



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-0644/P1

RPN&RLR:kmg:pg

↓
GMM

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Regen to

1 **AN ACT** *to renumber* 939.50 (1) (a) and 939.50 (3) (a); *to renumber and amend*
2 940.01 (1) (b); *to amend* 301.048 (2) (am) 2., 302.11 (1), 302.114 (1), 302.114 (2),
3 302.114 (3) (a) (intro.), 302.114 (3) (b), 302.114 (3) (c), 303.065 (1) (b), 304.02 (5),
4 304.06 (1) (b), 304.071 (2), 939.30 (2), 939.31, 939.32 (1) (a), 939.50 (2), 939.60,
5 939.62 (2m) (a) 2m. c., 939.62 (2m) (c), 939.624 (2), 939.63 (1) (b), 939.632 (1) (e)
6 2., 940.01 (1) (a), 940.01 (2) (intro.), 971.17 (1) (c), 972.03, 972.13 (6), 973.01 (3),
7 973.014 (1g) (a) (intro.), 973.032 (2) (b), 973.09 (1) (c) and 978.07 (1) (c) 1.; and
8 *to create* 301.046 (3) (cm), 302.11 (1w), 304.06 (1t), 939.22 (7), 939.22 (19m),
9 939.50 (1) (ag), 939.50 (3) (ag), 940.01 (1) (am), 940.01 (1) (b) 1. and 2., 961.335
10 (1m), 967.02 (1m), 973.0145, 973.016 and 973.065 of the statutes; **relating to:**
11 providing a penalty of either death or life imprisonment for first-degree

1 intentional homicide, 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. A court imposing a life sentence has the discretion to determine whether the defendant is eligible to petition for release on extended supervision after serving 20 years in prison or after some greater specified period, or whether the person is not eligible for release to extended supervision. (No person convicted for a crime committed on or after December 31, 1999, is eligible for parole under a sentence for that crime.)

This bill provides a penalty of either death or life imprisonment for certain first degree homicides. The death penalty is applicable to a first degree intentional homicide if the victim is under age 16 or is an unborn child, the offender is at least 16 years of age at the time of the offense, 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 crime 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 prosecution and defense present evidence of aggravating and mitigating circumstances concerning the offense or the defendant. In order for a judge to sentence a person to death, the judge must find that at least one of the following six aggravating circumstances applies to the offense or defendant:

1. The defendant was on parole or extended supervision or was confined in prison when he or she committed the offense.
2. The offense was committed for the purpose of avoiding or preventing arrest or for the purpose of effecting an escape from custody.
3. The defendant knowingly created a great risk to many persons.
4. The offense was committed to disrupt or hinder the exercise of government or the enforcement of law.
5. The defendant intentionally caused the victim bodily harm or mental anguish before the victim died.
6. The defendant enjoyed or was utterly indifferent to the victim's suffering.

The judge and jury must consider and weigh the existence of the specified aggravating circumstances against the existence of any mitigating factors such as whether the defendant acted under extreme mental or emotional duress, the defendant's capacity to appreciate the criminality of his or her conduct, whether the

a person who has

Must make

mental retardation as a

defendant has a prior criminal history, whether the victim participated in the defendant's conduct or consented to the defendant's act, and the defendant's age.

The jury makes a recommendation to the judge by majority vote as to whether the defendant should be sentenced to death or be sentenced to imprisonment for life. The jury's recommendation is only advisory. If the defendant intends to raise the bar to execution of mental retardation, based on the U.S. Supreme Court decision in *Atkins v. Virginia*, he or she makes a motion to the court after the jury has made its recommendation. The court appoints two experts in mental illness who evaluate the defendant. The court then holds a hearing to determine if the defendant has mental retardation. At the hearing, the defendant and the state may provide expert testimony as to the defendant's mental retardation. If the judge determines, by clear and convincing evidence, that the defendant has mental retardation, the judge may not impose a death sentence. If the judge determines that the defendant does not have mental retardation, the judge must review the aggravating and mitigating circumstances. If the judge does not find that one of the six aggravating circumstances applies, the judge must sentence the defendant to life imprisonment and make a determination as to whether and when the defendant is eligible to petition for release to extended supervision. If the judge does find that an aggravating circumstance applies, the judge must weigh the aggravating and mitigating circumstances and sentence the person either to death or to life imprisonment. If the judge imposes a death sentence, the judge must specify on the record his or her findings with regard to the existence of aggravating and mitigating circumstances. Any death sentence is subject to automatic appellate review by the supreme court.

The court that imposes the 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 bill applies only to those offenses committed on or after the effective date of the bill.

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.

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

Insert
3-1

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

- 1 SECTION 1. 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 2. 301.048 (2) (am) 2. of the statutes is amended to read:

1 301.048 (2) (am) 2. He or she is a prisoner serving a felony sentence for a felony
2 that is not punishable by death or life imprisonment and the department directs him
3 or her to participate in the program. This subdivision does not apply to a prisoner
4 serving a bifurcated sentence imposed under s. 973.01.

5 **SECTION 3.** 302.11 (1) of the statutes is amended to read:

6 302.11 (1) The warden or superintendent shall keep a record of the conduct of
7 each inmate, specifying each infraction of the rules. Except as provided in subs. (1g),
8 (1m), (1q), (1w), (1z), (7), and (10), each inmate is entitled to mandatory release on
9 parole by the department. The mandatory release date is established at two-thirds
10 of the sentence. Any calculations under this subsection or sub. (1q) (b) or (2) (b)
11 resulting in fractions of a day shall be rounded in the inmate's favor to a whole day.

12 **SECTION 4.** 302.11 (1w) of the statutes is created to read:

13 302.11 (1w) An inmate serving a sentence of life imprisonment imposed under
14 s. 973.0145 (4) (c) or awaiting imposition of a death sentence is not entitled to
15 mandatory release on parole under this section.

16 **SECTION 5.** 302.114 (1) of the statutes is amended to read:

17 302.114 (1) An inmate is subject to this section if he or she is serving a life
18 sentence imposed under s. 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2. An
19 inmate serving a life sentence under s. 939.62 (2m) ~~or~~ 973.014 (1g) (a) 3., or 973.0145
20 (4) (c) 3. is not eligible for release to extended supervision under this section.

21 **SECTION 6.** 302.114 (2) of the statutes is amended to read:

22 302.114 (2) Except as provided in subs. (3) and (9), an inmate subject to this
23 section may petition the sentencing court for release to extended supervision after
24 he or she has served 20 years, if the inmate was sentenced under s. 973.014 (1g) (a)
25 1. or 973.0145 (4) (c) 1., or after he or she has reached the extended supervision

1 eligibility date set by the court, if the inmate was sentenced under s. 973.014 (1g) (a)
2 2. or 973.0145 (4) (c) 2.

3 **SECTION 7.** 302.114 (3) (a) (intro.) of the statutes is amended to read:

4 302.114 (3) (a) (intro.) The warden or superintendent shall keep a record of the
5 conduct of each inmate subject to this section, specifying each infraction of the rules.
6 If any inmate subject to this section violates any regulation of the prison or refuses
7 or neglects to perform required or assigned duties, the department may extend the
8 extended supervision eligibility date set under s. 973.014 (1g) (a) 1. or 2. or 973.0145
9 (4) (c) 1. or 2., whichever is applicable, as follows:

10 **SECTION 8.** 302.114 (3) (b) of the statutes is amended to read:

11 302.114 (3) (b) In addition to the sanctions under par. (a), if an inmate subject
12 to this section is placed in adjustment, program, or controlled segregation status, the
13 department may extend the extended supervision eligibility date set under s.
14 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2., whichever is applicable, by a
15 number of days equal to 50% of the number of days spent in segregation status. In
16 administering this paragraph, the department shall use the definition of
17 adjustment, program, or controlled segregation status under departmental rules in
18 effect at the time that an inmate is placed in that status.

19 **SECTION 9.** 302.114 (3) (c) of the statutes is amended to read:

20 302.114 (3) (c) An inmate subject to this section who files an action or special
21 proceeding, including a petition for a common law writ of certiorari, to which s.
22 807.15 applies shall have his or her extended supervision eligibility date set under
23 s. 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2., whichever is applicable, extended
24 by the number of days specified in the court order prepared under s. 807.15 (3). Upon
25 receiving a court order issued under s. 807.15, the department shall recalculate the

1 date on which the inmate to whom the order applies will be entitled to petition for
2 release to extended supervision and shall inform the inmate of that date.

3 **SECTION 10.** 303.065 (1) (b) of the statutes is amended to read:

4 303.065 (1) (b) 1. A person serving a life sentence, other than a life sentence
5 specified in subd. 2., may be considered for work release only after he or she has
6 reached parole eligibility under s. 304.06 (1) (b) or 973.014 (1) (a) or (b), whichever
7 is applicable, or he or she has reached his or her extended supervision eligibility date
8 under s. 302.114 (9) ~~(a)~~ (am) or, 973.014 (1g) (a) 1. or 2., or 973.0145 (4) (c) 1. or 2.,
9 whichever is applicable.

10 2. A person serving a life sentence under s. 939.62 (2m) (c) or, 973.014 (1) (c)
11 or (1g) (a) 3., or 973.0145 (4) (c) 3., or awaiting imposition of a death sentence, may
12 not be considered for work release.

13 **SECTION 11.** 304.02 (5) of the statutes is amended to read:

14 304.02 (5) Notwithstanding subs. (1) to (3), a prisoner who is serving a life
15 sentence under s. 939.62 (2m) (c) or, 973.014 (1) (c) or (1g), or 973.0145 (4) (c), or who
16 is awaiting imposition of a death sentence, is not eligible for release to parole
17 supervision under this section.

18 **SECTION 12.** 304.06 (1) (b) of the statutes, as affected by 2001 Wisconsin Act
19 109, is amended to read:

20 304.06 (1) (b) Except as provided in s. 961.49 (2), 1999 stats., sub. (1m) or (1t)
21 or s. 302.045 (3), 973.01 (6), or 973.0135, the parole commission may parole an
22 inmate of the Wisconsin state prisons or any felon or any person serving at least one
23 year or more in a county house of correction or a county reforestation camp organized
24 under s. 303.07, when he or she has served 25% of the sentence imposed for the
25 offense, or 6 months, whichever is greater. Except as provided in s. 939.62 (2m) (c)

sub. (1t) or

1 or 973.014 (1) (b) or (c), (1g), or (2), the parole commission may parole an inmate
 2 serving a life term when he or she has served 20 years, as modified by the formula
 3 under s. 302.11 (1) and subject to extension under s. 302.11 (1q) and (2), if applicable.
 4 The person serving the life term shall be given credit for time served prior to
 5 sentencing under s. 973.155, including good time under s. 973.155 (4). The secretary
 6 may grant special action parole releases under s. 304.02. The department or the
 7 parole commission shall not provide any convicted offender or other person
 8 sentenced to the department's custody any parole eligibility or evaluation until the
 9 person has been confined at least 60 days following sentencing.

10 SECTION 13. 304.06 (1t) of the statutes is created to read:

11 304.06 (1t) The parole commission may not parole an inmate who is sentenced
 12 to life imprisonment or death under s. 973.0145.

13 SECTION 14. 304.071 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
 14 is amended to read:

15 304.071 (2) If a prisoner is ~~not eligible~~ ineligible for parole under s. 961.49 (2),
 16 1999 stats., or s. 304.06 (1t), 939.62 (2m) (c), 973.01 (6), 973.014 (1) (c) or (1g), or
 17 973.032 (5), he or she is not eligible for parole under this section.

18 SECTION 15. 939.22 (7) of the statutes is created to read:

19 939.22 (7) "that is Crime punishable by death or life imprisonment" means a crime for
 20 which one or more of the possible penalties is death or life imprisonment.

21 SECTION 16. 939.22 (19m) of the statutes is created to read:

22 939.22 (19m) "Mental retardation" means significantly ~~significant~~ subaverage general
 23 intellectual functioning usually defined as an intelligence quotient level of 70 or
 24 below accompanied by significant deficits or impairments in adaptive functioning
 25 with onset before the age of 18 years

skt

1

SECTION 17. 939.30 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
is amended to read:

2

3

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

4

5

6

SECTION 18. 939.31 of the statutes is amended to read:

7

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

8

9

10

11

12

13

14

SECTION 19. 939.32 (1) (a) of the statutes is amended to read:

15

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

16

17

SECTION 20. 939.50 (1) (a) of the statutes is renumbered 939.50 (1) (am).

18

SECTION 21. 939.50 (1) (ag) of the statutes is created to read:

19

939.50 (1) (ag) Class AA felony.

20

SECTION 22. 939.50 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
is amended to read:

21

22

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

23

24

SECTION 23. 939.50 (3) (a) of the statutes is renumbered 939.50 (3) (am).

25

SECTION 24. 939.50 (3) (ag) of the statutes is created to read:

1 939.50 (3) (ag) For a Class AA felony, life imprisonment or death, as determined
2 under s. 973.0145.

3 **SECTION 25.** 939.60 of the statutes is amended to read:

4 **939.60 Felony and misdemeanor defined.** A crime that is punishable by
5 death or imprisonment in the Wisconsin state prisons is a felony. Every other crime
6 is a misdemeanor.

7 **SECTION 26.** 939.62 (2m) (a) 2m. c. of the statutes is amended to read:

8 939.62 (2m) (a) 2m. c. The solicitation, conspiracy, or attempt, under s. 939.30,
9 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

10 **SECTION 27.** 939.62 (2m) (c) of the statutes is amended to read:

11 939.62 (2m) (c) If the actor is a persistent repeater and the actor is not
12 sentenced to death under s. 973.0145, the term of imprisonment for the felony for
13 which the persistent repeater presently is being sentenced under ch. 973 is life
14 imprisonment without the possibility of parole or extended supervision.

15 **SECTION 28.** 939.624 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
16 is amended to read:

17 939.624 (2) If a person has one or more prior convictions for a serious violent
18 crime or a crime punishable by death or life imprisonment and subsequently
19 commits a serious violent crime, the court shall impose a bifurcated sentence under
20 s. 973.01. The term of confinement in prison portion of a bifurcated sentence imposed
21 under this subsection may not be less than 3 years and 6 months, but otherwise the
22 penalties for the crime apply, subject to any applicable penalty enhancement. The
23 court may not place the defendant on probation.

24 **SECTION 29.** 939.63 (1) (b) of the statutes, as affected 2001 Wisconsin Act 109,
25 is amended to read:

(am)
par. (am) and

1 939.63 (1) (b) If the maximum term of imprisonment for a felony is more than
2 5 years or is a life term or the felony is punishable by death, the maximum term of
3 imprisonment for the felony may be increased by not more than 5 years.

4 SECTION 30. 939.632 (1) (e) 2. of the statutes is amended to read:

5 939.632 (1) (e) 2. The solicitation, conspiracy, or attempt, under s. 939.30,
6 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

7 SECTION 31. 940.01 (1) (a) of the statutes is amended to read:

8 940.01 (1) (a) Except as provided in sub. (2) *(plan)* ~~par. (am)~~ whoever causes the death
9 of another human being with intent to kill that person or another is guilty of a Class
10 A felony.

11 SECTION 32. 940.01 (1) (am) of the statutes is created to read:

12 940.01 (1) (am) Whoever causes the death of another human being with intent
13 to kill that person or another is guilty of a Class AA felony if the victim has not
14 attained the age of 16 years, unless any of the following applies:

- 15 1. The actor is less than 16 years of age when he or she commits the offense.
- 16 2. Notwithstanding s. 939.05, the actor is not guilty of a Class AA felony as a
- 17 party to a crime if the actor did not intend that a person be killed.

18 SECTION 33. 940.01 (1) (b) of the statutes is renumbered 940.01 (1) (b) (intro.)
19 and amended to read:

20 940.01 (1) (b) (intro.) Except as provided in sub. (2), *(plan)* ~~whoever~~ ~~Whoever~~ causes
21 the death of an unborn child with intent to kill that unborn child, kill the woman who
22 is pregnant with that unborn child, or kill another is guilty of a Class ~~A~~ AA felony.,
23 except as follows:

24 SECTION 34. 940.01 (1) (b) 1. and 2. of the statutes are created to read:

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

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

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

6 **SECTION 35.** 940.01 (2) (intro.) of the statutes is amended to read:

7 940.01 (2) MITIGATING CIRCUMSTANCES. (intro.) The Notwithstanding sub. (1)
8 ~~the~~ following are affirmative defenses to prosecution under this section which that
9 mitigate the offense offenses under sub. (1) to 2nd-degree intentional homicide
10 under s. 940.05:

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

12 961.335 (1m) Notwithstanding sub. (1), upon the application of the secretary
13 of corrections for a permit to obtain a controlled substance for purposes of an
14 execution under s. 973.0165, the controlled substances board shall issue a permit
15 under this section.

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

17 967.02 (1m) "that is Crime punishable by death or life imprisonment" has the
18 meaning given in s. 939.22 (7).

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

20 971.17 (1) (c) *Felonies punishable by death or life imprisonment*. If a defendant
21 is found not guilty by reason of mental disease or mental defect of a felony that is
22 punishable by death or life imprisonment, the commitment period specified by the
23 court may be life, subject to termination under sub. (5).

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

✓
Insert to
11-12

1 **972.03 Peremptory challenges.** Each side is entitled to only 4 peremptory
2 challenges except as otherwise provided in this section. When the crime charged is
3 punishable by death or life imprisonment, the state is entitled to 6 peremptory
4 challenges and the defendant is entitled to 6 peremptory challenges. If there is more
5 than one defendant, the court shall divide the challenges as equally as practicable
6 among them; and if their defenses are adverse and the court is satisfied that the
7 protection of their rights so requires, the court may allow the defendants additional
8 challenges. If the crime is punishable by death or life imprisonment, the total
9 peremptory challenges allowed the defense shall not exceed 12 if there are only 2
10 defendants and 18 if there are more than 2 defendants; in other felony cases 6
11 challenges if there are only 2 defendants and 9 challenges if there are more than 2.
12 In misdemeanor cases, the state is entitled to 3 peremptory challenges and the
13 defendant is entitled to 3 peremptory challenges, except that if there are 2
14 defendants, the court shall allow the defense 4 peremptory challenges, and, if there
15 are more than 2 defendants, the court shall allow the defense 6 peremptory
16 challenges. Each side shall be allowed one additional peremptory challenge if
17 additional jurors are to be selected under s. 972.04 (1).

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

19 972.13 (6) The following forms may be used for judgments:

20 STATE OF WISCONSIN

21 County

22 In.... Court

23 The State of Wisconsin

24 vs.

25 (Name of defendant)

1 UPON ALL THE FILES, RECORDS AND PROCEEDINGS,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 BY THE COURT....

9 Date of Offense....,

10 District Attorney....,

11 Defense Attorney....

12 *Strike inapplicable paragraphs.

13 STATE OF WISCONSIN

14 County

15 In.... Court

16 The State of Wisconsin

17 vs.

18(Name of defendant)

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

21 UPON ALL THE FILES, RECORDS AND PROCEEDINGS

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

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

25 BY THE COURT....

OR DEATH

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

2 (2) 973.01 (3) NOT APPLICABLE TO LIFE SENTENCES. If a person is being sentenced for
3 a felony that is punishable by life imprisonment or by death, he or she is not subject
4 to this section but shall be sentenced under s. 973.014 (1g) or 973.0145, whichever
5 is applicable.

6 SECTION 42. 973.014 (1g) (a) (intro.) of the statutes is amended to read:

7 973.014 (1g) (a) (intro.) Except as provided in sub. (2) or s. 973.0145 (4) (c),
8 when a court sentences a person to life imprisonment for a crime committed on or
9 after December 31, 1999, the court shall make an extended supervision eligibility
10 date determination regarding the person and choose one of the following options:

11 SECTION 43. 973.0145 of the statutes is created to read:

12 **973.0145 Sentence of death or life imprisonment for Class AA felony.**

13 (1) (a) Upon conviction of a defendant of a Class AA felony, the court shall conduct
14 a separate sentencing proceeding to determine whether the defendant should be
15 sentenced to death or life imprisonment. A defendant charged with a Class AA felony
16 who intends to raise mental retardation as a bar to his or her death sentence shall
17 give notice of that intention upon his or her conviction of a Class AA felony.

18 (b) The trial judge shall conduct the sentencing proceeding before the trial jury,
19 if there was a jury trial, as soon as practicable. If the trial jury is unable to reconvene
20 for a hearing on the issue of penalty, the trial judge may summon a new jury to
21 determine the issue of the imposition of the penalty. If the trial jury has been waived,
22 or if the defendant pleaded guilty, the court shall conduct the sentencing proceeding
23 before a jury summoned for that purpose unless the defendant waives the right to
24 a jury.

1 (c) In the sentencing proceeding, the court shall admit any evidence that may
2 be relevant to the sentence regarding any mitigating circumstance. The court shall
3 admit any other evidence according to the rules of evidence applicable at a criminal
4 trial. The court shall provide the defendant with a fair opportunity to rebut any
5 hearsay statements. This paragraph does not authorize the introduction of any
6 evidence secured in violation of the state or federal constitution. The state has the
7 burden of proof, beyond a reasonable doubt, regarding the existence of aggravating
8 circumstances. The defendant has the burden of proof, by a preponderance of the
9 evidence, regarding mitigating circumstances. The court shall permit the state and
10 the defendant or his or her counsel to present arguments for or against a sentence
11 of death.

12 (2) (a) Unless the defendant waives the right to a jury, the jury shall deliberate
13 after hearing all of the evidence and, by a majority vote, shall render an advisory
14 sentence of life imprisonment or death to the court, based upon the following
15 matters:

- 16 1. The existence of aggravating circumstances under sub. (6).
- 17 2. The existence of mitigating circumstances under sub. (7).

18 (b) Upon the request of the defendant or the state, the court shall explain to the
19 jury the court's options under sub. (4) (c) to sentence the defendant to life without the
20 possibility of extended supervision or with delayed eligibility for extended
21 supervision. If the defendant is not eligible for release to extended supervision, the
22 court shall also, upon request of the defendant or the state, explain to the jury the
23 defendant's ineligibility for extended supervision.

has mental retardation

1 (c) If the jury recommends life imprisonment, it may further recommend
2 restrictions on the defendant's eligibility for extended supervision or recommend
3 that the defendant not be eligible for extended supervision.

4 (3) After the defendant waives the right to a jury under sub. (2) (a), or after the
5 jury renders its advisory opinion regarding a sentence of life imprisonment or death,
6 a defendant who has given notice of the intention to raise mental retardation as a bar
7 to his or her death sentence may file a motion to determine whether he or she is

8 ~~mentally retarded~~. Upon receipt of the motion, the court shall appoint 2 experts in
9 the field of mental illness. ~~Those experts shall~~ ^{to} evaluate the defendant and report
10 their findings to the court. The court shall hold a hearing to consider the findings
11 of the court-appointed experts and to consider the findings of any other expert that
12 are offered by the state or the defense on the issue of whether the defendant has
13 mental retardation. If the court finds, by clear and convincing evidence, that the
14 defendant has mental retardation, the court may not impose a sentence of death and
15 shall enter a written order that sets forth with specificity the findings in support of
16 the determination.

17 (4) (a) Notwithstanding the recommendation of a majority of the jury, the court,
18 if it made no determination under sub. (3) that the defendant has mental retardation
19 and after weighing the aggravating and mitigating circumstances, shall enter a
20 sentence of life imprisonment or death, but if the court imposes a sentence of death,
21 it shall set forth in writing its findings upon which the sentence of death is based as

22 to the facts: all of the following

- 23 1. That sufficient aggravating circumstances exist under sub. (6) ~~and~~ ¹
24 2. That there are insufficient mitigating circumstances under sub. (7) to
25 outweigh the aggravating circumstances.

1 (b) In each case in which the court imposes the death sentence, the court must
2 support its determination by specific written findings of fact based upon the
3 circumstances in subs. (6) and (7) and upon the records of the trial and the sentencing
4 proceedings.

5 (c) If the court does not make the findings required under par. (b) for a death
6 sentence, or if there is a finding under sub. (3) that the defendant has mental
7 retardation, the court shall impose a sentence of life imprisonment and shall make
8 an extended supervision eligibility determination regarding the person and adopt
9 one of the following options:

10 1. The person is eligible for release to extended supervision after serving 20
11 years.

12 2. The person is eligible for release to extended supervision on a date set by the
13 court. Under this subdivision, the court may set any later date than that provided
14 in subd. 1., but may not set a date that occurs before the earliest possible date under
15 subd. 1.

16 3. The person is not eligible for release to extended supervision.

17 (d) When imposing a sentence of life imprisonment in accordance with par. (c)
18 1. or 2., the court shall inform the person of the provisions of s. 302.114 (3) and the
19 procedure for petitioning under s. 302.114 (5) for release to extended supervision.

20 (5) If a death sentence is imposed, the judgment of conviction and sentence of
21 death is subject to automatic review by the supreme court within 60 days after
22 certification by the sentencing court of the entire record, unless the supreme court,
23 for good cause shown, extends the time for an additional period not to exceed 30 days.
24 The review by the supreme court has priority over all other cases and shall be heard
25 in accordance with rules promulgated by the supreme court.

1 (6) The court and jury shall consider one or more of the following as
2 aggravating circumstances:

3 (a) The defendant was on parole or extended supervision under a sentence for
4 a felony or was confined in prison when he or she committed the Class AA felony.

5 (b) The Class AA felony was committed for the purpose of avoiding or
6 preventing a lawful arrest or effecting an escape from custody.

7 (c) The defendant knowingly created a great risk to many persons.

8 (d) The Class AA felony was committed to disrupt or hinder the lawful exercise
9 of any governmental function or the enforcement of laws.

10 (e) The defendant intentionally caused bodily harm or mental anguish to the
11 victim or another before the victim died.

12 (f) During the commission of the offense, the defendant enjoyed or was utterly
13 indifferent to the suffering of another.

14 (7) The court and jury shall consider as a mitigating factor any aspect of the
15 defendant's character, background, or record or any of the circumstances of the
16 offense that the defendant offers as a basis for a sentence other than death.
17 Mitigating circumstances may include, but are not limited to, any of the following:

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

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

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

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

1 (e) The capacity of the defendant to appreciate the criminality of his or her
2 conduct or to conform his or her conduct to the requirements of law was substantially
3 impaired.

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

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

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

11 (9) The execution of a death sentence shall be by lethal injection.

12 SECTION 44. ~~973.016~~ of the statutes is created to read:

13 ~~973.016 Stay of execution of death sentence.~~ The execution of a death
14 ~~sentence may be stayed only by the governor or incident to an appeal.~~

15 SECTION 45. 973.032 (2) (b) of the statutes is amended to read:

16 973.032 (2) (b) Notwithstanding par. (a), the court may not sentence a person
17 under sub. (1) if he or she is convicted of a felony punishable by death or life
18 imprisonment or has at any time been convicted, adjudicated delinquent, or found
19 not guilty or not responsible by reason of insanity or mental disease, defect, or illness
20 for committing a violent offense, as defined in s. 301.048 (2) (bm). (B)

21 SECTION 46. ~~973.065~~ of the statutes is created to read: (stay of execution)

22 ~~973.065~~ Execution of death sentence. The secretary of corrections shall
23 designate the executioner who shall provide a person subject to a death sentence with
24 an intravenous injection of one or more substances in a lethal quantity. A person is
25 immune from civil or criminal liability for his or her acts or omissions, in good faith,

Handwritten marks: a large arrow pointing down and the letters 'S O F' written vertically.

Handwritten circled numbers: 21 and 22.

The execution of a death sentence may be stayed only by the governor or incident to an appeal.

1 in regard to a lawful execution under this section. The secretary may not direct a
2 physician to be present or require a physician to announce when death has occurred.
3 A physician may certify the death after a person, other than a physician, has
4 determined or pronounced death. The secretary shall designate 12 citizens to
5 witness the execution. The convicted person may request that certain additional
6 people be allowed to witness the execution. The secretary shall grant any such
7 reasonable request. The secretary may allow representatives of the news media to
8 witness the execution under rules of the department. No other persons may be
9 allowed to witness the execution.

10 **SECTION 47.** 973.09 (1) (c) of the statutes is amended to read:

11 973.09 (1) (c) When a person is convicted of any crime ~~which~~ that is punishable
12 by death or life imprisonment, the court shall ~~shall~~ may not place the person on probation.

13 **SECTION 48.** 978.07 (1) (c) 1. of the statutes is amended to read:

14 978.07 (1) (c) 1. Any case record of a felony punishable by death or life
15 imprisonment or a related case, after the defendant's parole eligibility date under s.
16 304.06 (1) or 973.014 (1) or date of eligibility for release to extended supervision
17 under s. 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2., whichever is applicable,
18 or 50 years after the commencement of the action, whichever occurs later. If there
19 is no parole eligibility date or no date for release to extended supervision, the district
20 attorney may destroy the case record after the defendant's death.

21 **SECTION 49. Initial applicability.**

22 (1) This act first applies to offenses committed on February 1, 2003 or on the
23 effective date of this subsection, whichever is later.

24 **SECTION 50. Effective date.**

2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

102
LRB-0644/Pins
RPN&RLR:kmg:pg

1 Insert 3-1: ✓

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

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

10 NOTE: NOTE: Sub. (2g) is shown as amended eff. 2-1-03 by 2001 Wis. Act 109. Prior to 2-1-03 it reads:NOTE:

11 (2g) Notwithstanding subch. II of ch. 111, the state superintendent shall revoke a license granted by the state superintendent, without a hearing, if the licensee is
convicted of any Class A, B, C or D felony under ch. 940 or 948, except ss. 940.08 and 940.205, for a violation that occurs on or after September 12, 1991.
12 History: 1991 a. 42 ss. 1 to 3, 4r; 1993 a. 16, 98; 1995 a. 27 s. 945 (1); 1995 a. 77; 1997 a. 27, 237; 1999 a. 9; 2001 a. 57, 103, 109. ✓

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

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

23 NOTE: NOTE: Par. (a) is shown as amended eff. 2-1-03 by 2001 Wis. Act 109. Prior to 2-1-03 it reads:NOTE:

24 (a) Notwithstanding subch. II of ch. 111, the state superintendent may not grant a license to any person who has been convicted of any Class A, B, C or D felony
25 under ch. 940 or 948, except ss. 940.08 and 940.205, or of an equivalent crime in another state or country, for a violation that occurs on or after September 12, 1991,
26 for 6 years following the date of the conviction, and may grant the license only if the person establishes by clear and convincing evidence that he or she is entitled to
the license.

History: 1971 c. 154; 1975 c. 39, 95; 1979 c. 346; 1981 c. 314 s. 146; 1985 a. 29, 207; 1989 a. 31; 1991 a. 42, 108, 164, 315; 1993 a. 16, 334, 339, 454, 491; 1995 a. 27
ss. 3951m, 9145 (1); 1995 a. 299; 1997 a. 27, 113, 191, 237; 1999 a. 9; 2001 a. 109.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

insert 7-17: ✓

SECTION 3. 938.355 (4) (b) of the statutes, as affected by 2001 Wisconsin Act

109, is amended to read: *→ section 533b)*

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

NOTE: NOTE: Par. (b) is shown as amended eff. 2-1-03 by 2001 Wis. Act 189. Prior to 2-1-03 it reads:NOTE:

21
22
23
24
25
26
27
28
29

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

History: 1995 a. 77, 352; 1997 a. 27, 35, 205, 237, 239, 252; 1999 s. 9, 32, 103; 2001 a. 16, 69, 109.

SECTION 4. 938.538 (3) (a) 1m. of the statutes is amended to read:

1 938.538 (3) (a) 1m. If the participant has been adjudicated delinquent for
2 committing an act that would be a Class AA or A felony if committed by an adult,
3 placement in a Type 1 secured correctional facility, a secured child caring institution,
4 or, if the participant is 17 years of age or over or 15 years of age or over and
5 transferred under s. 938.357 (4) (d), a Type 1 prison, as defined in s. 301.01 (5), until
6 the participant reaches 25 years of age, unless the participant is released sooner,
7 subject to a mandatory minimum period of confinement of not less than one year.

NOTE: NOTE: The provisions of subd. 1m. that subject a juvenile to placement in an adult (Type 1) prison were held to violate Article I, s. 7 of the Wisconsin Constitution and the 6th and 14th amendments of the U. S. Constitution and to be severed from the remainder of ch. 938 by the Supreme Court in *State of Wisconsin v. Hezzie R.* 219 Wis. 2d 849, 580 N.W.2d 660 (1998).NOTE:

History: 1995 a. 77, 352; 1997 a. 27, 35; 2001 a. 16, 59.

8
9
10
11
12
13
14

insert 11-11: ✓

SECTION 5. 946.50 (1) of the statutes is renumbered 946.50 (1m). ✓

SECTION 6. 946.50 (1g) of the statutes is created to read: ✓

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

112
LRB-0644/P1dn
RPN&RLR:kmg:pg

December 2, 2002

Please review this draft carefully to ensure that it is consistent with your intent.

This draft is based on 2001 LRB-3279, prepared for your office in the last session.

The U.S. Supreme Court, in *Atkins v. Virginia*, docket number 00-8452, decided June 20, 2002, held that it is cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution to execute persons who have mental retardation. The language in this draft barring the imposition of the death penalty on a person who has mental retardation is based on a Florida statute, section 921.137. The definition of mental retardation is taken from the Wisconsin Administrative Code, section HFS 73.07 (1) (b).

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0644/P2dn
RPN&RLR:kmg:jf

December 12, 2002

Please review this draft carefully to ensure that it is consistent with your intent.

This draft is based on 2001 LRB-3279, prepared for your office in the last session.

The U.S. Supreme Court, in *Atkins v. Virginia*, docket number 00-8452, decided June 20, 2002, held that it is cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution to execute persons who have mental retardation. The language in this draft barring the imposition of the death penalty on a person who has mental retardation is based on a Florida statute, section 921.137. The definition of mental retardation is taken from the Wisconsin Administrative Code, section HFS 73.07 (1) (b).

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-0644/02
RPN/GMM/RLR:kmg:jf

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Due 1 p.m.
Today

1 *Gen. Cat.* 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), 302.114 (1), 302.114 (2), 302.114 (3) (a) (intro.), 302.114 (3)
4 (b), 302.114 (3) (c), 303.065 (1) (b), 304.02 (5), 304.06 (1) (b), 304.071 (2), 938.355
5 (4) (b), 938.538 (3) (a) 1m., 939.30 (2), 939.31, 939.32 (1) (a), 939.50 (2), 939.60,
6 939.62 (2m) (a) 2m. c., 939.62 (2m) (c), 939.624 (2), 939.63 (1) (b), 939.632 (1) (e)
7 2., 940.01 (1) (a), 940.01 (2) (intro.), 971.17 (1) (c), 972.03, 972.13 (6), 973.01 (3),
8 973.014 (1g) (a) (intro.), 973.032 (2) (b), 973.09 (1) (c) and 978.07 (1) (c) 1.; and
9 *to create* 301.046 (3) (cm), 302.11 (1w), 304.06 (1t), 939.22 (7), 939.22 (19m),
10 939.50 (1) (ag), 939.50 (3) (ag), 940.01 (1) (am), 940.01 (1) (b) 1. and 2., 946.50
11 (1g), 961.335 (1m), 967.02 (1m), 973.0145 and 973.0147 of the statutes;
12 **relating to:** providing a penalty of either death or life imprisonment for

- 1 first-degree intentional homicide, affecting eligibility for supervised release,
2 and granting 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. A court imposing a life sentence has the discretion to determine whether the defendant is eligible to petition for release on extended supervision after serving 20 years in prison or after some greater specified period, or whether the person is not eligible for release to extended supervision. (No person convicted for a crime committed on or after December 31, 1999, is eligible for parole under a sentence for that crime.)

This bill provides a penalty of either death or life imprisonment for certain first degree homicides. The death penalty is applicable to a first degree intentional homicide if the victim is under age 16 or is an unborn child, the offender is at least 16 years of age at the time of the offense, 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 crime 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 prosecution and defense present evidence of aggravating and mitigating circumstances concerning the offense or the defendant. In order for a judge to sentence a person to death, the judge must find that at least one of the following six aggravating circumstances applies to the offense or defendant:

1. The defendant was on parole or extended supervision or was confined in prison when he or she committed the offense.
2. The offense was committed for the purpose of avoiding or preventing arrest or for the purpose of effecting an escape from custody.
3. The defendant knowingly created a great risk to many persons.
4. The offense was committed to disrupt or hinder the exercise of government or the enforcement of law.
5. The defendant intentionally caused the victim bodily harm or mental anguish before the victim died.
6. The defendant enjoyed or was utterly indifferent to the victim's suffering.

The judge and jury must consider and weigh the existence of the specified aggravating circumstances against the existence of any mitigating factors such as whether the defendant acted under extreme mental or emotional duress, the defendant's capacity to appreciate the criminality of his or her conduct, whether the

defendant has a prior criminal history, whether the victim participated in the defendant's conduct or consented to the defendant's act, and the defendant's age.

The jury makes a recommendation to the judge by majority vote as to whether the defendant should be sentenced to death or be sentenced to imprisonment for life. The jury's recommendation is only advisory. If the defendant intends to raise mental retardation as a bar to execution, based on the U.S. Supreme Court decision in *Atkins v. Virginia*, US (2002), he or she must make a motion to the court after the jury has made its recommendation. The court appoints two experts in mental illness to evaluate the defendant. The court then holds a hearing to determine if the defendant has mental retardation. At the hearing, the defendant and the state may provide expert testimony as to the defendant's mental retardation. If the judge determines, by clear and convincing evidence, that the defendant has mental retardation, the judge may not impose a death sentence. If the judge determines that the defendant does not have mental retardation, the judge must review the aggravating and mitigating circumstances. If the judge does not find that one of the six aggravating circumstances applies, the judge must sentence the defendant to life imprisonment and make a determination as to whether and when the defendant is eligible to petition for release to extended supervision. If the judge does find that an aggravating circumstance applies, the judge must weigh the aggravating and mitigating circumstances and sentence the person either to death or to life imprisonment. If the judge imposes a death sentence, the judge must specify on the record his or her findings with regard to the existence of aggravating and mitigating circumstances. Any death sentence is subject to automatic appellate review by the supreme court.

The court that imposes the 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 bill applies only to those offenses committed on or after the effective date of the bill.

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.

For further information see the *state* 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.** 115.31 (2g) of the statutes, as affected by 2001 Wisconsin Act 109,
2 is amended to read:

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

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

9 118.19 (4) (a) Notwithstanding subch. II of ch. 111, the state superintendent
10 may not grant a license, for 6 years following the date of the conviction, to any person
11 who has been convicted of any Class AA, A, B, C, or D felony under ch. 940 or 948,
12 except ss. 940.08 and 940.205, or of an equivalent crime in another state or country,
13 for a violation that occurs on or after September 12, 1991, or any Class E, F, G, or H
14 felony under ch. 940 or 948, except ss. 940.08 and 940.205, for a violation that occurs
15 on or after February 1, 2003. The state superintendent may grant the license only
16 if the person establishes by clear and convincing evidence that he or she is entitled
17 to the license.

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

19 301.046 (3) (cm) The prisoner is not awaiting imposition of a death sentence.

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

21 301.048 (2) (am) 2. He or she is a prisoner serving a felony sentence for a felony
22 that is not punishable by death or life imprisonment and the department directs him
23 or her to participate in the program. This subdivision does not apply to a prisoner
24 serving a bifurcated sentence imposed under s. 973.01.

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

1 302.11 (1) The warden or superintendent shall keep a record of the conduct of
2 each inmate, specifying each infraction of the rules. Except as provided in subs. (1g),
3 (1m), (1q), (1w), (1z), (7), and (10), each inmate is entitled to mandatory release on
4 parole by the department. The mandatory release date is established at two-thirds
5 of the sentence. Any calculations under this subsection or sub. (1q) (b) or (2) (b)
6 resulting in fractions of a day shall be rounded in the inmate's favor to a whole day.

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

8 302.11 (1w) An inmate serving a sentence of life imprisonment imposed under
9 s. 973.0145 (4) (c) or awaiting imposition of a death sentence is not entitled to
10 mandatory release on parole under this section.

11 **SECTION 7.** 302.114 (1) of the statutes is amended to read:

12 302.114 (1) An inmate is subject to this section if he or she is serving a life
13 sentence imposed under s. 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2. An
14 inmate serving a life sentence under s. 939.62 (2m) ~~or~~ 973.014 (1g) (a) 3., or 973.0145
15 (4) (c) 3. is not eligible for release to extended supervision under this section.

16 **SECTION 8.** 302.114 (2) of the statutes is amended to read:

17 302.114 (2) Except as provided in subs. (3) and (9), an inmate subject to this
18 section may petition the sentencing court for release to extended supervision after
19 he or she has served 20 years, if the inmate was sentenced under s. 973.014 (1g) (a)
20 1. or 973.0145 (4) (c) 1., or after he or she has reached the extended supervision
21 eligibility date set by the court, if the inmate was sentenced under s. 973.014 (1g) (a)
22 2. or 973.0145 (4) (c) 2.

23 **SECTION 9.** 302.114 (3) (a) (intro.) of the statutes is amended to read:

24 302.114 (3) (a) (intro.) The warden or superintendent shall keep a record of the
25 conduct of each inmate subject to this section, specifying each infraction of the rules.

1 If any inmate subject to this section violates any regulation of the prison or refuses
2 or neglects to perform required or assigned duties, the department may extend the
3 extended supervision eligibility date set under s. 973.014 (1g) (a) 1. or 2. or 973.0145
4 (4) (c) 1. or 2., whichever is applicable, as follows:

5 **SECTION 10.** 302.114 (3) (b) of the statutes is amended to read:

6 302.114 (3) (b) In addition to the sanctions under par. (a), if an inmate subject
7 to this section is placed in adjustment, program, or controlled segregation status, the
8 department may extend the extended supervision eligibility date set under s.
9 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2., whichever is applicable, by a
10 number of days equal to 50% of the number of days spent in segregation status. In
11 administering this paragraph, the department shall use the definition of
12 adjustment, program, or controlled segregation status under departmental rules in
13 effect at the time that an inmate is placed in that status.

14 **SECTION 11.** 302.114 (3) (c) of the statutes is amended to read:

15 302.114 (3) (c) An inmate subject to this section who files an action or special
16 proceeding, including a petition for a common law writ of certiorari, to which s.
17 807.15 applies shall have his or her extended supervision eligibility date set under
18 s. 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2., whichever is applicable, extended
19 by the number of days specified in the court order prepared under s. 807.15 (3). Upon
20 receiving a court order issued under s. 807.15, the department shall recalculate the
21 date on which the inmate to whom the order applies will be entitled to petition for
22 release to extended supervision and shall inform the inmate of that date.

23 **SECTION 12.** 303.065 (1) (b) of the statutes is amended to read:

24 303.065 (1) (b) 1. A person serving a life sentence, other than a life sentence
25 specified in subd. 2., may be considered for work release only after he or she has

1 reached parole eligibility under s. 304.06 (1) (b) or 973.014 (1) (a) or (b), whichever
2 is applicable, or he or she has reached his or her extended supervision eligibility date
3 under s. 302.114 (9) ~~(a)~~ (am) ~~or~~ 973.014 (1g) (a) 1. or 2., or 973.0145 (4) (c) 1. or 2.,
4 whichever is applicable.

5 2. A person serving a life sentence under s. 939.62 (2m) (c) ~~or~~ 973.014 (1) (c)
6 or (1g) (a) 3., or 973.0145 (4) (c) 3., or awaiting imposition of a death sentence, may
7 not be considered for work release.

8 **SECTION 13.** 304.02 (5) of the statutes is amended to read:

9 304.02 (5) Notwithstanding subs. (1) to (3), a prisoner who is serving a life
10 sentence under s. 939.62 (2m) (c) ~~or~~ 973.014 (1) (c) or (1g), or 973.0145 (4) (c), or who
11 is awaiting imposition of a death sentence, is not eligible for release to parole
12 supervision under this section.

13 **SECTION 14.** 304.06 (1) (b) of the statutes, as affected by 2001 Wisconsin Act
14 109, is amended to read:

15 304.06 (1) (b) Except as provided in s. 961.49 (2), 1999 stats., sub. (1m) or (1t),
16 or s. 302.045 (3), 973.01 (6), or 973.0135, the parole commission may parole an
17 inmate of the Wisconsin state prisons or any felon or any person serving at least one
18 year or more in a county house of correction or a county reforestation camp organized
19 under s. 303.07, when he or she has served 25% of the sentence imposed for the
20 offense, or 6 months, whichever is greater. Except as provided in sub. (1t) or s. 939.62
21 (2m) (c) or 973.014 (1) (b) or (c), (1g), or (2), the parole commission may parole an
22 inmate serving a life term when he or she has served 20 years, as modified by the
23 formula under s. 302.11 (1) and subject to extension under s. 302.11 (1q) and (2), if
24 applicable. The person serving the life term shall be given credit for time served prior
25 to sentencing under s. 973.155, including good time under s. 973.155 (4). The

1 secretary may grant special action parole releases under s. 304.02. The department
2 or the parole commission shall not provide any convicted offender or other person
3 sentenced to the department's custody any parole eligibility or evaluation until the
4 person has been confined at least 60 days following sentencing.

5 **SECTION 15.** 304.06 (1t) of the statutes is created to read:

6 304.06 (1t) The parole commission may not parole an inmate who is sentenced
7 to life imprisonment or death under s. 973.0145.

8 **SECTION 16.** 304.071 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
9 is amended to read:

10 304.071 (2) If a prisoner is ~~not eligible~~ ineligible for parole under s. 961.49 (2),
11 1999 stats., or s. 304.06 (1t), 939.62 (2m) (c), 973.01 (6), 973.014 (1) (c) or (1g), or
12 973.032 (5), he or she is not eligible for parole under this section.

13 **SECTION 17.** 938.355 (4) (b) of the statutes, as affected by 2001 Wisconsin Act
14 109, section 533b, is amended to read:

15 938.355 (4) (b) Except as provided in s. 938.368, an order under s. 938.34 (4d)
16 or (4m) made before the juvenile reaches 18 years of age may apply for up to 2 years
17 after its entry or until the juvenile's 18th birthday, whichever is earlier, unless the
18 court specifies a shorter period of time or the court terminates the order sooner.
19 Except as provided in s. 938.368, an order under s. 938.34 (4h) made before the
20 juvenile reaches 18 years of age shall apply for 5 years after its entry, if the juvenile
21 is adjudicated delinquent for committing a violation of s. 943.10 (2) or for committing
22 an act that would be punishable as a Class B or C felony if committed by an adult,
23 or until the juvenile reaches 25 years of age, if the juvenile is adjudicated delinquent
24 for committing an act that would be punishable as a Class AA or A felony if
25 committed by an adult. Except as provided in s. 938.368, an extension of an order

1 under s. 938.34 (4d), (4h), (4m), or (4n) made before the juvenile reaches 17 years of
2 age shall terminate at the end of one year after its entry unless the court specifies
3 a shorter period of time or the court terminates the order sooner. No extension under
4 s. 938.365 of an original dispositional order under s. 938.34 (4d), (4h), (4m), or (4n)
5 may be granted for a juvenile who is 17 years of age or older when the original
6 dispositional order terminates.

7 **SECTION 18.** 938.538 (3) (a) 1m. of the statutes is amended to read:

8 938.538 (3) (a) 1m. If the participant has been adjudicated delinquent for
9 committing an act that would be a Class AA or A felony if committed by an adult,
10 placement in a Type 1 secured correctional facility, a secured child caring institution
11 or, if the participant is 17 years of age or over or 15 years of age or over and
12 transferred under s. 938.357 (4) (d), a Type 1 prison, as defined in s. 301.01 (5), until
13 the participant reaches 25 years of age, unless the participant is released sooner,
14 subject to a mandatory minimum period of confinement of not less than one year.

15 **SECTION 19.** 939.22 (7) of the statutes is created to read:

16 939.22 (7) "Crime that is punishable by death or life imprisonment" means a
17 crime for which one or more of the possible penalties is death or life imprisonment.

18 **SECTION 20.** 939.22 (19m) of the statutes is created to read:

19 939.22 (19m) "Mental retardation" means significantly subaverage general
20 intellectual functioning usually defined as an intelligence quotient level of 70 or
21 below accompanied by significant deficits or impairments in adaptive functioning
22 with onset before the age of 18 years.

23 **SECTION 21.** 939.30 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
24 is amended to read:

1 939.30 (2) For a solicitation to commit a crime ~~for which the penalty is that is~~
2 punishable by death or life imprisonment, the actor is guilty of a Class F felony. For
3 a solicitation to commit a Class I felony, the actor is guilty of a Class I felony.

4 **SECTION 22.** 939.31 of the statutes is amended to read:

5 **939.31 Conspiracy.** Except as provided in ss. 940.43 (4), 940.45 (4), and
6 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with
7 another for the purpose of committing that crime may, if one or more of the parties
8 to the conspiracy ~~does~~ do an act to effect its object, be fined or imprisoned or both not
9 to exceed the maximum provided for the completed crime; except that for a
10 conspiracy to commit a crime ~~for which the penalty is that is punishable by death or~~
11 life imprisonment, the actor is guilty of a Class B felony.

12 **SECTION 23.** 939.32 (1) (a) of the statutes is amended to read:

13 939.32 (1) (a) Whoever attempts to commit a crime ~~for which the penalty is that~~
14 is punishable by death or life imprisonment is guilty of a Class B felony.

15 **SECTION 24.** 939.50 (1) (a) of the statutes is renumbered 939.50 (1) (am).

16 **SECTION 25.** 939.50 (1) (ag) of the statutes is created to read:

17 939.50 (1) (ag) Class AA felony.

18 **SECTION 26.** 939.50 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
19 is amended to read:

20 939.50 (2) A felony is a Class AA, A, B, C, D, E, F, G, H, or I felony when it is
21 so specified in the statutes.

22 **SECTION 27.** 939.50 (3) (a) of the statutes is renumbered 939.50 (3) (am).

23 **SECTION 28.** 939.50 (3) (ag) of the statutes is created to read:

24 939.50 (3) (ag) For a Class AA felony, life imprisonment or death, as determined
25 under s. 973.0145.

1 **SECTION 29.** 939.60 of the statutes is amended to read:

2 **939.60 Felony and misdemeanor defined.** A crime that is punishable by
3 death or imprisonment in the Wisconsin state prisons is a felony. Every other crime
4 is a misdemeanor.

5 **SECTION 30.** 939.62 (2m) (a) 2m. c. of the statutes is amended to read:

6 **939.62 (2m) (a) 2m. c.** The solicitation, conspiracy, or attempt, under s. 939.30,
7 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

8 **SECTION 31.** 939.62 (2m) (c) of the statutes is amended to read:

9 **939.62 (2m) (c)** If the actor is a persistent repeater and the actor is not
10 sentenced to death under s. 973.0145, the term of imprisonment for the felony for
11 which the persistent repeater presently is being sentenced under ch. 973 is life
12 imprisonment without the possibility of parole or extended supervision.

13 **SECTION 32.** 939.624 (2) of the statutes, as affected by 2001 Wisconsin Act 109,
14 is amended to read:

15 **939.624 (2)** If a person has one or more prior convictions for a serious violent
16 crime or a crime that is punishable by death or life imprisonment and subsequently
17 commits a serious violent crime, the court shall impose a bifurcated sentence under
18 s. 973.01. The term of confinement in prison portion of a bifurcated sentence imposed
19 under this subsection may not be less than 3 years and 6 months, but otherwise the
20 penalties for the crime apply, subject to any applicable penalty enhancement. The
21 court may not place the defendant on probation.

22 **SECTION 33.** 939.63 (1) (b) of the statutes, as affected 2001 Wisconsin Act 109,
23 is amended to read:

1 939.63 (1) (b) If the maximum term of imprisonment for a felony is more than
2 5 years or is a life term or the felony is punishable by death, the maximum term of
3 imprisonment for the felony may be increased by not more than 5 years.

4 **SECTION 34.** 939.632 (1) (e) 2. of the statutes is amended to read:

5 939.632 (1) (e) 2. The solicitation, conspiracy, or attempt, under s. 939.30,
6 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

7 **SECTION 35.** 940.01 (1) (a) of the statutes is amended to read:

8 940.01 (1) (a) Except as provided in par. (am) and sub. (2), whoever causes the
9 death of another human being with intent to kill that person or another is guilty of
10 a Class A felony.

11 **SECTION 36.** 940.01 (1) (am) of the statutes is created to read:

12 940.01 (1) (am) Whoever causes the death of another human being with intent
13 to kill that person or another is guilty of a Class AA felony if the victim has not
14 attained the age of 16 years, unless any of the following applies:

- 15 1. The actor is less than 16 years of age when he or she commits the offense.
- 16 2. Notwithstanding s. 939.05, the actor is not guilty of a Class AA felony as a
17 party to a crime if the actor did not intend that a person be killed.
- 18 3. An affirmative defense under sub. (2) exists.

19 **SECTION 37.** 940.01 (1) (b) of the statutes is renumbered 940.01 (1) (b) (intro.)
20 and amended to read:

21 940.01 (1) (b) (intro.) Except as provided in sub. (2), whoever causes the death
22 of an unborn child with intent to kill that unborn child, kill the woman who is
23 pregnant with that unborn child, or kill another is guilty of a Class ~~A~~ AA felony,
24 except as follows:

25 **SECTION 38.** 940.01 (1) (b) 1. and 2. of the statutes are created to read:

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

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

6 **SECTION 39.** 940.01 (2) (intro.) of the statutes is amended to read:

7 940.01 (2) MITIGATING CIRCUMSTANCES. (intro.) The following are affirmative
8 defenses to prosecution under this section ~~which that~~ mitigate the offense offenses
9 under sub. (1) to 2nd-degree intentional homicide under s. 940.05:

10 **SECTION 40.** 946.50 (1) of the statutes is renumbered 946.50 (1m).

11 **SECTION 41.** 946.50 (1g) of the statutes is created to read:

12 946.50 (1g) A Class AA felony, if the person was adjudicated delinquent for
13 committing an act that would be a Class AA felony if committed by an adult.

14 **SECTION 42.** 961.335 (1m) of the statutes is created to read:

15 961.335 (1m) Notwithstanding sub. (1), upon the application of the secretary
16 of corrections for a permit to obtain a controlled substance for purposes of an
17 execution under s. 973.0165, the controlled substances board shall issue a permit
18 under this section.

19 **SECTION 43.** 967.02 (1m) of the statutes is created to read:

20 967.02 (1m) "Crime that is punishable by death or life imprisonment" has the
21 meaning given in s. 939.22 (7).

22 **SECTION 44.** 971.17 (1) (c) of the statutes is amended to read:

23 971.17 (1) (c) *Felonies punishable by death or life imprisonment.* If a defendant
24 is found not guilty by reason of mental disease or mental defect of a felony that is

1 punishable by death or life imprisonment, the commitment period specified by the
2 court may be life, subject to termination under sub. (5).

3 **SECTION 45.** 972.03 of the statutes is amended to read:

4 **972.03 Peremptory challenges.** Each side is entitled to only 4 peremptory
5 challenges except as otherwise provided in this section. When the crime charged is
6 punishable by death or life imprisonment, the state is entitled to 6 peremptory
7 challenges and the defendant is entitled to 6 peremptory challenges. If there is more
8 than one defendant, the court shall divide the challenges as equally as practicable
9 among them; and if their defenses are adverse and the court is satisfied that the
10 protection of their rights so requires, the court may allow the defendants additional
11 challenges. If the crime is punishable by death or life imprisonment, the total
12 peremptory challenges allowed the defense shall not exceed 12 if there are only 2
13 defendants and 18 if there are more than 2 defendants; in other felony cases 6
14 challenges if there are only 2 defendants and 9 challenges if there are more than 2.
15 In misdemeanor cases, the state is entitled to 3 peremptory challenges and the
16 defendant is entitled to 3 peremptory challenges, except that if there are 2
17 defendants, the court shall allow the defense 4 peremptory challenges, and, if there
18 are more than 2 defendants, the court shall allow the defense 6 peremptory
19 challenges. Each side shall be allowed one additional peremptory challenge if
20 additional jurors are to be selected under s. 972.04 (1).

21 **SECTION 46.** 972.13 (6) of the statutes is amended to read:

22 **972.13 (6)** The following forms may be used for judgments:

23 STATE OF WISCONSIN

24 County

25 In.... Court

1 The State of Wisconsin

2 vs.

3(Name of defendant)

4 UPON ALL THE FILES, RECORDS AND PROCEEDINGS,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 BY THE COURT....

12 Date of Offense....,

13 District Attorney....,

14 Defense Attorney....

15 *Strike inapplicable paragraphs.

16 STATE OF WISCONSIN

17 County

18 In.... Court

19 The State of Wisconsin

20 vs.

21 ...(Name of defendant)

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

24 UPON ALL THE FILES, RECORDS AND PROCEEDINGS

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

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

4 BY THE COURT....

5 **SECTION 47.** 973.01 (3) of the statutes is amended to read:

6 973.01 (3) NOT APPLICABLE TO LIFE OR DEATH SENTENCES. If a person is being
7 sentenced for a felony that is punishable by life imprisonment or by death, he or she
8 is not subject to this section but shall be sentenced under s. 973.014 (1g) or 973.0145,
9 whichever is applicable.

10 **SECTION 48.** 973.014 (1g) (a) (intro.) of the statutes is amended to read:

11 973.014 (1g) (a) (intro.) Except as provided in sub. (2) or s. 973.0145 (4) (c),
12 when a court sentences a person to life imprisonment for a crime committed on or
13 after December 31, 1999, the court shall make an extended supervision eligibility
14 date determination regarding the person and choose one of the following options:

15 **SECTION 49.** 973.0145 of the statutes is created to read:

16 **973.0145 Sentence of death or life imprisonment for Class AA felony.**

17 (1) (a) Upon conviction of a defendant of a Class AA felony, the court shall conduct
18 a separate sentencing proceeding to determine whether the defendant should be
19 sentenced to death or life imprisonment. A defendant charged with a Class AA felony
20 who intends to raise mental retardation as a bar to his or her death sentence shall
21 give notice of that intention upon his or her conviction of a Class AA felony.

22 (b) The trial judge shall conduct the sentencing proceeding before the trial jury,
23 if there was a jury trial, as soon as practicable. If the trial jury is unable to reconvene
24 for a hearing on the issue of penalty, the trial judge may summon a new jury to
25 determine the issue of the imposition of the penalty. If the trial jury has been waived,

1 or if the defendant pleaded guilty, the court shall conduct the sentencing proceeding
2 before a jury summoned for that purpose unless the defendant waives the right to
3 a jury.

4 (c) In the sentencing proceeding, the court shall admit any evidence that may
5 be relevant to the sentence regarding any mitigating circumstance. The court shall
6 admit any other evidence according to the rules of evidence applicable at a criminal
7 trial. The court shall provide the defendant with a fair opportunity to rebut any
8 hearsay statements. This paragraph does not authorize the introduction of any
9 evidence secured in violation of the state or federal constitution. The state has the
10 burden of proof, beyond a reasonable doubt, regarding the existence of aggravating
11 circumstances. The defendant has the burden of proof, by a preponderance of the
12 evidence, regarding mitigating circumstances. The court shall permit the state and
13 the defendant or his or her counsel to present arguments for or against a sentence
14 of death.

15 (2) (a) Unless the defendant waives the right to a jury, the jury shall deliberate
16 after hearing all of the evidence and, by a majority vote, shall render an advisory
17 sentence of life imprisonment or death to the court, based upon the following
18 matters:

- 19 1. The existence of aggravating circumstances under sub. (6).
- 20 2. The existence of mitigating circumstances under sub. (7).

21 (b) Upon the request of the defendant or the state, the court shall explain to the
22 jury the court's options under sub. (4) (c) to sentence the defendant to life without the
23 possibility of extended supervision or with delayed eligibility for extended
24 supervision. If the defendant is not eligible for release to extended supervision, the

1 court shall also, upon request of the defendant or the state, explain to the jury the
2 defendant's ineligibility for extended supervision.

3 (c) If the jury recommends life imprisonment, it may further recommend
4 restrictions on the defendant's eligibility for extended supervision or recommend
5 that the defendant not be eligible for extended supervision.

6 (3) After the defendant waives the right to a jury under sub. (2) (a), or after the
7 jury renders its advisory opinion regarding a sentence of life imprisonment or death,
8 a defendant who has given notice of the intention to raise mental retardation as a bar
9 to his or her death sentence may file a motion to determine whether he or she has
10 mental retardation. Upon receipt of the motion, the court shall appoint 2 experts in
11 the field of mental illness to evaluate the defendant and report their findings to the
12 court. The court shall hold a hearing to consider the findings of the court-appointed
13 experts and to consider the findings of any other expert that are offered by the state
14 or the defense on the issue of whether the defendant has mental retardation. If the
15 court finds, by clear and convincing evidence, that the defendant has mental
16 retardation, the court may not impose a sentence of death and shall enter a written
17 order that sets forth with specificity the findings in support of the determination.

18 (4) (a) Notwithstanding the recommendation of a majority of the jury, the court,
19 if it made no determination under sub. (3) that the defendant has mental retardation
20 and after weighing the aggravating and mitigating circumstances, shall enter a
21 sentence of life imprisonment or death, but if the court imposes a sentence of death,
22 it shall set forth in writing its findings upon which the sentence of death is based as
23 to all of the following facts:

24 1. That sufficient aggravating circumstances exist under sub. (6).

1 2. That there are insufficient mitigating circumstances under sub. (7) to
2 outweigh the aggravating circumstances.

3 (b) In each case in which the court imposes the death sentence, the court must
4 support its determination by specific written findings of fact based upon the
5 circumstances in subs. (6) and (7) and upon the records of the trial and the sentencing
6 proceedings.

7 (c) If the court does not make the findings required under par. (b) for a death
8 sentence, or if there is a finding under sub. (3) that the defendant has mental
9 retardation, the court shall impose a sentence of life imprisonment and shall make
10 an extended supervision eligibility determination regarding the person and adopt
11 one of the following options:

12 1. The person is eligible for release to extended supervision after serving 20
13 years.

14 2. The person is eligible for release to extended supervision on a date set by the
15 court. Under this subdivision, the court may set any later date than that provided
16 in subd. 1., but may not set a date that occurs before the earliest possible date under
17 subd. 1.

18 3. The person is not eligible for release to extended supervision.

19 (d) When imposing a sentence of life imprisonment in accordance with par. (c)
20 1. or 2., the court shall inform the person of the provisions of s. 302.114 (3) and the
21 procedure for petitioning under s. 302.114 (5) for release to extended supervision.

22 (5) If a death sentence is imposed, the judgment of conviction and sentence of
23 death is subject to automatic review by the supreme court within 60 days after
24 certification by the sentencing court of the entire record, unless the supreme court,
25 for good cause shown, extends the time for an additional period not to exceed 30 days.

1 The review by the supreme court has priority over all other cases and shall be heard
2 in accordance with rules promulgated by the supreme court.

3 (6) The court and jury shall consider one or more of the following as
4 aggravating circumstances:

5 (a) The defendant was on parole or extended supervision under a sentence for
6 a felony or was confined in prison when he or she committed the Class AA felony.

7 (b) The Class AA felony was committed for the purpose of avoiding or
8 preventing a lawful arrest or effecting an escape from custody.

9 (c) The defendant knowingly created a great risk to many persons.

10 (d) The Class AA felony was committed to disrupt or hinder the lawful exercise
11 of any governmental function or the enforcement of laws.

12 (e) The defendant intentionally caused bodily harm or mental anguish to the
13 victim or another before the victim died.

14 (f) During the commission of the offense, the defendant enjoyed or was utterly
15 indifferent to the suffering of another.

16 (7) The court and jury shall consider as a mitigating factor any aspect of the
17 defendant's character, background, or record or any of the circumstances of the
18 offense that the defendant offers as a basis for a sentence other than death.
19 Mitigating circumstances may include, but are not limited to, any of the following:

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

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

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

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

3 (e) The capacity of the defendant to appreciate the criminality of his or her
4 conduct or to conform his or her conduct to the requirements of law was substantially
5 impaired.

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

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

10 (8) The court that imposes a sentence of death shall set the date for execution.
11 The defendant shall be committed to the Wisconsin state prisons pending the
12 execution of the death sentence.

13 (9) The execution of a death sentence shall be by lethal injection.

14 **SECTION 50.** 973.0147 of the statutes is created to read:

15 **973.0147 Execution of death sentence; stay of execution.** The secretary
16 of corrections shall designate the executioner who shall provide a person subject to
17 a death sentence with an intravenous injection of one or more substances in a lethal
18 quantity. A person is immune from civil or criminal liability for his or her acts or
19 omissions, in good faith, in regard to a lawful execution under this section. The
20 secretary may not direct a physician to be present or require a physician to announce
21 when death has occurred. A physician may certify the death after a person, other
22 than a physician, has determined or pronounced death. The secretary shall
23 designate 12 citizens to witness the execution. The convicted person may request
24 that certain additional people be allowed to witness the execution. The secretary
25 shall grant any such reasonable request. The secretary may allow representatives

1 of the news media to witness the execution under rules of the department. No other
2 persons may be allowed to witness the execution. The execution of a death sentence
3 may be stayed only by the governor or incident to an appeal.

4 **SECTION 51.** 973.032 (2) (b) of the statutes is amended to read:

5 973.032 (2) (b) Notwithstanding par. (a), the court may not sentence a person
6 under sub. (1) if he or she is convicted of a felony punishable by death or life
7 imprisonment or has at any time been convicted, adjudicated delinquent, or found
8 not guilty or not responsible by reason of insanity or mental disease, defect, or illness
9 for committing a violent offense, as defined in s. 301.048 (2) (bm).

10 **SECTION 52.** 973.09 (1) (c) of the statutes is amended to read:

11 973.09 (1) (c) When a person is convicted of any crime ~~which~~ that is punishable
12 by death or life imprisonment, the court ~~shall~~ may not place the person on probation.

13 **SECTION 53.** 978.07 (1) (c) 1. of the statutes is amended to read:

14 978.07 (1) (c) 1. Any case record of a felony punishable by death or life
15 imprisonment or a related case, after the defendant's parole eligibility date under s.
16 304.06 (1) or 973.014 (1) or date of eligibility for release to extended supervision
17 under s. 973.014 (1g) (a) 1. or 2. or 973.0145 (4) (c) 1. or 2., whichever is applicable,
18 or 50 years after the commencement of the action, whichever occurs later. If there
19 is no parole eligibility date or no date for release to extended supervision, the district
20 attorney may destroy the case record after the defendant's death.

21 **SECTION 54. Initial applicability.**

22 (1) This act first applies to offenses committed on February 1, 2003 or on the
23 effective date of this subsection, whichever is later.

24 **SECTION 55. Effective date.**



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET
P. O. BOX 2037
MADISON, WI 53701-2037

STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
LEGAL FAX: (608) 264-6948

REFERENCE SECTION: (608) 266-0341
REFERENCE FAX: (608) 266-5648

February 5, 2003

MEMORANDUM

To: Senator Alan Lasee

From: Robert P. Nelson, Ron Sklansky

Subject: Effect of *Ring v. Arizona* on Senate Bill 2

The U. S. Supreme Court, in *Ring v. Arizona*, 122 S. Ct. 2428, decided in June 2002, reviewed the procedures of the State of Arizona in death penalty cases. Under that procedure, the judge, after a jury finding of guilt, makes findings during a separate sentencing hearing regarding aggravating circumstances and mitigating circumstances. If the judge finds that at least one aggravating circumstance exists and that no mitigating circumstances exist that are substantial enough to call for leniency, the judge may sentence the defendant to death.

In deciding *Ring*, the court reviewed two of its cases and determined that a 1990 case, which upheld the Arizona sentencing scheme, was incorrect and should be overturned. Instead, the court relied on a case decided in 2000, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that the Sixth Amendment to the U.S. Constitution does not permit a defendant to be exposed to a penalty exceeding the maximum he or she would receive if punished according to the facts reflected in the jury verdict alone. This applies, said that court in *Apprendi*, even if the state characterizes the additional findings made by the judge as "sentencing factors." The court, in *Ring*, said that if the state makes an increase in the defendant's authorized punishment contingent on a finding of a fact, that fact must be found beyond a reasonable doubt by the jury.

In Senate Bill 2 (SB-2), after the jury finds a defendant guilty of a Class AA felony, the court conducts a separate sentencing proceeding before a jury. (If a jury is waived, the court conducts the hearing and the issues discussed in this memorandum do not arise.) The prosecution and defendant may present evidence regarding mitigating and aggravating circumstances. The bill requires the jury to render, by a majority vote, an advisory sentence of life imprisonment or death to the court, based on the existence of aggravating and mitigating circumstances. The judge, notwithstanding the advice (or "advisory opinion") of the jury, shall impose a sentence of life imprisonment or death. If the judge does impose a death sentence, the judge must set forth in writing that sufficient aggravating circumstances exist that outweigh any mitigating circumstances.

The *Ring* decision calls into question the procedure in SB-2, both as to the advisory opinion by a majority of the jury and as to the judge's authority to overrule the jury's advice (or "advisory opinion") about the imposition of a life sentence or death. To be consistent with the *Ring* decision,

SB-2 needs some revision. We believe that the majority vote provision of the jury in the sentencing hearing must be changed to a unanimous verdict. See *State v. Johnson*, 243 Wis. 2d 365, 372 (2001), which discusses the requirement that the jury's decision be unanimous. We further believe that there are various methods of achieving compliance with the rest of the *Ring* decision, and would suggest that you consider one of the following options:

1. The safest option is to put the decision of life or death completely in the hands of the jury; whatever decision the jury makes after the sentencing hearing, when aggravating and mitigating circumstances are considered, must be followed by the judge.
2. Another option is to have the jury make the findings about aggravating and mitigating circumstances after the sentencing hearing and recommend either death or life imprisonment to the judge. If the jury recommends life imprisonment, the judge must follow the jury's recommendation. If the jury recommends a death sentence, the judge could impose the death sentence as recommended or could reduce the sentence to life imprisonment if he or she makes a finding based on the evidence at the hearing that the mitigating circumstances outweigh the aggravating circumstances. This option should pass constitutional muster because the jury is making the findings of fact as required under *Ring*, and the judge's discretion is limited to reducing, not increasing, the punishment.
3. Another option is to have the jury make findings of fact and a recommended sentence as described in option 2, but, in a case in which the jury finds both aggravating and mitigating circumstances and recommends life, permit the judge to sentence the defendant to death if he or she decides that the aggravating circumstances outweighed the mitigating circumstances. In other words, the jury makes the findings of fact as required under *Ring*, but the judge may substitute his or her judgment for that of the jury as to the *weight* to be given to those facts. This option is constitutionally closer to the edge because even though the jury makes findings of fact as required under *Ring*, the judge may increase the penalty based on the weight given to those facts. As such, this option may invite a court to extend *Ring* to say that to increase a penalty the jury must not only find the facts, but also weigh them.

We would be glad to meet with you to consider these options, and any other you may suggest, as a way to rectify the problem we see in SB-2 as a result of the *Ring* decision.