

EARNED RELEASE PROGRAM

rev. 12/2007

On July 26, 2003, the Wisconsin legislature created the Earned Release Program (ERP) within the Department of Corrections (DOC). This new law is codified as Wis. Stat. §§ 302.05(3) and 973.01(3g). The ERP statute applies to inmates serving Truth-in-Sentencing (TIS) sentences for crimes committed on or after January 1, 2000. It also applies to inmates who are serving parolable (also known as "New Law") sentences for crimes committed before January 1, 2000.

According to the DOC, the purpose of ERP is to provide an incentive to inmates to actively participate in an intensive treatment program for alcohol and other drug abuse (AODA), designed to reduce future criminal behavior. This information sheet describes the statutory requirements for ERP, as well as explaining how the DOC is implementing the ERP as of 2007.

1) Statutory Eligibility Requirements for ERP

A copy of Wis. Stat. § 302.05(3), which describes the ERP program, is attached to this information sheet.

Section 302.05(3)(a) states that an inmate is eligible for ERP if the inmate is not serving a sentence for any Ch. 940 offense or for certain Ch. 948 offenses.¹ In addition, for TIS inmates, the sentencing court must determine that the inmate is eligible to participate in ERP. Wis. Stat. §§ 302.05(3)(a)(2) and 302.05(3)(e).

Section 302.05(3) provides for slightly different procedures, depending on whether an inmate is serving a New Law (parolable) sentence, or a TIS sentence imposed before or after July 26, 2003, the effective date of the statute.

New Law inmates

Under the statute, New Law inmates are eligible to participate in ERP. Wis. Stat. § 302.05(3)(b).

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The Wisconsin Court of Appeals has ruled that the legislature's categorical exclusion of inmates convicted of Chapter 940 offenses and certain Chapter 948 offenses does not violate the constitution's equal protection clause or substantive due process. See *State v. Gerald R. Lynch*, 2006 WI App 231, 297 Wis. 2d 51, 724 N.W.2d 656.

TIS inmates sentenced on or after 7/26/03

For TIS inmates sentenced on or after July 26, 2003, the sentencing court determines at the time of sentencing whether or not to declare the inmate eligible for ERP. Wis. Stat. § 302.05(3)(a)(2). The Wisconsin Court of Appeals has ruled that a trial court, at sentencing, has the authority to delay the defendant's eligibility date for entry into ERP. See *State v. White*, 2004 WI App 237, 277 Wis. 2d 580, 690 N.W.2d 880.

The Court of Appeals has also ruled that, under the plain language of § 973.01(3g), a court may declare that a TIS inmate is eligible for ERP only at a sentencing hearing, not at a reconfinement hearing. In other words, if an inmate is released from prison onto Extended Supervision which is later revoked, the trial court does not have the authority to declare the inmate eligible for ERP at the reconfinement hearing. See *State v. Hall*, 2007 WI App 168, ___ Wis. 2d ___, 737 N.W.2d 13.

TIS inmates sentenced before 7/26/03

For TIS inmates sentenced before July 26, 2003, the process is more involved. All TIS inmates must be declared eligible for ERP by the sentencing judge. But because these inmates were sentenced before the effective date of the ERP statute, they did not have an opportunity for a judicial declaration of ERP eligibility at the time of sentencing. Therefore, the ERP statute provides a procedure for these inmates to be declared ERP eligible after the fact.

The inmate, "with the department's [i.e. DOC's] approval," must petition the sentencing court to declare him or her eligible to participate in ERP. Wis. Stat. § 302.05(3)(e). A copy of the petition requesting ERP eligibility must be served upon the district attorney, who may file a written response. Wis. Stat. § 302.05(3)(e). The court must rule on the petition within 90 days of its being filed. *Id.*

2) Effect of ERP Completion

New Law inmates

If the DOC determines that the inmate has successfully completed ERP, the Parole Commission shall parole the inmate. The Parole Commission must require as a condition of parole that the parolee participate in an intensive drug supervision program. Wis. Stat. § 302.05(3)(b).

TIS inmates

If the DOC informs the sentencing court that an eligible TIS inmate has successfully completed ERP, the court shall reduce the confinement portion of the sentence. Wis. Stat.

§302.05(3)(c)(2)(a). The period of Extended Supervision shall also be lengthened, so that the overall length of the sentence is unchanged. Wis. Stat. § 302.05(3)(c)(2)(b).

3) DOC Implementation of ERP

As of 2007, the DOC has implemented ERP as follows. ERP is a 6-month, full-time intensive residential treatment program. It includes reintegration planning, as well as a post-release supervision component to be carried out by the DOC's Division of Community Corrections. ERP is available to both male and female inmates.

By 2008, DOC expects to have ERP beds at the following institutions: approximately 280 (male) at the Drug Abuse Correctional Center; 55 (female) at the Robert E. Ellsworth Center when it reaches full capacity; 200 (male) at Racine Correctional Institution when it reaches full capacity; and 200 (male) at the Chippewa Valley Treatment Center when it reaches full capacity.

The DOC has prepared a set of criteria for probation agents to use in recommending in a Presentence Investigation Report (PSI), whether or not the sentencing court should declare the defendant eligible for ERP. The "suitability" criteria for agents to use in making a recommendation regarding ERP eligibility are more restrictive than the statutory eligibility criteria under § 302.05(3)(a), and include the following:

- The offender must have an identified substance abuse treatment need, which is related to the offender's criminal behavior.
- The offender cannot have previously served adult prison time for the violent/assaultive offenses listed in § 302.05(3)(a), even if the offender's current incarceration is not for such an offense. This criterion includes read-ins, as well as comparable convictions in other states if the conviction resulted in incarceration.
- At the time of sentencing, the offender cannot be facing a conviction for an offense involving a weapon. This criterion includes read-ins, but involves current convictions only, not past convictions.

Note that these criteria are used by the probation agent to recommend to the sentencing judge whether or not to declare the defendant eligible for ERP. However, if the probation agent recommends against eligibility for ERP, but the court declares the defendant eligible anyway, then the DOC will not generally exclude the defendant from ERP, even if he or she does not meet the "recommendation" criteria listed above (for example, if the defendant's current convictions include a weapons offense).

Once a court has declared an inmate eligible for ERP, the DOC has created a second set of criteria, in order to manage wait lists and priority lists for inmates to be placed in ERP:

- the inmate must be classified as minimum or minimum community custody;
- if the court has specified a minimum confinement time that the inmate must serve prior to being allowed into ERP, the DOC will require that the minimum time be served;

- the inmate must have an identified substance abuse need, and there must be a relationship between the substance abuse and criminal behavior;
- inmates who are in need of sex offender treatment, regardless of conviction, will not be allowed to participate in ERP;
- inmates who have refused, or who have dropped out of, the Challenge Incarceration Program (CIP or "boot camp") will not be allowed to participate in ERP;
- inmates must volunteer and sign a "Memo of Agreement";
- inmates with physical limitations will be reviewed on a case-by-case basis;
- inmates with psychological limitations and/or psychotropic drugs will be reviewed on a case-by-case basis;
- inmates with significant dental needs will have to have those needs resolved prior to transfer to ERP; and
- inmates with poor institution adjustment will have to demonstrate appropriate behavior prior to transfer to ERP.

4) Application of ERP to New Law (Parolable) Inmates and Pre-7/26/03 TIS Inmates

The DOC's implementation of ERP, as outlined above, is fairly clear in terms of its application to TIS inmates sentenced on or after July 26, 2003. The criteria are more complicated with regard to New Law inmates and TIS inmates sentenced before July 26, 2003.

New Law inmates

The DOC has indicated that New Law inmates may be considered for participation in ERP with the approval of the DOC, provided they meet the statutory requirements and are eligible for parole (i.e. have served 25% or 6 months of their sentences, whichever is greater). However, it is the understanding of LAIP that the DOC is not prioritizing New Law inmates on ERP wait lists. The rationale is that these inmates can be released by the Parole Commission even if they do not complete ERP, whereas TIS inmates must complete ERP in order for the judge to have the authority to order early release. Thus, as a practical matter, New Law inmates are very unlikely to get into ERP.

TIS inmates sentenced before July 26, 2003

A TIS inmate who was sentenced before July 26, 2003 may, "with the department's [i.e. DOC's] approval," petition the sentencing court to declare him or her eligible to participate in ERP. Wis. Stat. § 302.05(3)(e). For several years after 2003, the DOC was refusing to process--and hence to "approve"--inmates' petitions to be declared eligible for ERP participation. In 2007, however, the Wisconsin Court of Appeals ruled that the DOC's refusal to process such requests amounts to "approval" of the requests. See *State v. Kathy J. Johnson*, 2007 WI App 41 at ¶ 17, 299 Wis. 2d 785, 730 N.W.2d 661.

Following the *Johnson* decision, the DOC has developed a procedure for considering and approving inmate eligibility requests. If an inmate is statutorily eligible for ERP, the DOC

will approve the inmate's petition to be declared eligible by the court, using Form DOC-2251. The DOC-2251 form is identical to **Court Form CR-264, "Department of Corrections Approval to File Petition for Determination of Eligibility for the Earned Release Program § 302.05(3)(e),"** which is supposed to be filed in court along with the inmate's petition. A copy of this form is attached to this information sheet. If you are planning to file petition asking the court to determine your ERP eligibility, you should speak with your social worker about the exact procedures to follow in order to get the **DOC-2251/CR-264** approval form signed and filed with your petition.

Assuming that you can obtain the DOC's approval, you need to file a petition with the sentencing court, asking to be declared eligible for ERP participation. A copy of the petition form, **Court Form CR-263, "Petition for Determination of Eligibility for the Earned Release Program § 302.05(3)(e),"** is attached to this information sheet. This is a mandatory court form, which pre-7/26/03 inmates must use in petitioning the court to be declared eligible for ERP.

A copy of your petition requesting ERP eligibility, along with the DOC's approval, must be served upon the district attorney, who may file a written response. Wis. Stat. § 302.05(3)(e).

The court must rule on the petition within 90 days of its being filed. Wis. Stat. § 302.05(3)(e). In ruling on your petition, the court will sign **Court Form CR-265, "Order on Petition Determination of Eligibility for the Earned Release Program § 302.05(3)(e)"** (copy attached).

If the court declares you eligible for ERP, then the DOC wait list/priority requirements outlined in Part 3 above will apply.

6) Conclusion

Because § 302.05(3) is so new, it is likely that there will be the subject of more case law. It is also likely that DOC policies governing ERP will evolve over time. So it is important to check with DOC staff to make sure that you are aware of the most current ERP implementation criteria. It is also important to research the case law to see if additional cases discussing § 302.05(3) have been published.

State of Wisconsin
-vs-

**Petition for Determination of
Eligibility for the Earned
Release Program
§302.05(3)(e)**

_____, Defendant
Name

Case No. _____

Date of Birth

1. I am presently serving the confinement portion of a bifurcated sentence.
2. I was not convicted of a crime specified in chapter 940 or §§948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08 or 948.095, Wisconsin Statutes.
3. My sentence was imposed
 - a. on or after July 26, 2003, the effective date of the Earned Release Program. The sentencing court did not determine if I was eligible or ineligible to participate in the Earned Release Program.
 - OR**
 - b. before July 26, 2003, the effective date of the Earned Release Program.
4. Attached is form CR-264, Department of Corrections Approval to File Petition for Determination of Eligibility for the Earned Release Program.
5. A copy of this petition is being served on the district attorney who prosecuted me. The district attorney may file a written response.

I request the sentencing court to determine if I am eligible or ineligible to participate in the Earned Release Program within 90 days after the filing of this petition.

Signature of Petitioner

Name Printed or Typed

Date

- Distribution:
1. Court – Original
 2. Inmate
 3. District Attorney

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

For Official Use

State of Wisconsin
-vs-

**Department of Corrections
Approval to File Petition for
Determination of Eligibility for
the Earned Release Program
§302.05(3)(e)**

_____, Defendant
Name

Date of Birth

Case No. _____

The petitioner is presently serving the confinement portion of a bifurcated sentence. The petitioner was not convicted of a crime specified in chapter 940 or §§948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08 or 948.095, Wisconsin Statutes.

The court has not yet determined if the petitioner is eligible or ineligible to participate in the Earned Release Program.

The Department of Corrections approves filing of the Petition for Determination of Eligibility for the Earned Release Program.

Subscribed and sworn to before me

on _____

Notary Public, State of Wisconsin

My commission expires: _____

Signature of Department of Corrections Representative

Name Typed or Printed

Date

Distribution:

- 1. Court – Original
- 2. Department of Corrections - copy

State of Wisconsin
-vs-

Order on Petition for
Determination of Eligibility for
The Earned Release Program
§302.05(3)

_____, Defendant
Name

Case No. _____

Date of Birth

A petition for determination of eligibility for the Earned Release Program has been filed.

THE COURT FINDS:

All of the following criteria for eligibility have have not been satisfied.

1. The defendant is presently serving the confinement portion of a bifurcated sentence.
2. The defendant was not convicted of a crime specified in chapter 940 or §§948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08 or 948.095, Wisconsin Statutes.
3. The sentencing court did not determine if the defendant is eligible or ineligible to participate in the Earned Release Program.
4. The Department of Corrections has approved the filing of the petition.
5. The district attorney was served with a copy of the petition.

THE COURT ORDERS:

1. The petition is granted because all of the criteria for eligibility have been satisfied and
- The gravity of the crime is not inconsistent with participation.
 - The defendant's character suggests the defendant can be successful in the program.
 - The community's interest in rehabilitation is served by allowing participation.
 - Other: _____

The defendant is eligible to participate in the Earned Release Program

as of the date of this order.

OR

after serving _____ years, _____ months, _____ days, of the confinement portion of this bifurcated sentence.

If the defendant is approved for placement in the Earned Release Program and successfully completes the Earned Release Program, the Department of Corrections shall inform the court that the defendant has successfully completed the treatment program. Upon being informed that the defendant has successfully completed the treatment program, the court shall reduce the term of confinement in prison portion of the defendant's bifurcated sentence in a manner that provides for the release of the defendant to extended supervision within 30 days of the date on which the court receives the information from the Department of Corrections. The court shall lengthen the term of extended supervision imposed so that the total length of the bifurcated sentence originally imposed does not change.

2. The petition is denied. The defendant is not eligible for the Earned Release Program because:
- The defendant has not satisfied the following criteria for eligibility: [Specify criteria number(s)]: _____
 - The court already made this determination at sentencing and declines to change it.
 - The seriousness of the crime requires continued confinement.
 - The defendant's character suggests the defendant would not be successful in this program.
 - The defendant needs to be confined to protect the community.
 - Other: _____

BY THE COURT:

Distribution:

1. Court - Original
2. Defendant
3. Defendant's attorney
4. District Attorney
5. Department of Corrections
6. Victim(s)

Circuit Court Judge

Name Printed or Typed

Date

