



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1617/1
MLJ&TJD:klm

2019 ASSEMBLY BILL 11

February 8, 2019 - Introduced by Representatives SPIROS, KUGLITSCH, MURSAU, NOVAK, PETRYK and TUSLER, cosponsored by Senators PETROWSKI, WANGGAARD, FEYEN, STROEBEL, COWLES, OLSEN, MARKLEIN and JACQUE. Referred to Committee on Judiciary.

- 1 **AN ACT** *to create* 950.04 (1v) (df), 971.313 and 974.05 (1) (e) of the statutes;
2 **relating to:** obtaining crime victim mental health treatment records.

Analysis by the Legislative Reference Bureau

This bill creates a procedure by which a defendant in a criminal case may seek access to the mental health treatment records of a crime victim that are not in the possession of or under the control of a government entity when he or she believes that those records contain information that is crucial to the defendant's defense.

Under the bill, if a defendant wishes to gain access to the mental health treatment records of a crime victim, he or she must file a motion describing the information sought and show that there are mental health treatment records that are reasonably likely to contain the information sought, that the information is necessary to formulate an articulated theory of defense, and that the information is not available from any other source. If the court finds that the defendant has made this showing and that the potential benefit to the defendant is greater than the harm to the crime victim from disclosure, and if the crime victim consents, the court may conduct an in camera review of the mental health treatment records. Upon reviewing the records, if the court determines both that the information in the mental health treatment records is necessary to an articulated theory of defense and that the benefit to the defendant from disclosure is greater than the harm to the crime victim from disclosure, or determines that the evidence is otherwise exculpatory, the court may order disclosure of the records. Following this order, the crime victim may review the records that the court has determined should be disclosed and may consent to disclose the records, may appeal the court's decision, or may decline to disclose the records and be barred from testifying at the trial.

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If the crime victim declines to disclose his or her mental health treatment records for an in camera review, the court must abide by his or her declination and must permit the victim to testify at trial. The defendant, however, may then comment on the declination and question the victim about those records.

All filings and records pertinent to this process and the mental health treatment records of the victim are to be sealed by the court. Additionally, all decisions of the court during this process may be appealed at any time by the state or the crime victim as a matter of right.

This bill also adds enumerated rights to the basic bill of rights for victims describing the right of a victim to privacy in his or her mental health treatment records, in accordance with the new procedure that the bill creates.

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.** 950.04 (1v) (df) of the statutes is created to read:

2 950.04 (1v) (df) To privacy in his or her confidential mental health treatment
3 records, in accordance with the procedure under s. 971.313.

4 **SECTION 2.** 971.313 of the statutes is created to read:

5 **971.313 Obtaining victim mental health treatment records. (1)**

6 DEFINITIONS. In this section:

7 (a) “Crime victim” has the meaning given for “victim” in s. 950.02 (4) or a
8 guardian ad litem appointed under sub. (3) (c) 2. if a person identified under s. 950.02
9 (4) (a) 2. has interests that are adverse to a child victim.

10 (b) “Mental health treatment records” means all records that are not in the
11 possession of a government agency that are created in the course of providing
12 services to individuals for mental illness, developmental disabilities, alcoholism,
13 drug dependence, or other mental health issues and that are maintained by
14 treatment facilities as defined in s. 51.01 (19), by psychologists licensed under s.
15 455.04 (1), or by licensed mental health professionals as defined in s. 51.01 (11m).

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1 “Mental health treatment records” does not include psychotherapy notes, as defined
2 in 45 CFR 164.501, that are maintained for personal use and kept separate from
3 other mental health treatment records.

4 (c) “Necessary to an articulated theory of defense” means that the evidence is
5 necessary to a determination of guilt or innocence by tending to create reasonable
6 doubt that would not otherwise exist.

7 **(2) MOTION FOR DISCOVERY OF MENTAL HEALTH TREATMENT RECORDS.** (a)
8 Notwithstanding ss. 51.30 (4) (b) 4. and 146.82 (2) (a) 4., a defendant seeking
9 discovery of a person’s mental health treatment records shall file a confidential
10 motion, sealed under s. 801.20, at least 60 days before trial, unless the court extends
11 the time for filing upon a specific finding of good cause, including when there has
12 been new discovery.

13 (b) In a motion under par. (a), the defendant shall submit a fact-specific good
14 faith offer of proof and a supporting affidavit from someone with personal knowledge
15 that demonstrates all of the following:

16 1. The specific information that is sought from the mental health treatment
17 records.

18 2. There are mental health treatment records that are reasonably likely to
19 contain the information sought under subd. 1.

20 3. The specific information sought under subd. 1. is necessary to an articulated
21 theory of defense.

22 4. The mental health treatment records are the only source for the information
23 sought under subd. 1.

24 5. The information sought under subd. 1. is not cumulative to evidence already
25 available.

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1 (c) Each of the following offers of proof, considered alone, are not sufficient to
2 determine whether the defendant has met the burden of proof to obtain a person's
3 mental health treatment records under par. (b):

4 1. The crime victim reported or failed to report a victimization.

5 2. The crime victim sought or received counseling or mental health treatment
6 for a prior or current victimization.

7 3. The crime victim received counseling or mental health treatment to address
8 personal or family issues.

9 4. The crime victim may have made an inconsistent statement about the
10 offense.

11 **(3) NOTIFICATION REQUIRED; CRIME VICTIM RIGHTS.** (a) The prosecuting attorney
12 shall notify the crime victim whose mental health treatment records are being
13 sought of all of the following:

14 1. A motion has been filed under sub. (2) (a) requesting his or her mental health
15 treatment records.

16 2. He or she has the right to the assistance of counsel regarding the issue of
17 access to his or her mental health treatment records.

18 3. He or she may consent or decline to consent to an in camera review of his or
19 her mental health treatment records.

20 4. By consenting to an in camera review, he or she has not waived any privilege
21 under s. 905.11 or 905.12 to object to redisclosure of the privileged information or the
22 use of any privileged information in a subsequent court proceeding after the court's
23 review and determination under sub. (4).

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1 (b) The prosecuting attorney may respond to the motion made under sub. (2)

2 (a) with affidavits or written arguments, which shall be filed confidentially and
3 sealed under s. 801.20.

4 (c) 1. The crime victim whose mental health treatment records are being sought
5 has the right to counsel. The crime victim may retain counsel who may intervene in
6 this proceeding on his or her behalf. The court shall provide the crime victim
7 reasonable time to secure counsel. The court may appoint counsel upon the victim's
8 request regarding access to and disclosure of the privileged mental health treatment
9 records. The counsel may file a response to the filing made under sub. (2) (a) with
10 affidavits or written arguments, which shall be filed confidentially and sealed under
11 s. 801.20.

12 2. If the victim of the crime is a child, and the court determines that a person
13 identified under s. 950.02 (4) (a) 2. has interests that are adverse to the child, the
14 court shall appoint a guardian ad litem. The guardian ad litem shall be an advocate
15 for the best interests of the child regarding access to and disclosure of the privileged
16 mental health treatment records. The guardian ad litem shall function
17 independently in the same manner as the counsel identified under subd. 1.

18 **(4) IN CAMERA REVIEW; DETERMINATION OF WHETHER DISCLOSURE IS WARRANTED.** (a)
19 If the court concludes both that the defendant has made the showing required by sub.
20 (2) (b) and that the potential benefit to the defendant from disclosure outweighs the
21 harm to the crime victim from disclosure, the court shall inquire as to whether the
22 crime victim consents to an in camera review of the mental health treatment records
23 by the court.

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1 (b) 1. If the crime victim does not consent to an in camera review of his or her
2 mental health treatment records by the court, the court shall follow the procedures
3 in sub. (6) (a).

4 2. If the crime victim consents to an in camera review of his or her mental health
5 treatment records by the court, the court shall examine the mental health treatment
6 records in camera for the presence of any evidence that is necessary to an articulated
7 theory of defense.

8 (c) Following an in camera review of the mental health treatment records under
9 par. (b) 2., the court may order the disclosure of the relevant records only if the court
10 determines one of the following:

11 1. The information in the mental health treatment records is necessary to an
12 articulated theory of defense and the benefit to the defendant from disclosure
13 outweighs the harm to the crime victim from disclosure.

14 2. The information in the mental health treatment records is exculpatory
15 because it is necessary to a determination of guilt or innocence by tending to create
16 reasonable doubt that would not otherwise exist.

17 (d) If the court determines under par. (c) that some or all of the mental health
18 treatment records are eligible for disclosure, the crime victim shall have the
19 opportunity to review the records identified for disclosure. Within 45 days from the
20 date of the order under par. (c), the crime victim and the state shall notify the court
21 whether the crime victim or the state intends to appeal the order pursuant to s.
22 974.05, and if neither the crime victim nor the state intends to appeal the order, the
23 crime victim shall indicate whether he or she consents or declines to consent to the
24 disclosure of the relevant records. If the crime victim or the state appeals the order

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1 under par. (c) within 45 days, the crime victim's mental health treatment records
2 may not be disclosed until the appeal has concluded.

3 (e) 1. After the appeal under par. (d) has concluded, the crime victim shall
4 indicate whether he or she consents to the disclosure of his or her mental health
5 treatment records.

6 2. If the crime victim does not consent to the disclosure of the mental health
7 treatment records under par. (d) after the appeal has concluded or after the state and
8 the crime victim each indicate that he or she or it does not intend to appeal the order,
9 the court shall follow the procedures in sub. (6) (b).

10 3. If the crime victim consents to the disclosure of the mental health treatment
11 records after the appeal has concluded or after the state and the crime victim each
12 indicate that he or she or it does not intend to appeal the order, the court shall order
13 disclosure of those records to the prosecuting attorney and to the defendant's
14 attorney in accordance with the procedures in sub. (5).

15 **(5) DISCLOSURE OF INFORMATION; DISSEMINATION PROHIBITED.** (a) If the court
16 orders disclosure of mental health treatment records, the order may include only
17 those mental health treatment records or portions of mental health treatment
18 records that are necessary to an articulated theory of defense or are otherwise
19 exculpatory.

20 (b) If the court orders disclosure of mental health treatment records, the court
21 shall enter a protective order under s. 971.23 (6) that provides that any record or
22 information provided to the prosecuting attorney and to the defendant's attorney
23 shall be confidential and may not be redisclosed or disseminated by the prosecuting
24 attorney or the defendant's attorney unless specifically authorized by the court. Any
25 provided record or information in paper form shall be returned to the court at the

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1 conclusion of representation. Any provided or stored electronic record or information
2 shall be deleted at the conclusion of the representation by the prosecuting attorney
3 and the defendant's attorney, both of whom shall provide the court with an affidavit
4 affirming that the records or information have been deleted.

5 (c) The court shall determine the admissibility of any disclosed mental health
6 treatment records under the applicable rules of evidence.

7 (d) The court shall retain any mental health treatment records under seal for
8 the applicable period of time as specified in SCR 72.01.

9 **(6) CRIME VICTIM NONCONSENT; APPEALS OF COURT DECISIONS REGARDING MENTAL**
10 **HEALTH TREATMENT RECORDS.** (a) If the crime victim does not consent to in camera
11 review of his or her mental health treatment records, the court shall do all of the
12 following:

13 1. Abide by the declination of the crime victim.

14 2. Permit the crime victim to testify at the trial.

15 3. If the case is tried by a jury, inform the jury immediately following the
16 testimony of the crime victim and before jury deliberations of all of the following:

17 a. The defendant filed a motion for discovery of mental health treatment
18 records that met the requirements for an in camera review.

19 b. The crime victim declined to disclose mental health treatment records for
20 inspection by the court.

21 c. The crime victim has the right to decline an in camera review of the mental
22 health treatment records.

23 4. Notwithstanding any prohibition under s. 905.11 to 905.13, permit comment
24 on the declination by the crime victim and allow the defendant to draw any
25 reasonable inference therefrom.

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1 (b) If the crime victim does not consent to disclosure of his or her mental health
2 treatment records following an in camera review, the court shall prohibit the crime
3 victim from testifying at the trial and the court may not order disclosure of the crime
4 victim's mental health treatment records.

5 (c) Any of the following orders of the court may be appealed to the court of
6 appeals as a matter of right by the state under s. 974.05 or by the crime victim in the
7 manner under s. 974.05:

8 1. The order of the court determining that the defendant has met his or her
9 burden of proof under sub. (2) (b), triggering an in camera review of mental health
10 treatment records.

11 2. The order of the court determining that the mental health treatment records
12 should be disclosed under sub. (4) (c).

13 **(7) PRIVILEGE.** The consent of a crime victim to review of mental health
14 treatment records under sub. (4) (a) or disclosure of mental health treatment records
15 under sub. (4) (d) does not waive any privilege under s. 905.11 or 905.12. A crime
16 victim may still claim any applicable privilege for confidential communications or for
17 information reviewed or disclosed under this section.

18 **(8) PSYCHOTHERAPY NOTES.** Except for uses or disclosures described in 45 CFR
19 164.508 (a) (2) (i) and (ii), a defendant may not obtain and a court may not order
20 disclosure of psychotherapy notes, as defined in 45 CFR 164.501, that are
21 maintained for personal use and kept separate from other mental health treatment
22 records unless the crime victim voluntarily provides an authorization in accordance
23 with 45 CFR 164.508 to disclose psychotherapy notes.

24 **SECTION 3.** 974.05 (1) (e) of the statutes is created to read:

