

2007 SENATE BILL 115

March 27, 2007 – Introduced by Senators A. LASEE and ROESSLER, cosponsored by Representatives KAUFERT, F. LASEE, LEMAHIEU, OWENS and GUNDERSON. Referred to Committee on Ethics Reform and Government Operations.

1 **AN ACT to amend** 301.048 (2) (am) 2., 302.11 (1), 303.065 (1) (b) 2., 304.02 (5),
2 304.06 (1) (b), 304.071 (2), 939.30 (2), 939.31, 939.32 (1) (a), 939.50 (3) (a),
3 939.60, 939.619 (2), 939.62 (2m) (c), 939.63 (1) (b), 971.17 (1) (c), 972.03, 972.13
4 (6), 973.01 (3), 973.09 (1) (c) and 978.07 (1) (c) 1.; and **to create** 301.046 (3) (cm),
5 302.11 (1w), 304.06 (1t), 939.22 (7), 961.335 (1m), 967.02 (1m), 971.01 (3),
6 973.0145, 973.0147, 973.15 (2m) (a) 2. c. and 978.07 (1) (c) 1m. of the statutes;
7 **relating to:** providing a penalty of death or life imprisonment for a first-degree
8 intentional homicide that is vicious.

Analysis by the Legislative Reference Bureau

Under current law, no state crime is punishable by a sentence of death. First-degree intentional homicide (causing the death of another human being or an unborn child with the intent to kill that human being, unborn child, or another, except in the case of a legal abortion) is a Class A felony, punishable by life imprisonment. Unless the defendant is found to be a persistent repeat offender, a court imposing a sentence of life imprisonment must determine whether the defendant will be eligible to petition for release to extended supervision after serving 20 years in prison, after serving a longer period of time in prison, or never. A persistent repeat offender who is sentenced to life imprisonment is not eligible to petition for release to extended supervision.

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This bill allows a penalty of death for a first-degree intentional homicide that is vicious. If the state intends to seek a death sentence for a first-degree intentional homicide, the state must provide notice of intent to seek a death sentence as part of the court filing that charges the first-degree intentional homicide.

For a death penalty case, the court must hold a sentencing hearing separate from the trial. The defendant has a right to a jury at the sentencing hearing. Generally, the trial jury will serve at the sentencing hearing. However, if the trial was held without a jury or if the trial jury cannot continue to serve, a new jury must be selected. If the defendant waives the right to a jury for the sentencing hearing the hearing will be held before the court alone.

At the sentencing hearing, the parties may present evidence relating to the nature of the offense, deoxyribonucleic acid (DNA) evidence related to the offense, the history and background of the defendant, and any mitigating circumstances. The jury may not recommend and the court may not impose a sentence of death unless it finds that the offense was vicious. The jury and court must consider any DNA evidence related to the offense and any mitigating circumstances in determining whether a sentence of death is appropriate. If the sentencing hearing is before a jury, the court must instruct the jury that a mitigating circumstance need not be found by all members of the jury and need only be proved to the satisfaction of an individual juror in order to be considered in the individual juror's sentencing recommendation. Further, if the defendant is a persistent repeat offender and thus not eligible for release to extended supervision, the court must instruct the jury that if it does not recommend a sentence of death the defendant will be imprisoned for life without the possibility of release.

If the jury unanimously recommends a sentence of death, the court must impose a sentence of death unless the court finds that a sentence of death is not appropriate, in which case the court must impose a sentence of life imprisonment. If the jury does not unanimously recommend a sentence of death, the court must impose a sentence of life imprisonment. The court may not sentence to death a person who is mentally retarded.

Any sentence of death is subject to automatic appellate review by the Wisconsin Supreme Court. The court that imposes a death sentence sets the execution date. The secretary of corrections designates the executioner and at least 12 witnesses. The execution is by lethal injection. A death sentence may be stayed only by the governor or incident to an appeal.

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.

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

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

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

2 301.046 (3) (cm) The prisoner is not awaiting execution 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),
11 (1m), (1q), (1w), (1z), (7), and (10), each inmate is entitled to mandatory release on
12 parole by the department. The mandatory release date is established at two-thirds
13 of the sentence. Any calculations under this subsection or sub. (1q) (b) or (2) (b)
14 resulting in fractions of a day shall be rounded in the inmate's favor to a whole day.

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

16 302.11 (1w) An inmate who is sentenced to death or life imprisonment under
17 s. 973.0145 is not entitled to mandatory release on parole under this section.

18 **SECTION 5.** 303.065 (1) (b) 2. of the statutes is amended to read:

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

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

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

5 **SECTION 7.** 304.06 (1) (b) of the statutes is amended to read:

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

21 **SECTION 8.** 304.06 (1t) of the statutes is created to read:

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

24 **SECTION 9.** 304.071 (2) of the statutes is amended to read:

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

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

5 939.22 **(7)** “Crime that is punishable by death or life imprisonment” means a
6 crime for which one or more of the possible penalties is death or life imprisonment.

7 **SECTION 11.** 939.30 (2) of the statutes is amended to read:

8 939.30 **(2)** For a solicitation to commit a crime ~~for which the penalty is that is~~
9 punishable by death or life imprisonment, the actor is guilty of a Class F felony. For
10 a solicitation to commit a Class I felony, the actor is guilty of a Class I felony.

11 **SECTION 12.** 939.31 of the statutes is amended to read:

12 **939.31 Conspiracy.** Except as provided in ss. 940.43 (4), 940.45 (4), and
13 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with
14 another for the purpose of committing that crime may, if one or more of the parties
15 to the conspiracy ~~does~~ do an act to effect its object, be fined or imprisoned or both not
16 to exceed the maximum provided for the completed crime; except that for a
17 conspiracy to commit a crime ~~for which the penalty is that is punishable by death or~~
18 life imprisonment, the actor is guilty of a Class B felony.

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

20 939.32 **(1)** (a) Whoever attempts to commit a crime ~~for which the penalty is that~~
21 is punishable by death or life imprisonment is guilty of a Class B felony.

22 **SECTION 14.** 939.50 (3) (a) of the statutes is amended to read:

23 939.50 **(3)** (a) For a Class A felony, life imprisonment, except the penalty for a
24 violation of s. 940.01 (1) is death or life imprisonment.

25 **SECTION 15.** 939.60 of the statutes is amended to read:

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1 **939.60 Felony and misdemeanor defined.** A crime that is punishable by
2 death or imprisonment in the Wisconsin state prisons is a felony. Every other crime
3 is a misdemeanor.

4 **SECTION 16.** 939.619 (2) of the statutes is amended to read:

5 939.619 **(2)** If a person has one or more prior convictions for a serious violent
6 crime or a crime that is punishable by death or life imprisonment and subsequently
7 commits a serious violent crime, the court shall impose a bifurcated sentence under
8 s. 973.01. The term of confinement in prison portion of a bifurcated sentence imposed
9 under this subsection may not be less than 3 years and 6 months, but otherwise the
10 penalties for the crime apply, subject to any applicable penalty enhancement. The
11 court may not place the defendant on probation.

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

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

17 **SECTION 18.** 939.63 (1) (b) of the statutes is amended to read:

18 939.63 **(1)** (b) If the maximum term of imprisonment for a felony is more than
19 5 years or is a life term or the felony is a crime that is punishable by death or life
20 imprisonment, the maximum term of imprisonment for the felony may be increased
21 by not more than 5 years.

22 **SECTION 19.** 961.335 (1m) of the statutes is created to read:

23 961.335 **(1m)** Notwithstanding sub. (1), upon the application of the secretary
24 of corrections for a permit to obtain a controlled substance for purposes of an

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1 execution under s. 973.0147, the controlled substances board shall issue a permit
2 under this section.

3 **SECTION 20.** 967.02 (1m) of the statutes is created to read:

4 967.02 **(1m)** “Crime that is punishable by death or life imprisonment” has the
5 meaning given in s. 939.22 (7).

6 **SECTION 21.** 971.01 (3) of the statutes is created to read:

7 971.01 **(3)** If the information charges an offense under s. 940.01, the
8 information shall contain a statement as to whether the state seeks a sentence of
9 death for the offense.

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

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

15 **SECTION 23.** 972.03 of the statutes is amended to read:

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

SENATE BILL 115**SECTION 23**

1 felony cases 6 challenges if there are only 2 defendants and 9 challenges if there are
2 more than 2. In misdemeanor cases, the state is entitled to 3 peremptory challenges
3 and the defendant is entitled to 3 peremptory challenges, except that if there are 2
4 defendants, the court shall allow the defense 4 peremptory challenges, and, if there
5 are more than 2 defendants, the court shall allow the defense 6 peremptory
6 challenges. Each side shall be allowed one additional peremptory challenge if
7 additional jurors are to be selected under s. 972.04 (1).

8 **SECTION 24.** 972.13 (6) of the statutes is amended to read:

9 972.13 (6) The following forms may be used for judgments:

10 STATE OF WISCONSIN

11 County

12 In.... Court

13 The State of Wisconsin

14 vs.

15(Name of defendant)

16 UPON ALL THE FILES, RECORDS AND PROCEEDINGS,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 BY THE COURT....

25 Date of Offense....,

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1 District Attorney....,

2 Defense Attorney....

3 *Strike inapplicable paragraphs.

4 STATE OF WISCONSIN

5 County

6 In.... Court

7 The State of Wisconsin

8 vs.

9(Name of defendant)

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

12 UPON ALL THE FILES, RECORDS AND PROCEEDINGS

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

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

16 BY THE COURT....

17 **SECTION 25.** 973.01 (3) of the statutes is amended to read:

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

22 **SECTION 26.** 973.0145 of the statutes is created to read:

23 **973.0145 Sentence of death or life imprisonment. (1)** If a defendant is
24 convicted of an offense under s. 940.01 and the information charging the offense
25 included a statement that the state seeks a sentence of death for the offense, the court

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1 shall conduct a separate sentencing hearing under this section to determine whether
2 the defendant shall be sentenced to death or life imprisonment.

3 (2) If at any time before the court pronounces sentence, the state notifies the
4 court that it no longer seeks a sentence of death, the court may not impose a sentence
5 of death.

6 (3) The sentencing hearing shall be before a jury unless the defendant waives
7 the right to a jury for sentencing. The trial jury shall serve as the sentencing jury
8 unless the trial jury is unable to reconvene for the sentencing hearing, the defendant
9 pleaded guilty, or the defendant waived the right to a jury at trial, in which case the
10 court shall summon a new jury.

11 (4) The parties may present evidence relating to the nature of the offense, the
12 history and background of the defendant, and any mitigating circumstances, as well
13 as deoxyribonucleic acid evidence related to the offense.

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

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

16 (b) The offense was committed while the defendant was under the influence of
17 extreme mental or emotional disturbance.

18 (c) The offense was committed by more than one individual and the defendant's
19 participation in the commission of the offense was relatively minor.

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

22 (e) The capacity of the defendant to appreciate the criminality of his or her
23 conduct or to conform his or her conduct to the requirements of law was substantially
24 impaired.

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1 (f) The age of the defendant at the time of the offense affected his or her
2 judgment.

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

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

6 **(6)** The court shall instruct the jurors that a mitigating circumstance need not
7 be found by all members of the jury and need only be proved to the satisfaction of an
8 individual juror in order to be considered by the juror in making a sentence
9 recommendation. If the defendant is ineligible for extended supervision under s.
10 939.62 (2m) (c), the court shall inform the jurors that if the jury does not recommend
11 imposition of a sentence of death the defendant will be sentenced to life
12 imprisonment without the possibility of release to extended supervision.

13 **(7)** (a) The court may not impose a sentence of death unless the jury or, if the
14 hearing is before the court without a jury, the court finds that the offense was vicious.

15 (b) The jury and court shall consider any deoxyribonucleic acid evidence that
16 is related to the offense or the absence of any such deoxyribonucleic acid evidence and
17 shall consider evidence of mitigating circumstances in determining whether a
18 sentence of death is appropriate.

19 **(8)** (a) If the jury unanimously recommends a sentence of death, the court shall
20 impose a sentence of death, except that if the court finds that a sentence of death is
21 not appropriate the court shall impose a sentence of life imprisonment under s.
22 973.014.

23 (b) If the jury does not unanimously recommend a sentence of death, the court
24 shall impose a sentence of life imprisonment under s. 973.014.

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1 (c) If the hearing is before the court without a jury, the court shall consider the
2 factors described under sub. (7) (b) and impose a sentence of death or life
3 imprisonment under s. 973.014.

4 (9) The court may not impose a sentence of death on a person who is mentally
5 retarded.

6 (10) If the court imposes a sentence of death, the judgment of conviction and
7 sentence of death are subject to automatic review by the supreme court within 60
8 days after certification by the sentencing court of the entire record, unless the
9 supreme court, for good cause shown, extends the time for an additional period not
10 to exceed 30 days. The review by the supreme court has priority over all other cases
11 and shall be heard in accordance with rules promulgated by the supreme court.

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

15 (12) The execution of a death sentence shall be by lethal injection.

16 **SECTION 27.** 973.0147 of the statutes is created to read:

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

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1 that certain additional people be allowed to witness the execution. The secretary
2 shall grant any such reasonable request. The secretary may allow representatives
3 of the news media to witness the execution under rules of the department. No other
4 persons may be allowed to witness the execution. The execution of a death sentence
5 may be stayed only by the governor or incident to an appeal.

6 **SECTION 28.** 973.09 (1) (c) of the statutes is amended to read:

7 973.09 (1) (c) When a person is convicted of any crime ~~which~~ that is a crime that
8 is punishable by death or life imprisonment, the court ~~shall~~ may not place the person
9 on probation.

10 **SECTION 29.** 973.15 (2m) (a) 2. c. of the statutes is created to read:

11 973.15 (2m) (a) 2. c. A sentence of death under s. 973.0145.

12 **SECTION 30.** 978.07 (1) (c) 1. of the statutes is amended to read:

13 978.07 (1) (c) 1. ~~Any~~ Except if subd. 1m. applies, any case record of a felony
14 punishable by life imprisonment or a related case, after the defendant's parole
15 eligibility date under s. 304.06 (1) or 973.014 (1) or date of eligibility for release to
16 extended supervision under s. 973.014 (1g) (a) 1. or 2., whichever is applicable, or 50
17 years after the commencement of the action, whichever occurs later. If there is no
18 parole eligibility date or no date for release to extended supervision, the district
19 attorney may destroy the case record after the defendant's death.

20 **SECTION 31.** 978.07 (1) (c) 1m. of the statutes is created to read:

21 978.07 (1) (c) 1m. Any case record of a felony that is a crime that is punishable
22 by death or life imprisonment under s. 973.0145 or a related case, 20 years after the
23 person's death, or 50 years after the commencement of the action, whichever occurs
24 later.

25 (END)