

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3279/1dn
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October 1, 2001

Senator Lasee:

This is a redraft of 1999 SB-153. There are a couple of recent developments in death penalty law that you may wish to consider incorporating into this bill.

1. The U.S. Supreme Court agreed to hear arguments in the case of Ernest McCarver regarding the question of whether execution of a mentally retarded person constitutes a violation of the Eighth Amendment prohibition against cruel and unusual punishment. The case arises from North Carolina. This month, North Carolina adopted legislation that prohibits executing mentally retarded persons, so the Supreme Court will likely drop McCarver's case from its schedule, because his case is now moot. However, the Supreme Court may accept a similar case from another state. The court's determination of whether a punishment constitutes cruel and unusual punishment is often based on an analysis of evolving standards of decency, measured primarily by legislative action of the states. In 1989, the U.S. Supreme Court held that execution of a mentally retarded person does *not* violate the Eighth Amendment, *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). At the time of the court's ruling in *Penry*, only two death penalty states, Georgia and Maryland, prohibited execution of mentally retarded persons. Now 18 of the 38 death penalty states, plus the U.S. government, prohibit the execution of mentally retarded persons. (However, one of those states, New York, does permit execution of a mentally retarded person for murder by a prisoner.) You may wish to monitor whether the Supreme Court's takes another case regarding execution of the mentally retarded and amend this bill if the court determines that execution of mentally retarded persons is unconstitutional.

2. The U.S. Supreme Court recently clarified a 1994 holding regarding jury instructions in cases in which the only alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole. In *Simmons v. South Carolina*, the court held that if the future dangerousness of the defendant is at issue in sentencing, and if the only sentencing alternatives for a particular defendant are death or life imprisonment without the possibility of parole, then the trial court must either instruct the jury or permit defense counsel to inform the jury that, if the jury does not recommend death, the defendant will be imprisoned for life without the possibility of parole. *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). This year, the Supreme Court clarified that the prosecution need not actually

argue that the defendant will be a danger in the future in order for future dangerousness to be at issue in sentencing. *Shafer v. South Carolina*, __ U.S. __, 121 S.Ct. 1263, __ L.Ed.2d __ (2001). The court did not specify what constitutes putting future dangerousness at issue, but did find in *Shafer* that the state put future dangerousness at issue when it presented evidence of an assault committed by the defendant after he was arrested for capital murder. The court further noted that South Carolina is one of only two states that has a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers, but does not require that courts inform sentencing juries if a defendant is ineligible for parole. *Shafer* at 1271, n. 4.

This issue is relevant to Wisconsin because current law requires that courts impose a sentence of life without parole or extended supervision for certain persistent repeat offenders. Under the bill, a person who has been convicted of two serious felonies and is convicted of capital murder must be sentenced either to death or life imprisonment without the possibility of parole or extended supervision. I therefore added a provision, under s. 973.0145 (2) (b), stats., as created by this bill, that directs the sentencing court to inform the jury if the defendant is ineligible for release to extended supervision if either the defense or the state requests such instruction.

3. It appears that 1999 SB-153 has been redrafted over multiple sessions and that the original model for 1999 SB-153 was the Florida death penalty statute. The Florida statute has been upheld by the U.S. Supreme Court, so it is a workable model, but you may wish to consider alternative state models, either now or if you request a redraft of this bill in the future, for the following two reasons:

a. The Florida model is changed little since the mid-1970s and does not codify much federal jurisprudence on the death penalty. This simply means that courts will have to interpret the bill in accordance with decades of case law. You may, however, prefer a bill that is more complete. The more recently enacted death penalty statutes, such as the New York state statute and the federal statute, are more complete because they include more precise aggravating factors, provide more guidance on how to weigh aggravating versus mitigating factors, and provide more guidance regarding jury instructions. (I have not reviewed all of the state statutes so I do not know if other long-time death penalty states have updated their statutes.)

b. In 28 of the 38 states that have the death penalty, the jury makes the determination as to whether a person is sentenced to death, and generally the jury decision is effective only if it is unanimous or requires at least 10 out of 12 votes. Under the Florida statute and this bill, the jury's decision is only a recommendation to the judge and it need be reached only by a simple majority vote.

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State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-3279/1
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2001 BILL

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), 939.625 (1) (b) 2., 939.63 (1)
6 (a) 2., 939.632 (1) (e) 2., 940.01 (1) (a), 940.01 (2) (intro.), 948.35 (1) (b), 971.17
7 (1), 972.03, 972.13 (6), 973.01 (3), 973.014 (1g) (a) (intro.), 973.032 (2) (b), 973.09
8 (1) (c) and 978.07 (1) (c) 1.; and *to create* 301.046 (3) (cm), 302.11 (1w), 304.06
9 (1t), 939.22 (7), 939.50 (1) (ag), 939.50 (3) (ag), 940.01 (1) (am), 940.01 (1) (b) 1.
10 and 2., 961.335 (1m), 967.02 (1m), 973.0145, 973.016 and 973.017 of the
11 statutes; **relating to:** providing a penalty of either death or life imprisonment

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1 for first-degree intentional homicide, affecting eligibility for supervised
2 release, 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

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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 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 its effective date (the day after publication).

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.** 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:

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

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

9 302.11 (1) The warden or superintendent shall keep a record of the conduct of
10 each inmate, specifying each infraction of the rules. Except as provided in subs. (1g),

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1 (1m), (1q), (1w), (1z), (7), and (10), each inmate is entitled to mandatory release on
2 parole by the department. The mandatory release date is established at two-thirds
3 of the sentence. Any calculations under this subsection or sub. (1q) (b) or (2) (b)
4 resulting in fractions of a day shall be rounded in the inmate's favor to a whole day.

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

6 302.11 (1w) An inmate serving a sentence of life imprisonment imposed under
7 s. 973.0145 (3) (c) or awaiting imposition of a death sentence is not entitled to
8 mandatory release on parole under this section.

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

10 302.114 (1) An inmate is subject to this section if he or she is serving a life
11 sentence imposed under s. 973.014 (1g) (a) 1. or 2. or 973.0145 (3) (c) 1. or 2. An
12 inmate serving a life sentence under s. 939.62 (2m) ~~or~~ 973.014 (1g) (a) 3., or 973.0145
13 (3) (c) 3. is not eligible for release to extended supervision under this section.

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

15 302.114 (2) Except as provided in subs. (3) and (9), an inmate subject to this
16 section may petition the sentencing court for release to extended supervision after
17 he or she has served 20 years, if the inmate was sentenced under s. 973.014 (1g) (a)
18 1. or 973.0145 (3) (c) 1., or after he or she has reached the extended supervision
19 eligibility date set by the court, if the inmate was sentenced under s. 973.014 (1g) (a)
20 2. or 973.0145 (3) (c) 2.

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

22 302.114 (3) (a) (intro.) The warden or superintendent shall keep a record of the
23 conduct of each inmate subject to this section, specifying each infraction of the rules.
24 If any inmate subject to this section violates any regulation of the prison or refuses
25 or neglects to perform required or assigned duties, the department may extend the

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1 extended supervision eligibility date set under s. 973.014 (1g) (a) 1. or 2. or 973.0145
2 (3) (c) 1. or 2., whichever is applicable, as follows:

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

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

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

13 302.114 (3) (c) An inmate subject to this section who files an action or special
14 proceeding, including a petition for a common law writ of certiorari, to which s.
15 807.15 applies shall have his or her extended supervision eligibility date set under
16 s. 973.014 (1g) (a) 1. or 2. or 973.0145 (3) (c) 1. or 2., whichever is applicable, extended
17 by the number of days specified in the court order prepared under s. 807.15 (3). Upon
18 receiving a court order issued under s. 807.15, the department shall recalculate the
19 date on which the inmate to whom the order applies will be entitled to petition for
20 release to extended supervision and shall inform the inmate of that date.

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

22 303.065 (1) (b) 1. A person serving a life sentence, other than a life sentence
23 specified in subd. 2., may be considered for work release only after he or she has
24 reached parole eligibility under s. 304.06 (1) (b) or 973.014 (1) (a) or (b), whichever
25 is applicable, or he or she has reached his or her extended supervision eligibility date

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1 under s. 302.114 (9) (b) ~~or~~, 973.014 (1g) (a) 1. or 2., or 973.0145 (3) (c) 1. or 2.,
2 whichever is applicable.

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

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

7 304.02 (5) Notwithstanding subs. (1) to (3), a prisoner who is serving a life
8 sentence under s. 939.62 (2m) (c) ~~or~~, 973.014 (1) (c) or (1g), or 973.0145 (3) (c), or who
9 is awaiting imposition of a death sentence, is not eligible for release to parole
10 supervision under this section.

11 **SECTION 12.** 304.06 (1) (b) of the statutes is amended to read:

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

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1 department's custody any parole eligibility or evaluation until the person has been
2 confined at least 60 days following sentencing.

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

4 304.06 (1t) The parole commission may not parole an inmate who is sentenced
5 to life imprisonment or death under s. 973.0145.

6 **SECTION 14.** 304.071 (2) of the statutes is amended to read:

7 304.071 (2) If a prisoner is ~~not eligible~~ ineligible for parole under s. 304.06 (1t),
8 939.62 (2m) (c), 961.49 (2), 973.01 (6), 973.014 (1) (c) or (1g), or 973.032 (5), he or she
9 is not eligible for parole under this section.

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

11 939.22 (7) "Crime punishable by death or life imprisonment" means a crime for
12 which one or more of the possible penalties is death or life imprisonment.

13 **SECTION 16.** 939.30 (2) of the statutes is amended to read:

14 939.30 (2) For a solicitation to commit a crime ~~for which the penalty is that is~~
15 punishable by death or life imprisonment, the actor is guilty of a Class C felony. For
16 a solicitation to commit a Class E felony, the actor is guilty of a Class E felony.

17 **SECTION 17.** 939.31 of the statutes is amended to read:

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

25 **SECTION 18.** 939.32 (1) (a) of the statutes is amended to read:

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

3 **SECTION 19.** 939.50 (1) (a) of the statutes is renumbered 939.50 (1) (am).

4 **SECTION 20.** 939.50 (1) (ag) of the statutes is created to read:

5 939.50 (1) (ag) Class AA felony.

6 **SECTION 21.** 939.50 (2) of the statutes is amended to read:

7 939.50 (2) A felony is a Class AA, A, B, BC, C, D, or E felony when it is so
8 specified in chs. 939 to 951.

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

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

11 939.50 (3) (ag) For a Class AA felony, life imprisonment or death, as determined
12 under s. 973.0145.

13 **SECTION 24.** 939.60 of the statutes is amended to read:

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

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

18 939.62 (2m) (a) 2m. c. The solicitation, conspiracy, or attempt, under s. 939.30,
19 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

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

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

25 **SECTION 27.** 939.624 (2) of the statutes is amended to read:

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1 939.624 (2) If a person has one or more prior convictions for a serious violent
2 crime or a crime punishable by death or life imprisonment and subsequently
3 commits a serious violent crime, the court shall sentence the person to not less than
4 5 years' imprisonment, but otherwise the penalties for the crime apply, subject to any
5 applicable penalty enhancement. The court shall not place the defendant on
6 probation.

7 **SECTION 28.** 939.625 (1) (b) 2. of the statutes is amended to read:

8 939.625 (1) (b) 2. If the maximum term of imprisonment for a felony is more
9 than 5 years or is a life term or the felony is punishable by death, the maximum term
10 of imprisonment for the felony may be increased by not more than 5 years.

11 **SECTION 29.** 939.63 (1) (a) 2. of the statutes is amended to read:

12 939.63 (1) (a) 2. If the maximum term of imprisonment for a felony is more than
13 5 years or is a life term or the felony is punishable by death, the maximum term of
14 imprisonment for the felony may be increased by not more than 5 years.

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

16 939.632 (1) (e) 2. The solicitation, conspiracy, or attempt, under s. 939.30,
17 939.31, or 939.32, to commit a Class AA felony or a Class A felony.

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

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

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

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

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

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

4 **SECTION 33.** 940.01 (1) (b) of the statutes is renumbered 940.01 (1) (b) (intro.)
5 and amended to read:

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

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

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

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

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

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

21 **SECTION 36.** 948.35 (1) (b) of the statutes is amended to read:

22 948.35 (1) (b) For a solicitation to commit a Class AA felony or a Class A felony
23 under the circumstances described under par. (a), the person may be imprisoned not
24 to exceed the maximum period of imprisonment for a Class B felony.

25 **SECTION 37.** 961.335 (1m) of the statutes is created to read:

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1 961.335 (1m) Notwithstanding sub. (1), upon the application of the secretary
2 of corrections for a permit to obtain a controlled substance for purposes of an
3 execution under s. 973.017, the controlled substances board shall issue a permit
4 under this section.

5 **SECTION 38.** 967.02 (1m) of the statutes is created to read:

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

8 **SECTION 39.** 971.17 (1) of the statutes is amended to read:

9 971.17 (1) COMMITMENT PERIOD. When a defendant is found not guilty by reason
10 of mental disease or mental defect, the court shall commit the person to the
11 department of health and family services for a specified period not exceeding
12 two-thirds of the maximum term of imprisonment that could be imposed under s.
13 973.15 (2) (a) against an offender convicted of the same crime or crimes, including
14 imprisonment authorized by ss. 346.65 (2) (f), (2j) (d), or (3m), 939.62, 939.621,
15 939.63, 939.635, 939.64, 939.641, 939.645, 940.09 (1b), 940.25 (1b), and 961.48 and
16 other penalty enhancement statutes, as applicable, subject to the credit provisions
17 of s. 973.155. If the ~~maximum term of imprisonment is~~ crime is punishable by death
18 or life imprisonment, the commitment period specified by the court may be life,
19 subject to termination under sub. (5).

20 **SECTION 40.** 972.03 of the statutes is amended to read:

21 **972.03 Peremptory challenges.** Each side is entitled to only 4 peremptory
22 challenges except as otherwise provided in this section. When the crime charged is
23 punishable by death or life imprisonment, the state is entitled to 6 peremptory
24 challenges and the defendant is entitled to 6 peremptory challenges. If there is more
25 than one defendant, the court shall divide the challenges as equally as practicable

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

13 **SECTION 41.** 972.13 (6) of the statutes is amended to read:

14 972.13 (6) The following forms may be used for judgments:

15 STATE OF WISCONSIN

16 County

17 In.... Court

18 The State of Wisconsin

19 vs.

20(Name of defendant)

21 UPON ALL THE FILES, RECORDS AND PROCEEDINGS,

22 IT IS ADJUDGED That the defendant has been convicted upon the defendant's
23 plea of guilty (not guilty and a verdict of guilty) (not guilty and a finding of guilty)
24 (no contest) on the.... day of...., (year), of the crime of.... in violation of s.....; and
25 the court having asked the defendant whether the defendant has anything to state

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1 why sentence should not be pronounced, and no sufficient grounds to the contrary
2 being shown or appearing to the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

4 BY THE COURT....

5 Date of Offense....,

6 District Attorney....,

7 Defense Attorney....

8 *Strike inapplicable paragraphs.

9 STATE OF WISCONSIN

10 County

11 In.... Court

12 The State of Wisconsin

13 vs.

14(Name of defendant)

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

17 UPON ALL THE FILES, RECORDS AND PROCEEDINGS

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

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

21 BY THE COURT....

22 **SECTION 42.** 973.01 (3) of the statutes is amended to read:

23 973.01 (3) NOT APPLICABLE TO LIFE SENTENCES. If a person is being sentenced for
24 a felony that is punishable by life imprisonment or by death, he or she is not subject

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1 to this section but shall be sentenced under s. 973.014 (1g) or 973.0145, whichever
2 is applicable.

3 **SECTION 43.** 973.014 (1g) (a) (intro.) of the statutes is amended to read:

4 973.014 (1g) (a) (intro.) Except as provided in sub. (2) or s. 973.0145 (3) (c),
5 when a court sentences a person to life imprisonment for a crime committed on or
6 after December 31, 1999, the court shall make an extended supervision eligibility
7 date determination regarding the person and choose one of the following options:

8 **SECTION 44.** 973.0145 of the statutes is created to read:

9 **973.0145 Sentence of death or life imprisonment for Class AA felony.**

10 (1) (a) Upon conviction of a defendant of a Class AA felony, the court shall conduct
11 a separate sentencing proceeding to determine whether the defendant should be
12 sentenced to death or life imprisonment. The trial judge shall conduct the proceeding
13 before the trial jury, if there was a jury trial, as soon as practicable. If the trial jury
14 is unable to reconvene for a hearing on the issue of penalty, the trial judge may
15 summon a new jury to determine the issue of the imposition of the penalty. If the trial
16 jury has been waived, or if the defendant pleaded guilty, the court shall conduct the
17 sentencing proceeding before a jury summoned for that purpose unless the
18 defendant waives the right to a jury.

19 (b) In the proceeding, the court shall admit any evidence that may be relevant
20 to the sentence regarding any mitigating circumstance. The court shall admit any
21 other evidence according to the rules of evidence applicable at a criminal trial. The
22 court shall provide the defendant with a fair opportunity to rebut any hearsay
23 statements. This paragraph does not authorize the introduction of any evidence
24 secured in violation of the state or federal constitution. The state has the burden of
25 proof, beyond a reasonable doubt, regarding the existence of aggravating

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1 circumstances. The defendant has the burden of proof, by a preponderance of the
2 evidence, regarding mitigating circumstances. The court shall permit the state and
3 the defendant or his or her counsel to present arguments for or against a sentence
4 of death.

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

9 1. The existence of aggravating circumstances under sub. (5).

10 2. The existence of mitigating circumstances under sub. (6).

11 (b) Upon the request of the defendant or the state, the court shall explain to the
12 jury the court's options under sub. (3) (c) to sentence the defendant to life without the
13 possibility of extended supervision or with delayed eligibility for extended
14 supervision. If the defendant is not eligible for release to extended supervision, the
15 court shall also, upon request of the defendant or the state, explain to the jury the
16 defendant's ineligibility for extended supervision.

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

20 (3) (a) Notwithstanding the recommendation of a majority of the jury, the court,
21 after weighing the aggravating and mitigating circumstances, shall enter a sentence
22 of life imprisonment or death, but if the court imposes a sentence of death, it shall
23 set forth in writing its findings upon which the sentence of death is based as to the
24 facts:

25 1. That sufficient aggravating circumstances exist under sub. (5); and

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1 2. That there are insufficient mitigating circumstances under sub. (6) 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. (5) and (6) 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, the court shall impose a sentence of life imprisonment and shall make an
9 extended supervision eligibility determination regarding the person and adopt one
10 of the following options:

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

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

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

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

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

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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 (5) 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 (6) 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.

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

14 **SECTION 45.** 973.016 of the statutes is created to read:

15 **973.016 Stay of execution of death sentence.** The execution of a death
16 sentence may be stayed only by the governor or incident to an appeal.

17 **SECTION 46.** 973.017 of the statutes is created to read:

18 **973.017 Execution of death sentence.** The secretary of corrections shall
19 designate the executioner who shall provide a person subject to a death sentence with
20 an intravenous injection of one or more substances in a lethal quantity. A person is
21 immune from civil or criminal liability for his or her acts or omissions, in good faith,
22 in regard to a lawful execution under this section. The secretary may not direct a
23 physician to be present or require a physician to announce when death has occurred.
24 A physician may certify the death after a person, other than a physician, has
25 determined or pronounced death. The secretary shall designate 12 citizens to

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1 witness the execution. The convicted person may request that certain additional
2 people be allowed to witness the execution. The secretary shall grant any such
3 reasonable request. The secretary may allow representatives of the news media to
4 witness the execution under rules of the department. No other persons may be
5 allowed to witness the execution.

6 **SECTION 47.** 973.032 (2) (b) of the statutes is amended to read:

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

12 **SECTION 48.** 973.09 (1) (c) of the statutes is amended to read:

13 973.09 (1) (c) When a person is convicted of any crime ~~which~~ that is punishable
14 by death or life imprisonment, the court ~~shall~~ may not place the person on probation.

15 **SECTION 49.** 978.07 (1) (c) 1. of the statutes is amended to read:

16 978.07 (1) (c) 1. Any case record of a felony punishable by death or life
17 imprisonment or a related case, after the defendant's parole eligibility date under s.
18 304.06 (1) or 973.014 (1) or date of eligibility for release to extended supervision
19 under s. 973.014 (1g) (a) 1. or 2. or 973.0145 (3) (c) 1. or 2., whichever is applicable,
20 or 50 years after the commencement of the action, whichever occurs later. If there
21 is no parole eligibility date or no date for release to extended supervision, the district
22 attorney may destroy the case record after the defendant's death.

23 **SECTION 50. Initial applicability.**

