

## NEW AVENUES FOR REDUCING TIS CONFINEMENT TIME

*Note: Wisconsin's 2009 budget bill created new avenues for reducing TIS confinement time. This outline is intended to provide a first look at the new provisions. Future application of the new laws should be clearer after the DOC and other agencies issue administrative rules regarding the laws. Needless to say, this outline does not constitute legal advice, and anyone using the outline should consult the recent budget bill in order to determine how to apply the new laws to any particular situation.*

### **I. Positive Adjustment For Misdemeanors & Class F-I Felonies – 302.113(2)(b)**

*Certain inmates serving prison time for a misdemeanor or a Class F-I Felony may earn 1 day for every 2 days served without a rule violation beginning October 1, 2009.*

a. Applicable to an inmate who:

- i. Is serving a sentence for a misdemeanor or a Class F-I Felony,
- ii. Is not serving a sentence for a violent offense under 301.048(2)(bm)1<sup>1</sup>, *and*
- iii. Is determined by the DOC to not be a “high risk of reoffending,” using an “objective risk assessment instrument” (*see* 973.01(3d))

---

<sup>1</sup> The following are violent offenses under 301.048(2)(bm)1:

1. 940.01-940.06 – Intentional, reckless, felony homicide; abortion
2. 940.08-940.10 – Homicide by negligent weapon, OWI car or gun, negligent car
3. 940.19(4) or (5) & 940.195(4) or (5) – Aggravated batteries (inc. unborn) w/ GBH
4. 940.20-940.203 – Battery by prisoner or to judge or to witness
5. 940.21 – Mayhem
6. 940.225(1)-(3) – First, second, third degree sexual assault
7. 940.23 – Reckless injury
8. 940.285(2)(a)(1) or (2) – Intentional or reckless abuse to at-risk person
9. 940.29 – Guard abuse of prisoner
10. 940.295(3)(b)(1g), (1m), (1r)2 or 3 – Abuse of patient w/ death or GBH
11. 940.31 – Kidnapping
12. 940.43(1)-(3) & 94.43(1)-(3) – Witness or victim intimidation w/ injury or force
13. 941.20(2)-(3) – Endangering safety by discharging firearm
14. 941.26 – Machine guns
15. 941.20 – Recklessly endangering safety
16. 941.327 – Tampering w/ household products
17. 943.01(2)(c), 943.011 – Damage to property of juror or witness or judge
18. 943.02, 943.04, 943.06 – Arson of building or to defraud or use of Molotov
19. 943.10(2) – Aggravated burglary
20. 943.23(1g) – OMVWOC carjacking
21. 943.30 – Threat to accuse of crime
22. 943.32 – Robbery
23. 946.43 – Assault by prisoner
24. 947.015 – Bomb scare
25. 948.02(1) or (2) or 948.025 – 1st and 2d degree child sexual assault or rep'd CSA
26. 948.03-948.0051 – Abuse, emotional harm, exploitation, trafficking of child
27. 948.06 – 948.07 – Child enticement & incest w/ child
28. 948.08 – Solicitation of child prostitution
29. 948.085 – Sex assault of child in substitute care
30. 948.30 – Child abduction
31. Former 940.19(3) – Now-nonexistent Class D aggravated battery
32. Former 940.195(3) – Now-nonexistent Class D abortion
33. Former 943.23(1m) – Now-nonexistent carjacking w/ great bodily harm
34. Former 943.23(1r) – Now-nonexistent carjacking causing death

- b. Exclusion for an otherwise eligible inmate who:
  - i. Is considered to be violent in that he or she:
    - 1. Has served, is serving, or will serve, a sentence for a violent offense under 301.048(2)(bm)1, during the present period of confinement, whether concurrent or consecutive to the controlling sentence
    - 2. Is a violent offender under 16.964(12)(a)<sup>2</sup>; or
  - ii. Has served, is serving, or will serve, a sentence for a Class C-F Felony, during the present period of confinement, whether concurrent or consecutive to the controlling sentence; or
  - iii. Has been determined by the DOC to be a high risk of reoffending under 973.01(3d); or
  - iv. Is considered to be a sex offender because he or she:
    - 1. Is required to register under 301.45, or
    - 2. Is the subject of a sex offender bulletin under 301.46(2m), or
    - 3. Has at some point been convicted of or found NGI for sex offense, as defined in 301.45(1d)(b), or
    - 4. Has ever committed a sex offense in another jurisdiction, as defined in 301.45(1d)(am), or
    - 5. Has ever been committed under 975; or
  - v. Is serving a sentence for any of the following crimes:
    - 1. Offense against an elderly or vulnerable person, 939.22(20d)
    - 2. Offense related to ethical government, 939.22(20m)
    - 3. Offense related to school safety, 939.22(20s)
    - 4. Felony murder, 940.03
    - 5. Mutilating or hiding a corpse to conceal crime, 940.11(1)
    - 6. Strangulation or suffocation, 940.235
    - 7. Aggravated stalking, 940.32(3)
    - 8. Disarming a cop, 941.21
    - 9. Tampering w/ a GPS device, 946.465
- c. Procedure – 302.113(2)(c)
  - i. DOC notifies sentencing court when within 90 days of intended release date.
  - ii. Court may choose to hold a hearing within 30 days of notification.
    - 1. If hearing chosen, court:
      - a. Must hold hearing, issue order, and issue decision within 60 days of notification,
      - b. May consider inmate’s conduct in prison, the risk of reoffense based on an objective instrument, and the nature of the offense,
      - c. May order the DOC to release the inmate on the DOC’s proposed date or to hold him up to the original IC release date.

---

<sup>2</sup> This section defines a “violent offender” as one who “has been charged with or convicted of an offense in a pending case and, during the course of the offense, the person carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm” or one who “has one or more prior convictions for a felony involving the use or attempted use of force against another person with the intent to cause death or serious bodily harm.”

2. If court does not hold hearing, then DOC can release at calculated date.

iii. Remaining confinement time is added to ES (*see* 302.113(3)(e)).

## II. Positive Adjustment For Certain Inmates Not Otherwise Eligible – 304.06

a. For Misdemeanors or Class F-I Felonies – 304.06(1)(bg)1

*Certain inmates serving prison time for a misdemeanor or a Class F-I Felony, but who don't qualify for the program set forth in sec. I, above, may earn up to 1 day for every 3 days served w/o a rule violation beginning October 1, 2009.*

i. Applicable to an inmate who:

1. Is serving a sentence for a misdemeanor or a Class F-I Felony; and
2. Does not qualify for the adjustment of 1 day for every 2 days because he is serving a sentence for a violent offense under 301.048(2)(bm)1 or b/c DOC determined that he is a high risk to reoffend

ii. Exclusion for an otherwise eligible inmate who:

1. Has served or will be serving, in this period of confinement, a sentence for a Class C-F Felony; or
2. Is considered to be a sex offender because he or she:
  - a. Is required to register under 301.45, or
  - b. Is the subject of a sex offender bulletin under 301.46(2m), or
  - c. Has ever been convicted of or found NGI for sex offense, as defined in 301.45(1d)(b), or
  - d. Has ever committed a sex offense in another jurisdiction, as defined in 301.45(1d)(am), or
  - e. Has ever been committed under 975; or
3. Is serving a sentence for any of the following crimes:
  - a. Offense against an elderly or vulnerable person as in 939.22(20d)
  - b. Offense related to ethical government, as in 939.22(20m)
  - c. Offense related to school safety, as in 939.22(20s)
  - d. Felony murder, 940.03
  - e. Mutilating or hiding a corpse to conceal crime, 940.11(1)
  - f. Strangulation or suffocation, 940.235
  - g. Aggravated stalking, 940.32(3)
  - h. Disarming a cop, 941.21
  - i. Tampering w/ a GPS device, 946.465

b. For Class C-E Felonies – 304.06(1)(bg)2

*Certain inmates serving prison time for a Class C-E Felony may earn up to 1 day for every 5.7 days served w/o a rule violation beginning October 1, 2009.*

i. Exclusion for an otherwise applicable inmate who:

1. Is considered to be a sex offender because he or she:
    - a. Is required to register under 301.45, or
    - b. Is the subject of a sex offender bulletin under 301.46(2m), or
    - c. Has ever been convicted of or found NGI for sex offense, as defined in 301.45(1d)(b), or
    - d. Has ever committed a sex offense in another jurisdiction, as defined in 301.45(1d)(am), or
    - e. Has ever been committed under 975; or
  2. Is serving a sentence for any of the following crimes:
    - a. Offense against an elderly or vulnerable person as in 939.22(20d)
    - b. Offense related to ethical government, as in 939.22(20m)
    - c. Offense related to school safety, as in 939.22(20s)
    - d. Felony murder, 940.03
    - e. 2d degree reckless homicide, 940.06
    - f. Human trafficking, 940.302
    - g. Kidnapping, 940.31(1)
    - h. Intentional abuse of child, GBH, 948.03(2)(a)
- c. Procedure – 304.06(1)(bk)
- i. Inmate must petition for release to ES.
  - ii. Earned Release Review Commission decides whether to release based on:
    1. Inmate's conduct, progress in treatment & programming; and
    2. Whether detainer in another state or deportation order; and
    3. The interests of justice
  - iii. Within 60 days of the new release date, the ERRC must notify the sentencing court that it plans to release the inmate.
  - iv. The court may choose to hold a hearing within 30 days of notification.
    1. If hearing chosen, court:
      - a. Must hold hearing, issue order, and issue decision within 60 days of notification,
      - b. May consider inmates conduct in prison, the risk of reoffense based on an objective instrument, and the nature of the offense,
      - c. May order the DOC to release the inmate on the DOC's proposed date or to hold him up to the original IC release date.
    2. If court does not hold hearing, then DOC can release at calculated date.
  - v. Remaining confinement time is added to ES.

### **III. Discretionary Sentence Modification Through ERRC**

- a. Applicable to an inmate who:
  - i. Is serving a sentence for crimes committed prior to October 1, 2009,
  - ii. Has not petitioned the court for sentence adjustment.
- b. As applied to misdemeanors or Class F-I Felonies – 304.06(1)(bg)3.

*An inmate serving a sentence for a misdemeanor or a Class F-I Felony – and not serving a sentence for a C-F Felony during the same period of confinement, whether concurrent or consecutive to the controlling sentence – may petition the Earned Release Review Commission (beginning October 1, 2009) for release to ES after serving 75% of the confinement portion of the sentence.*

- c. As applied to Class C-E Felonies – 304.06(1)(bg)4.

*An inmate serving a sentence for a Class C-E Felony may petition the Earned Release Review Commission (beginning October 1, 2009) for release to ES after serving 85% of the confinement portion of the sentence.*

- d. No additional exclusions.
- e. Procedure the same as that for Positive Adjustment for Inmates Not Otherwise Eligible, under 304.06(1)(bk), described above.

### **IV. Discretionary Sentence Modification Through Social Worker/Agent – 302.113(9h)**

*The DOC may reduce an inmate's sentence by up to one year (beginning October 1, 2009) if he is serving a sentence for a misdemeanor or Class F-I Felony.*

- a. Applies to an inmate who:
  - i. Is serving a sentence for a misdemeanor or a Class F-I Felony,
  - ii. Is not serving a sentence for a violent offense under s. 301.048(2)(bm)1,
  - iii. Has been determined by his prison social worker or ES agent to be “able to maintain himself or herself while not confined without engaging in assaultive activity,”
  - iv. Is within one year of release date.
- b. Exclusion for an otherwise eligible inmate who is a sex offender because he or she:
  - i. Is required to register under 301.45, or
  - ii. Is the subject of a sex offender bulletin under 301.46(2m), or
  - iii. Has ever been convicted of or found NGI for a sex offense, as defined in 301.45(1d)(b), or

- iv. Has ever committed a sex offense in another jurisdiction, as defined in 301.45(1d)(am), or
- v. Has ever been committed under 975

c. Procedure

- i. Where requirements met, DOC may modify the sentence & notify court & DA.
- ii. Prison must release within 30 days of modification; there is no option for court review.
- iii. Remaining confinement time is added to ES.

**V. Sentence Modification for Health – 302.1135**

*If an eligible inmate proves that modification of his sentence would be in the public interest, the DOC must release him within 30 days of determining that modification is appropriate beginning October 1, 2009.*

a. Applicable to an inmate who:

- i. Is 65 years old and has served at least 5 years of his sentence, or
- ii. Is 60 years old and has served at least 10 years of his sentence, or
- iii. Has an extraordinary health condition, defined as “a condition afflicting a person, such as
  - 1. advanced age,
  - 2. infirmity, or
  - 3. disability of the person or
  - 4. a need for medical treatment or services not available within a correctional institution” 302.113(9g)(a)2

b. No per se exclusions based on the nature of the crime or offender.

c. Right to counsel, which inmate can invoke before filing the petition.

d. Procedure

- i. Inmate must petition the Earned Release Review Commission for a modification.
  - 1. If alleges “extraordinary health condition,” must attach affidavits from two physicians setting forth the diagnosis.
- ii. After receiving the petition, the commission shall set a hearing and give notice to: inmate, inmate’s attorney, DA, victim.
- iii. Standard: inmate must prove, by the “greater weight of the credible evidence” that a modification would serve the public interest.
- iv. Remaining confinement time added to ES.

- e. Review is only through a writ of certiorari, and is limited to whether there was an abuse of discretion.

## **VI. Risk Reduction Sentence – 302.042 & 973.031**

*When imposing a felony sentence on or after October 1, 2009, the court may specifically provide for a risk reduction sentence that would provide for early release if the defendant agrees to participate in risk testing, special programming, and treatment while in prison.*

- a. The court may not impose a risk reduction sentence for anyone convicted of:
  - i. Felony murder, 940.03
  - ii. 2d degree reckless homicide, 940.06
  - iii. Mutilating or hiding a corpse, 940.11(1)
  - iv. Strangulation and suffocation, 940.235
  - v. Human trafficking, 940.302
  - vi. Kidnapping, 940.31(1)
  - vii. Stalking, 940.32(3)
  - viii. Disarming a cop, 941.21
  - ix. Tampering with a GPS device, 946.465
  - x. Abuse of a child, 948.03(2)(a)
  - xi. Contributing to the delinquency of a child, 948.40(4)(a)
  - xii. Offense against elderly or vulnerable, 939.22 (20d)
  - xiii. Offense related to ethical government, 939.22 (20m)
  - xiv. Offense related to school safety, 939(20s)
  
- b. Department may release an inmate serving a risk reduction sentence after he serves at least 75% of sentence if:
  - i. Good conduct
  - ii. Completed planned programming/treatment

## **VII. Other, Older Avenues for Reducing TIS Confinement Time**

- a. Sentence adjustment by court – 973.195
  
- b. Sentence modification by court – Case law
  
- c. Challenge Incarceration Program – 302.045
  
- d. Earned Release Program – 302.05

## NEW AVENUES FOR REDUCING TIS SUPERVISION TIME

### I. ES Discharge – 973.01(4m)

*The DOC may discharge anyone from ES after he serves at least 2 years under supervision, if he has met the conditions of supervision and release is in the interest of justice.*

- a. Does not apply to anyone under supervision for:
  - i. Felony murder, 940.03
  - ii. 2d degree reckless homicide, 940.06
  - iii. Mutilating or hiding a corpse, 940.11(1)
  - iv. Strangulation and suffocation, 940.235
  - v. Human trafficking, 940.302
  - vi. Kidnapping, 940.31(1)
  - vii. Stalking, 940.32(3)
  - viii. Disarming a cop, 941.21
  - ix. Tampering with a GPS device, 946.465
  - x. Abuse of a child, 948.03(2)(a)
  - xi. Contributing to the delinquency of a child, 948.40(4)(a)
  - xii. Offense against elderly or vulnerable, 939.22 (20d)
  - xiii. Offense related to ethical government, 939.22 (20m)
  - xiv. Offense related to school safety, 939(20s)
- b. DOC must notify certain persons, but does not need court approval.

### II. Probation Reduction – 973.09(3)(d)

*The DOC may modify anyone's probationary period after he serves 50% of his period of probation, without court involvement.*

JNE August 09