

**1000 INTRODUCTORY COMMENT: WISCONSIN'S NEW HOMICIDE LAW**

[WITHDRAWN]

**COMMENT**

Wis JI-Criminal 1000, Introductory Comment: Wisconsin's New Homicide Law, was originally published in 1989. Its withdrawal was approved by the Committee in August 2005.

This Introductory Comment was published to identify and explain the substantial changes made to the Wisconsin law of homicide by 1987 Wisconsin Act 399. It outlined those changes and included as appendices copies of the new statutes and a copy of the original bill that included Judicial Council Notes explaining the changes.

Because the "new" homicide law has been in effect for over 15 years, the Committee concluded that the Introductory Comment was no longer needed. Further, with one exception, the information it contained is available from other sources. The Judicial Council Notes to the original bill [1987 Senate Bill 191] are provided as annotations in the Wisconsin Statutes, following each statute affected by the homicide revision. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325. The single item not generally accessible is the Prefatory Note to 1987 Senate Bill 191 and it is preserved below.

All case law interpreting the homicide statutes is included in the Comment to the relevant instructions.

In 1982, the Wisconsin Judicial Council created a committee to analyze Wisconsin's law of homicide and to draft a bill that would make the necessary clarifications. A bill introduced as 1985 Senate Bill 279 failed to pass and was reintroduced as 1987 Senate Bill 191. The provisions of that bill were incorporated into the budget bill and were passed as part of 1987 Wisconsin Act 399. A delayed effective date was adopted: the homicide changes would apply to offenses committed on or after January 1, 1989. The following is the "Prefatory Note" to 1987 Senate Bill 191; it provides information regarding the background of the homicide revision and summarizes the major provisions.

**1987 SENATE BILL 191**

**PREFATORY NOTE:** This bill contains the recommendations of the judicial council committee on homicide and lesser included offenses, the members of which are listed in the last paragraph of this NOTE. That committee held 11 meetings between September 1982 and May 1983, minutes of which are available from the judicial council. The committee concluded that:

(1) Wisconsin's homicide statutes contain antiquated legalistic terminology which obscures the actual elements of these offenses.

(2) The differences between various homicide offenses are statutorily expressed in misleading terms, which results in inappropriate charging.

(3) The relevancy of intoxication to crimes based on criminal recklessness is not statutorily defined, which has produced conflicting judicial interpretations of the recklessness offenses.

(4) The statutory mental elements of the homicide offenses are also used in crimes of injury and endangering safety, where they cause many of the same problems as in the homicide area.

(5) The felony murder statute is of minimal usefulness because it does not permit enhanced punishment for causing death in the commission of a Class B felony.

(6) The penalties for certain crimes resulting in death, injury or endangering safety do not reflect differences in the culpable mental elements or the seriousness of the results or both.

The committee therefore recommended, and this bill provides, that the most serious homicide offenses be divided into intentional and reckless categories, with 2 degrees of each, corresponding to present first-degree murder, manslaughter, 2nd-degree murder and homicide by reckless conduct. The revised codification preserves the traditional elements of each offense but modernizes terminology.

The bill conforms the definition of "intent to kill" to the uniform definition of criminal intent. It also creates a uniform definition of "criminal recklessness", requiring both the creation of an objectively substantial and unreasonable risk of death or serious injury, and the actor's subjective awareness of that risk. However, voluntary intoxication is not a defense if the actor, had he or she been sober, would have had such an awareness. The bill creates a uniform definition of criminal negligence, requiring the creation of a substantial and unreasonable risk of death or serious injury, of which the actor should be aware.

The bill increases the penalty for the offense now known as manslaughter from a Class C to a Class B felony and abolishes the legal fiction, that it is not an intentional homicide. Thus, persons convicted of this offense would be barred from benefitting from the victim's estate under chapter 228, laws of 1981. The revision clarifies the state's burden, of proof, both when this offense is charged and when it is submitted as a lesser included offense in prosecutions for first-degree intentional homicide. The bill defines "adequate provocation" to require both subjective loss of control and an objectively sufficient cause for that condition.

The bill limits felony murder to homicide caused in the commission or attempt to commit armed burglary, armed robbery, arson, first degree sexual assault or 2nd degree sexual assault by use or threat of force or violence. The bill allows punishment for the homicide and the underlying felony to be cumulative.

The bill eliminates the obsolete term, "depraved mind", clarifying that the offense now known as 2nd-degree murder requires not a mental disorder, but criminal recklessness aggravated by circumstances which show utter disregard for human life.

The same mental element is prescribed for first-degree reckless injury and first-degree recklessly endangering safety. The bill creates the crimes of 2nd-degree reckless injury and 2nd-degree recklessly endangering safety. Creation of the latter statute eliminates the need for the separate offenses of highway

obstruction (s. 941.03, stats.) and mooring watercraft to railroad tracks or fixtures (s. 941.04, stats.). The bill, therefore, eliminates both offenses.

The bill also reduces the mental element of the offense now known as reckless use of weapons from reckless conduct to criminal negligence, to distinguish this Class A misdemeanor from the Class E felony of recklessly endangering safety, 2nd degree.

The bill retains the Class D felony of homicide by negligent use of weapon but reduces homicide by negligent use of vehicle to a Class E felony, as it was before May 1, 1986. The bill reduces the maximum imprisonment for causing great bodily harm by negligent use of vehicle from 2 years to 18 months.

Finally, the bill eliminates the phrase "high probability" from numerous provisions of the criminal code to avoid any inference that a statistical likelihood greater than 50% was ever intended. The bill substitutes the concept of "substantial risk".

The judicial council's homicide and lesser included offenses committee consisted of: Prof. Walter J. Dickey, (chair); Justice Shirley S. Abrahamson; Judge Michael J. Barron; Asst. Atty. Gen. David J. Becker; William U. Burke; William M. Coffey; Francis R. Croak; Jerome L. Fox; Sen. Donald Hanaway; Asst. Dist. Atty. Michael Malmstadt; Judge Gordon Myse; Revisor of Statutes Orlan L. Prestegard; Prof. Frank J. Remington; Asst. Public Defender Michael J. Rosborough; Rep. James A. Rutkowski; Janet Schipper; and Prof. David E. Schultz. The reporter was James L. Fullin, Jr.