624 (2), 939.63 (1) (b),
6 939.632 (1) (e) 2., 940.01 (1) (a), 940.01 (2) (intro.), 971.17 (1) (c), 972.03, 972.13
7 (6), 973.01 (3), 973.03 (3) (e) 1., 973.032 (2) (b) and 973.09 (1) (c); and *to create*
8 301.046 (3) (cm), 302.11 (1w), 304.06 (1t), 939.22 (7), 939.50 (1) (ag), 939.50 (3)
9 (ag), 940.01 (1) (am), 940.01 (1) (b) 1. and 2., 946.50 (1g), 961.335 (1m), 967.02
10 (1m), 973.0145, 973.0147 and 978.07 (1) (c) 1m. of the statutes; **relating to:**
11 providing a penalty of either death or life imprisonment for certain first-degree

1 intentional homicides, affecting eligibility for supervised release, and granting
2 rule-making authority.

Analysis by the Legislative Reference Bureau

Under current law, no state crime is punishable by a sentence of death. First degree homicide (causing the death of another human being or an unborn child with the intent to kill that human being, unborn child, or another, except in the case of a legal abortion) is a Class A felony, punishable by life imprisonment.

Unless the defendant is found to be a persistent repeat offender, a court imposing a sentence of life imprisonment must determine whether the defendant will be eligible to petition for release to extended supervision after serving 20 years in prison, after serving a longer period of time in prison, or never. A persistent repeat offender who is sentenced to life imprisonment is not eligible to petition for release to extended supervision.

This substitute amendment provides a penalty of either death or life imprisonment for first degree homicide if the victim is less than 16 years of age, the offender is at least 16 years of age, and the offender is convicted for directly committing the homicide as opposed to being convicted as a party to the crime.

If a person is convicted for a homicide that is punishable by death, the trial court must convene a separate sentencing proceeding. The defendant has a right to a jury at the sentencing proceeding. Generally, the trial jury will serve at the sentencing proceeding. However, if there was no trial jury or if the trial jury cannot continue to serve, a new jury is selected.

At the sentencing proceeding, the defense may present evidence of mitigating circumstances, and the state may present evidence in rebuttal. The jury must consider the circumstances of the crime and evidence of mitigating circumstances and recommend to the court whether to impose a sentence of death. The court may not impose a sentence of death unless the jury unanimously recommends death and the court finds, after considering the circumstances of the crime and evidence of mitigating circumstances, that a sentence of death is appropriate. If the jury recommends a sentence of death and the court finds that a sentence of death is not appropriate, or if the jury recommends a sentence of life imprisonment, the court must sentence the defendant to life imprisonment. Any sentence of death is subject to automatic appellate review by the Wisconsin Supreme Court.

The court may not impose a sentence of death on a person who is mentally retarded. Under the substitute amendment, a person is mentally retarded if he or she has significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning. If a jury recommends a sentence of death and the defendant claims to be mentally retarded, the court must hold a hearing on the issue of mental retardation and must appoint two mental health experts to examine the defendant and testify at the hearing. The court must determine without a jury whether the defendant is mentally retarded.

The court that imposes a death sentence sets the execution date. The secretary of corrections designates the executioner and at least 12 witnesses. The execution is by lethal injection. A death sentence may be stayed only by the governor or an appellate court.

This substitute amendment applies only to those offenses committed on or after the effective date of the substitute amendment.

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

1 **SECTION 1.** 115.31 (2g) of the statutes, as affected by 2001 Wisconsin Act 109,
2 is amended to read:

3 115.31 (2g) Notwithstanding subch. II of ch. 111, the state superintendent shall
4 revoke a license granted by the state superintendent, without a hearing, if the
5 licensee is convicted of any Class AA, A, B, C, or D felony under ch. 940 or 948, except
6 ss. 940.08 and 940.205, for a violation that occurs on or after September 12, 1991, or
7 any Class E, F, G, or H felony under ch. 940 or 948, except ss. 940.08 and 940.205,
8 for a violation that occurs on or after February 1, 2003.

9 **SECTION 2.** 118.19 (4) (a) of the statutes, as affected by 2001 Wisconsin Act 109,
10 is amended to read:

11 118.19 (4) (a) Notwithstanding subch. II of ch. 111, the state superintendent
12 may not grant a license, for 6 years following the date of the conviction, to any person
13 who has been convicted of any Class AA, A, B, C, or D felony under ch. 940 or 948,
14 except ss. 940.08 and 940.205, or of an equivalent crime in another state or country,
15 for a violation that occurs on or after September 12, 1991, or any Class E, F, G, or H
16 felony under ch. 940 or 948, except ss. 940.08 and 940.205, for a violation that occurs
17 on or after February 1, 2003. The state superintendent may grant the license only
18 if the person establishes by clear and convincing evidence that he or she is entitled
19 to the license.

1 **SECTION 3.** 301.046 (3) (cm) of the statutes is created to read:

2 301.046 (3) (cm) The prisoner is not awaiting imposition of a death sentence.

3 **SECTION 4.** 301.048 (2) (am) 2. of the statutes is amended to read:

4 301.048 (2) (am) 2. He or she is a prisoner serving a felony sentence for a felony
5 that is not punishable by death or life imprisonment and the department directs him
6 or her to participate in the program. This subdivision does not apply to a prisoner
7 serving a bifurcated sentence imposed under s. 973.01.

8 **SECTION 5.** 302.11 (1) of the statutes is amended to read:

9 302.11 (1) The warden or superintendent shall keep a record of the conduct of
10 each inmate, specifying each infraction of the rules. Except as provided in subs. (1g),
11 (1m), (1q), (1w), (1z), (7), and (10), each inmate is entitled to mandatory release on
12 parole by the department. The mandatory release date is established at two-thirds
13 of the sentence. Any calculations under this subsection or sub. (1q) (b) or (2) (b)
14 resulting in fractions of a day shall be rounded in the inmate's favor to a whole day.

15 **SECTION 6.** 302.11 (1w) of the statutes is created to read:

16 302.11 (1w) An inmate who is sentenced to death or life imprisonment under
17 s. 976.0145 is not entitled to mandatory release on parole under this section.

18 **SECTION 7.** 303.065 (1) (b) 2. of the statutes is amended to read:

19 303.065 (1) (b) 2. A person serving a life sentence under s. 939.62 (2m) (c) or
20 973.014 (1) (c) or (1g) (a) 3. or awaiting imposition of a death sentence may not be
21 considered for work release.

22 **SECTION 8.** 304.02 (5) of the statutes is amended to read:

23 304.02 (5) Notwithstanding subs. (1) to (3), a prisoner who is serving a life
24 sentence under s. 939.62 (2m) (c) or 973.014 (1) (c) or (1g) or who is awaiting

1 imposition of a death sentence is not eligible for release to parole supervision under
2 this section.

3 **SECTION 9.** 304.06 (1) (b) of the statutes, as affected by 2001 Wisconsin Act 109,
4 is amended to read:

5 304.06 (1) (b) Except as provided in s. 961.49 (2), 1999 stats., sub. (1m) or (1t),
6 or s. 302.045 (3), 973.01 (6), or 973.0135, the parole commission may parole an
7 inmate of the Wisconsin state prisons or any felon or any person serving at least one
8 year or more in a county house of correction or a county reforestation camp organized
9 under s. 303.07, when he or she has served 25% of the sentence imposed for the
10 offense, or 6 months, whichever is greater. Except as provided in sub. (1t) or s. 939.62
11 (2m) (c) or 973.014 (1) (b) or (c), (1g), or (2), the parole commission may parole an
12 inmate serving a life term when he or she has served 20 years, as modified by the
13 formula under s. 302.11 (1) and subject to extension under s. 302.11 (1q) and (2), if
14 applicable. The person serving the life term shall be given credit for time served prior
15 to sentencing under s. 973.155, including good time under s. 973.155 (4). The
16 secretary may grant special action parole releases under s. 304.02. The department
17 or the parole commission shall not provide any convicted offender or other person
18 sentenced to the department's custody any parole eligibility or evaluation until the
19 person has been confined at least 60 days following sentencing.

20 **SECTION 10.** 304.06 (1t) of the statutes is created to read:

21 304.06 (1t) The parole commission may not parole an inmate who is sentenced
22 to life imprisonment or death under s. 973.0145.

23 **SECTION 11.** 304.071 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
24 is amended to read:

1 304.071 (2) If a prisoner is ~~not eligible~~ ineligible for parole under s. 961.49 (2),
2 1999 stats., or s. 304.06 (1t), 939.62 (2m) (c), 973.01 (6), 973.014 (1) (c) or (1g), or
3 973.032 (5), he or she is not eligible for parole under this section.

4 **SECTION 12.** 938.355 (4) (b) of the statutes, as affected by 2001 Wisconsin Act
5 109, section 533b, is amended to read:

6 938.355 (4) (b) Except as provided in s. 938.368, an order under s. 938.34 (4d)
7 or (4m) made before the juvenile reaches 18 years of age may apply for up to 2 years
8 after its entry or until the juvenile’s 18th birthday, whichever is earlier, unless the
9 court specifies a shorter period of time or the court terminates the order sooner.
10 Except as provided in s. 938.368, an order under s. 938.34 (4h) made before the
11 juvenile reaches 18 years of age shall apply for 5 years after its entry, if the juvenile
12 is adjudicated delinquent for committing a violation of s. 943.10 (2) or for committing
13 an act that would be punishable as a Class B or C felony if committed by an adult,
14 or until the juvenile reaches 25 years of age, if the juvenile is adjudicated delinquent
15 for committing an act that would be punishable as a Class AA or A felony if
16 committed by an adult. Except as provided in s. 938.368, an extension of an order
17 under s. 938.34 (4d), (4h), (4m), or (4n) made before the juvenile reaches 17 years of
18 age shall terminate at the end of one year after its entry unless the court specifies
19 a shorter period of time or the court terminates the order sooner. No extension under
20 s. 938.365 of an original dispositional order under s. 938.34 (4d), (4h), (4m), or (4n)
21 may be granted for a juvenile who is 17 years of age or older when the original
22 dispositional order terminates.

23 **SECTION 13.** 938.538 (3) (a) 1m. of the statutes is amended to read:

24 938.538 (3) (a) 1m. If the participant has been adjudicated delinquent for
25 committing an act that would be a Class AA or A felony if committed by an adult,

1 placement in a Type 1 secured correctional facility, a secured child caring institution
2 or, if the participant is 17 years of age or over or 15 years of age or over and
3 transferred under s. 938.357 (4) (d), a Type 1 prison, as defined in s. 301.01 (5), until
4 the participant reaches 25 years of age, unless the participant is released sooner,
5 subject to a mandatory minimum period of confinement of not less than one year.

6 **SECTION 14.** 939.22 (7) of the statutes is created to read:

7 939.22 (7) "Crime that is punishable by death or life imprisonment" means a
8 crime for which one or more of the possible penalties is death or life imprisonment.

9 **SECTION 15.** 939.30 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
10 is amended to read:

11 939.30 (2) For a solicitation to commit a crime ~~for which the penalty is that is~~
12 punishable by death or life imprisonment, the actor is guilty of a Class F felony. For
13 a solicitation to commit a Class I felony, the actor is guilty of a Class I felony.

14 **SECTION 16.** 939.31 of the statutes is amended to read:

15 **939.31 Conspiracy.** Except as provided in ss. 940.43 (4), 940.45 (4), and
16 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with
17 another for the purpose of committing that crime may, if one or more of the parties
18 to the conspiracy ~~does~~ do an act to effect its object, be fined or imprisoned or both not
19 to exceed the maximum provided for the completed crime; except that for a
20 conspiracy to commit a crime ~~for which the penalty is that is punishable by death or~~
21 life imprisonment, the actor is guilty of a Class B felony.

22 **SECTION 17.** 939.32 (1) (a) of the statutes is amended to read:

23 939.32 (1) (a) Whoever attempts to commit a crime ~~for which the penalty is that~~
24 is punishable by death or life imprisonment is guilty of a Class B felony.

25 **SECTION 18.** 939.50 (1) (a) of the statutes is renumbered 939.50 (1) (am).

1 **SECTION 19.** 939.50 (1) (ag) of the statutes is created to read:

2 939.50 (1) (ag) Class AA felony.

3 **SECTION 20.** 939.50 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
4 is amended to read:

5 939.50 (2) A felony is a Class AA, A, B, C, D, E, F, G, H, or I felony when it is
6 so specified in the statutes.

7 **SECTION 21.** 939.50 (3) (a) of the statutes is renumbered 939.50 (3) (am).

8 **SECTION 22.** 939.50 (3) (ag) of the statutes is created to read:

9 939.50 (3) (ag) For a Class AA felony, life imprisonment or death, as determined
10 under s. 973.0145.

11 **SECTION 23.** 939.60 of the statutes is amended to read:

12 **939.60 Felony and misdemeanor defined.** A crime that is punishable by
13 death or imprisonment in the Wisconsin state prisons is a felony. Every other crime
14 is a misdemeanor.

15 **SECTION 24.** 939.62 (2m) (a) 2m. c. of the statutes is amended to read:

16 939.62 (2m) (a) 2m. c. The solicitation, conspiracy, or attempt, under s. 939.30,
17 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

18 **SECTION 25.** 939.62 (2m) (c) of the statutes is amended to read:

19 939.62 (2m) (c) If the actor is a persistent repeater and the actor is not
20 sentenced to death under s. 973.0145, the term of imprisonment for the felony for
21 which the persistent repeater presently is being sentenced under ch. 973 is life
22 imprisonment without the possibility of parole or extended supervision.

23 **SECTION 26.** 939.624 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
24 is amended to read:

1 939.624 (2) If a person has one or more prior convictions for a serious violent
2 crime or a crime that is punishable by death or life imprisonment and subsequently
3 commits a serious violent crime, the court shall impose a bifurcated sentence under
4 s. 973.01. The term of confinement in prison portion of a bifurcated sentence imposed
5 under this subsection may not be less than 3 years and 6 months, but otherwise the
6 penalties for the crime apply, subject to any applicable penalty enhancement. The
7 court may not place the defendant on probation.

8 **SECTION 27.** 939.63 (1) (b) of the statutes, as affected 2001 Wisconsin Act 109,
9 is amended to read:

10 939.63 (1) (b) If the maximum term of imprisonment for a felony is more than
11 5 years or is a life term or the felony is punishable by death, the maximum term of
12 imprisonment for the felony may be increased by not more than 5 years.

13 **SECTION 28.** 939.632 (1) (e) 2. of the statutes is amended to read:

14 939.632 (1) (e) 2. The solicitation, conspiracy, or attempt, under s. 939.30,
15 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

16 **SECTION 29.** 940.01 (1) (a) of the statutes is amended to read:

17 940.01 (1) (a) Except as provided in par. (am) and sub. (2), whoever causes the
18 death of another human being with intent to kill that person or another is guilty of
19 a Class A felony.

20 **SECTION 30.** 940.01 (1) (am) of the statutes is created to read:

21 940.01 (1) (am) Whoever causes the death of another human being with intent
22 to kill that person or another is guilty of a Class AA felony if the victim has not
23 attained the age of 16 years, unless any of the following applies:

24 1. The actor is less than 16 years of age when he or she commits the offense.

1 2. Notwithstanding s. 939.05, the actor is not guilty of a Class AA felony as a
2 party to a crime if the actor did not intend that a person be killed.

3 3. An affirmative defense under sub. (2) exists.

4 **SECTION 31.** 940.01 (1) (b) of the statutes is renumbered 940.01 (1) (b) (intro.)
5 and amended to read:

6 940.01 (1) (b) (intro.) Except as provided in sub. (2), whoever causes the death
7 of an unborn child with intent to kill that unborn child, kill the woman who is
8 pregnant with that unborn child, or kill another is guilty of a Class ~~A~~ AA felony,
9 except as follows:

10 **SECTION 32.** 940.01 (1) (b) 1. and 2. of the statutes are created to read:

11 940.01 (1) (b) 1. If the actor is less than 16 years of age when he or she commits
12 the offense, the actor is guilty of a Class A felony.

13 2. If the actor is a party to the offense as provided under s. 939.05 and did not
14 intend that an unborn child, the woman who was pregnant with that unborn child,
15 or another be killed, the actor is guilty of a Class A felony.

16 **SECTION 33.** 940.01 (2) (intro.) of the statutes is amended to read:

17 940.01 (2) MITIGATING CIRCUMSTANCES. (intro.) The following are affirmative
18 defenses to prosecution under this section ~~which~~ that mitigate the offense ~~offenses~~
19 under sub. (1) to 2nd-degree intentional homicide under s. 940.05:

20 **SECTION 34.** 946.50 (1) of the statutes is renumbered 946.50 (1m).

21 **SECTION 35.** 946.50 (1g) of the statutes is created to read:

22 946.50 (1g) A Class AA felony, if the person was adjudicated delinquent for
23 committing an act that would be a Class AA felony if committed by an adult.

24 **SECTION 36.** 961.335 (1m) of the statutes is created to read:

1 961.335 (1m) Notwithstanding sub. (1), upon the application of the secretary
2 of corrections for a permit to obtain a controlled substance for purposes of an
3 execution under s. 973.0147, the controlled substances board shall issue a permit
4 under this section.

5 **SECTION 37.** 967.02 (1m) of the statutes is created to read:

6 967.02 (1m) "Crime that is punishable by death or life imprisonment" has the
7 meaning given in s. 939.22 (7).

8 **SECTION 38.** 971.17 (1) (c) of the statutes is amended to read:

9 971.17 (1) (c) *Felonies punishable by death or life imprisonment*. If a defendant
10 is found not guilty by reason of mental disease or mental defect of a felony that is
11 punishable by death or life imprisonment, the commitment period specified by the
12 court may be life, subject to termination under sub. (5).

13 **SECTION 39.** 972.03 of the statutes is amended to read:

14 **972.03 Peremptory challenges.** Each side is entitled to only 4 peremptory
15 challenges except as otherwise provided in this section. When the crime charged is
16 punishable by death or life imprisonment, the state is entitled to 6 peremptory
17 challenges and the defendant is entitled to 6 peremptory challenges. If there is more
18 than one defendant, the court shall divide the challenges as equally as practicable
19 among them; and if their defenses are adverse and the court is satisfied that the
20 protection of their rights so requires, the court may allow the defendants additional
21 challenges. If the crime is punishable by death or life imprisonment, the total
22 peremptory challenges allowed the defense shall not exceed 12 if there are only 2
23 defendants and 18 if there are more than 2 defendants; in other felony cases 6
24 challenges if there are only 2 defendants and 9 challenges if there are more than 2.
25 In misdemeanor cases, the state is entitled to 3 peremptory challenges and the

1 defendant is entitled to 3 peremptory challenges, except that if there are 2
2 defendants, the court shall allow the defense 4 peremptory challenges, and, if there
3 are more than 2 defendants, the court shall allow the defense 6 peremptory
4 challenges. Each side shall be allowed one additional peremptory challenge if
5 additional jurors are to be selected under s. 972.04 (1).

6 **SECTION 40.** 972.13 (6) of the statutes is amended to read:

7 972.13 (6) The following forms may be used for judgments:

8 STATE OF WISCONSIN

9 County

10 In.... Court

11 The State of Wisconsin

12 vs.

13(Name of defendant)

14 UPON ALL THE FILES, RECORDS AND PROCEEDINGS,

15 IT IS ADJUDGED That the defendant has been convicted upon the defendant's
16 plea of guilty (not guilty and a verdict of guilty) (not guilty and a finding of guilty)
17 (no contest) on the.... day of...., (year), of the crime of.... in violation of s.....; and
18 the court having asked the defendant whether the defendant has anything to state
19 why sentence should not be pronounced, and no sufficient grounds to the contrary
20 being shown or appearing to the court.

21 *IT IS ADJUDGED That the defendant is guilty as convicted.

22 *IT IS ADJUDGED That the defendant shall be executed by lethal injection.

23 *IT IS ADJUDGED That the defendant is hereby committed to the Wisconsin
24 state prisons (county jail of.... county) for an indeterminate term of not more than....

1 *IT IS ADJUDGED That the defendant is ordered to serve a bifurcated
2 sentence consisting of year(s) of confinement in prison and months/years of
3 extended supervision.

4 *IT IS ADJUDGED That the defendant is placed in the intensive sanctions
5 program subject to the limitations of section 973.032 (3) of the Wisconsin Statutes
6 and the following conditions:....

7 *IT IS ADJUDGED That the defendant is hereby committed to detention in
8 (the defendant's place of residence or place designated by judge) for a term of not
9 more than....

10 *IT IS ADJUDGED That the defendant is placed on lifetime supervision by the
11 department of corrections under section 939.615 of the Wisconsin Statutes.

12 *IT IS ADJUDGED That the defendant is ordered to pay a fine of \$.... (and the
13 costs of this action).

14 *IT IS ADJUDGED That the defendant pay restitution to....

15 *IT IS ADJUDGED That the defendant is restricted in his or her use of
16 computers as follows:....

17 *The.... at.... is designated as the Reception Center to which the defendant shall
18 be delivered by the sheriff.

19 *IT IS ORDERED That the clerk deliver a duplicate original of this judgment
20 to the sheriff who shall forthwith execute the same and deliver it to the warden.

21 Dated this.... day of...., (year)

22 BY THE COURT....

23 Date of Offense....,

24 District Attorney....,

25 Defense Attorney....

1 *Strike inapplicable paragraphs.

2 STATE OF WISCONSIN

3 County

4 In.... Court

5 The State of Wisconsin

6 vs.

7(Name of defendant)

8 On the.... day of...., (year), the district attorney appeared for the state and
9 the defendant appeared in person and by.... the defendant's attorney.

10 UPON ALL THE FILES, RECORDS AND PROCEEDINGS

11 IT IS ADJUDGED That the defendant has been found not guilty by the verdict
12 of the jury (by the court) and is therefore ordered discharged forthwith.

13 Dated this.... day of...., (year)

14 BY THE COURT....

15 **SECTION 41.** 973.01 (3) of the statutes is amended to read:

16 973.01 (3) NOT APPLICABLE TO LIFE OR DEATH SENTENCES. If a person is being
17 sentenced for a felony that is punishable by life imprisonment or by death, he or she
18 is not subject to this section but shall be sentenced under s. 973.014 (1g) or 973.0145,
19 whichever is applicable.

20 **SECTION 42.** 973.0145 of the statutes is created to read:

21 **973.0145 Sentence of death or life imprisonment for Class AA felony.**

22 (1) Upon conviction of a defendant of a Class AA felony, the court shall conduct a
23 separate sentencing proceeding to determine whether the defendant should be
24 sentenced to death or to life imprisonment.

1 **(2)** The sentencing proceeding shall be before a jury unless the defendant
2 waives the right to a jury for sentencing. The trial jury shall serve as the sentencing
3 jury unless the trial jury is unable to reconvene for the sentencing hearing, the
4 defendant pleaded guilty, or the defendant waived the right to a jury at trial, in which
5 case the court shall summon a new jury.

6 **(3)** At the sentencing proceeding, the defendant may present evidence relating
7 to any mitigating circumstance and the state may present evidence in rebuttal. The
8 court shall admit any evidence according to the rules of evidence applicable at a
9 criminal trial. The court shall provide the defendant with a fair opportunity to rebut
10 any hearsay statement. This subsection does not authorize the introduction of any
11 evidence secured in violation of the state or federal constitution. Following the
12 presentation of evidence, the parties may present summary arguments for and
13 against the penalty sought by the state.

14 **(4)** The court shall instruct the jurors that in making a sentencing decision they
15 must consider the circumstances surrounding the crime and any mitigating
16 circumstances proved by the defendant, including aspects of the defendant's
17 character, background, and capabilities that bear on his or her culpability for the
18 crime. The court shall instruct the jurors that a mitigating circumstance need not
19 be found by all members of the jury and need only be proved to the satisfaction of an
20 individual juror in order to be considered in the individual juror's sentencing
21 decision. If the defendant is not eligible for extended supervision under s. 939.62
22 (2m) (c), the court shall inform the jurors that if the jury does not recommend
23 imposition of a sentence of death the defendant will be sentenced to life
24 imprisonment without the possibility of release to extended supervision.

25 **(5)** Mitigating circumstances may include any of the following:

1 (a) The defendant has no significant history of prior criminal activity.

2 (b) The Class AA felony was committed while the defendant was under the
3 influence of extreme mental or emotional disturbance.

4 (c) The defendant was an accomplice in the Class AA felony committed by
5 another person and the defendant's participation was relatively minor.

6 (d) The defendant acted under extreme duress or under the substantial
7 domination of another person.

8 (e) The capacity of the defendant to appreciate the criminality of his or her
9 conduct or to conform his or her conduct to the requirements of law was substantially
10 impaired.

11 (f) The age of the defendant at the time of the crime affected his or her
12 judgment.

13 (g) The victim was a participant in the defendant's conduct or consented to the
14 act.

15 (h) Any other factor bearing on a defendant's culpability for the offense.

16 **(6)** (a) In this subsection:

17 1. "Mental health expert" means a psychiatrist, psychologist, or other person
18 who has received training or education relating to, or has experience relating to, the
19 identification, diagnosis, treatment, or evaluation of mental diseases, defects, or
20 conditions.

21 2. "Mentally retarded" means having significantly subaverage general
22 intellectual functioning accompanied by significant deficits or impairments in
23 adaptive functioning.

24 (b) If the jury unanimously recommends that the court impose a sentence of
25 death and the defendant files a motion claiming that the defendant is mentally

1 retarded, the court shall hold a hearing without a jury to determine whether the
2 defendant is mentally retarded and shall appoint 2 mental health experts to examine
3 the defendant and testify at the hearing. Mental health experts for the defendant
4 and the state may also examine the defendant and testify at the hearing.

5 (c) If the court finds by the preponderance of the evidence that the defendant
6 is mentally retarded, the court may not sentence the defendant to death.

7 (d) Statements made by the defendant during an examination under this
8 subsection are inadmissible as evidence in a criminal proceeding concerning the
9 defendant, except as evidence concerning the issue of mental retardation in a
10 hearing under this subsection or as evidence of a mitigating circumstance in a
11 sentencing proceeding under this section.

12 **(7)** (a) The court may not impose a sentence of death unless the jury
13 unanimously recommends that a sentence of death be imposed. If the jury
14 recommends a sentence of death and either the defendant does not claim mental
15 retardation or the court determines that defendant is not mentally retarded, the
16 court shall consider the circumstance of the crime and all of the evidence of
17 mitigating circumstances and determine whether to impose a sentence of life
18 imprisonment under s. 973.014 (1g) or a sentence of death. If the court imposes a
19 sentence of death, the court shall state the reasons for the sentence on the record.

20 (b) If the jury recommends a sentence of life imprisonment or cannot
21 unanimously agree on a sentencing recommendation, the court shall impose a
22 sentence of life imprisonment under s. 973.014 (1g).

23 **(8)** If the court imposes a sentence of death, the judgment of conviction and
24 sentence of death are subject to automatic review by the supreme court within 60
25 days after certification by the sentencing court of the entire record, unless the

1 supreme court, for good cause shown, extends the time for an additional period not
2 to exceed 30 days. The review by the supreme court has priority over all other cases
3 and shall be heard in accordance with rules promulgated by the supreme court.

4 (9) The court that imposes a sentence of death shall set the date for execution.
5 The defendant shall be committed to the Wisconsin state prisons pending the
6 execution of the death sentence.

7 (10) The execution of a death sentence shall be by lethal injection.

8 **SECTION 43.** 973.0147 of the statutes is created to read:

9 **973.0147 Execution of death sentence; stay of execution.** The secretary
10 of corrections shall designate the executioner who shall provide a person subject to
11 a death sentence with an intravenous injection of one or more substances in a lethal
12 quantity. A person is immune from civil or criminal liability for his or her acts or
13 omissions, in good faith, in regard to a lawful execution under this section. The
14 secretary may not direct a physician to be present or require a physician to announce
15 when death has occurred. A physician may certify the death after a person, other
16 than a physician, has determined or pronounced death. The secretary shall
17 designate 12 citizens to witness the execution. The convicted person may request
18 that certain additional people be allowed to witness the execution. The secretary
19 shall grant any such reasonable request. The secretary may allow representatives
20 of the news media to witness the execution under rules of the department. No other
21 persons may be allowed to witness the execution. The execution of a death sentence
22 may be stayed only by the governor or incident to an appeal.

23 **SECTION 44.** 973.03 (3) (e) 1. of the statutes, as affected by 2001 Wisconsin Act
24 109, is amended to read:

25 973.03 (3) (e) 1. A crime which is a Class AA, A, B, or C felony.

