Assembly Committee on Judiciary
Thursday, September 26, 2013

Statement Re: 2013 Assembly Bill 383

David E. Schultz
Professor of Law
University of Wisconsin Law School

Introduction

I am a professor of law emeritus at the UW Law School where I teach substantive criminal law and, until 2011, taught criminal procedure. Since 1976, I have been the "reporter" – draftsman and researcher – for the Wisconsin Criminal Jury Instructions Committee, a committee of state trial judges which prepares the jury instructions used in criminal prosecutions throughout the state. Since 1989 I have been a member of the Wisconsin Judicial Council as the designee of the dean of the UW Law School. I served as chair of the Council from 1991 to 1996 and chair of its Criminal Procedure Committee since it was first formed in 1992.

On behalf of the Judicial Council, I want to express our appreciation to the Committee for giving us this opportunity to provide information on a bill that has occupied the time and effort of many people over many years. I especially want to thank Rep. Ott for his assistance in helping us get to this point.

I will try to provide some background information about AB 383 and a brief review of its contents. I welcome questions at any time during or after this hearing.

Background – Why This Bill Is Coming From The Judicial Council

The Judicial Council is a non-partisan state agency that was created in 1952. Its membership, powers and organization are set forth in § 758.13 of the Wisconsin Statutes. The Council consists of twenty-one members: a supreme court justice; a court of appeals judge; four circuit court judges; one district attorney appointed by the governor; three members elected by the state bar; two citizen members appointed by the governor; and all of the following individuals (or their designees): the chairs of the senate and assembly standing committees with jurisdiction over judicial affairs, the director of state courts, the attorney general, the chief of the legislative reference bureau, the deans of the law schools of the University of Wisconsin and Marquette University, the state public defender, and the president-elect of the state bar. Council members do not receive compensation, but are reimbursed for travel expenses necessarily incurred as a result of attending council meetings.

The Council's statutory powers and duties include studying the rules of pleading, practice and procedure and advising the supreme court as to changes that will simplify procedures and promote efficiency. The Council is also tasked with recommending to the legislature any changes

in the organization, jurisdiction, operation and methods of conducting the business of the courts, including statutes governing pleading, practice, procedure and related matters, which can be put into effect only by legislative action. The Council can receive, consider and investigate suggestions concerning, and recommend proposed changes pertaining to, the administration of justice in Wisconsin. The Council also is empowered to recommend to the governor, the supreme court, and the legislature any changes in the organization, jurisdiction, operation and business methods of the courts that would result in a more effective and cost-efficient court system.

The Judicial Council created its Criminal Procedure Committee in May, 1992, as one of its two ongoing study committees. The Committee's charge was to study a complete revision of Chapters 967 - 976 of the statutes. The rationale behind the project was stated as follows:

> A properly codified criminal procedure code may improve the quality of legal practice in this state and cut down on a number of errors and appeals.

There were several reasons for the Council's decision to take on this task. First, the Council had been responsible for the last comprehensive revision of the criminal procedure statutes. In 1967, the Wisconsin Legislature funded a Judicial Council Criminal Rules Committee "to prepare a complete redraft of those statutes which deal with procedure in criminal cases." That effort resulted in a bill enacted as Chapter 255, Laws of 1969, which became effective on July 1, 1970. The bill created Chapters 967 to 976 and stated its purpose as follows: "[This bill] attempts to codify statutory and case law in systematic form beginning with the initiation of the criminal process and ending with post conviction remedies." This mirrors the intent of the current revision. Further, the earlier revision was based on study of various model acts, such as the American Law Institute's Model Code of Pre-Arraignment Procedure and the then-new ABA Standards for Criminal Justice. This connection with model rules also exists in the current revision.

After the 1970 revision, the Council sponsored several significant study committees on criminal procedure topics. These resulted in the revision or creation of statutes relating to: competency to stand trial; the insanity defense; restitution procedures; rules relating to conducting proceedings by telephone and audiovisual means; and, rules relating to use of videotaped testimony. Thus, the Judicial Council continued to be significantly involved with the criminal procedure statutes after the 1970 revision and before the project leading to this bill.

In the years leading up to the creation of the Criminal Procedure Committee, several criminal procedure issues had been referred to the Council from the legislature, the courts, and other sources. They were put on hold, in the anticipation that they would eventually be dealt with together. One of these referrals was a request from Uniform Commissioners on State Laws to evaluate the Uniform Rules of Criminal Procedure. The Uniform Rules are based on the current version of the ABA Standards for Criminal Justice.

Finally, and more generally, several members of the Council were convinced that the criminal procedure statutes needed a complete review: provisions were hard to find; the Code's organization

had broken down as new provisions were added; and, case law needed to be codified. The situation appeared to be very much like the one that had existed before the 1970 revision.

With this background, the guiding principle for the Committee was that current procedures should be reflected in the statutes and presented in a manner that made them easy to find and understandable. A well-intentioned, if inexperienced, prosecutor, defense lawyer, or judge ought to be able to rely on the statutes as a guide to criminal procedure. Further, the procedures should be flexible enough to allow counties to employ approaches that work at the local level.

Committee Membership and the Drafting Process

The original Judicial Council Criminal Procedure Committee was appointed in May 1992. Due to the long duration of this project, most of the original members have been replaced; at least 25 different individuals have participated. The Committee's membership was composed of Council members who elected to participate, augmented with selected ad hoc members, selected for their expertise in the criminal law and their ability to represent important constituencies. Members included judges, district attorneys, public defenders, private criminal defense lawyers [from the State Bar Criminal Law Sections and the Wisconsin Association of Criminal Defense Lawyers], the Wisconsin Department of Justice, and faculty of the Marquette and UW law schools. Counties with large, medium, and small populations were represented.

The Committee began its work during the summer of 1992 and proceeded in the manner that was at that time typical for Judicial Council study committees: The Committee was staffed by the Judicial Council's executive secretary, who maintained minutes of the Committee's discussion and prepared all draft material considered by the Committee. The Committee's progress was interrupted when, effective July 1, 1995, the Judicial Council's budget was eliminated. The Council's two staff positions were also cut, meaning that valuable research and drafting services were no longer available to the Committee. Although the Committee's progress was seriously hampered by the loss of staff, the volunteer committee members continued their work. The Committee proceeded through the criminal procedure code statute by statute and word by word. It operated by compromise and consensus, reaching general agreement on each section before it was approved.

The Committee completed a draft in 1999. The final draft included a complete revision of the Criminal Procedure Code, consisting of Chapters 967 through 975 and Chapter 979, with one exception: Chapter 973, Sentencing, was not included. Each chapter was completely reorganized; a great deal of material was moved from one chapter to another. Longer chapters were broken down into subchapters. Long statutes were divided into separate statutes. Subsections within lengthy statutes were provided with captions. All this was intended to make the statutes easier to use by making their contents more readily apparent. All statutes that were significantly revised were followed by Comments that attempted to explain the nature and purpose of the change.

The final product carried the unanimous endorsement of the Committee. Not everyone was wholeheartedly in favor of every item; not everyone preferred each item exactly as it was drafted.

But, on balance, all committee members endorsed and recommended adoption of the draft without reservation. The draft cannot be characterized as a pro-defendant or pro-prosecution product; fairness, improved accessibility, and increased efficiency were the primary goals.

The revision was unanimously approved by the Judicial Council on December 10, 1999 (Justice Crooks abstaining). The draft was forwarded to the Legislative Reference Bureau [LRB] with the request that a draft marked "Preliminary Draft – Not Ready For Introduction" be prepared. The idea was that while the technical work was being done by the LRB, the draft could be circulated to various interested groups before it appeared to be in a final form. Drafts were shared with the following groups: Criminal Law Section of the State Bar; State Public Defender; Wisconsin Association of Criminal Defense Lawyers; Wisconsin District Attorney's Association; and, the Committee of Chief Judges. Presentations were made during the year 2000 to most of these groups.

Review and Redrafting by the Legislative Reference Bureau

The Committee and the Council believed the draft approved in 1999 was in virtually final form as to style and content, and that the Legislative Reference Bureau's [LRB] task would be a technical one of putting the draft in bill form, dealing with cross-references, identifying other statutes affected, etc. However, the LRB undertook a complete redraft of all the material, changing the style of the draft, raising new issues, and identifying questions about the content on a line-by-line basis. As chapters were completed by the LRB, the Committee again went through the material line-by-line, question-by-question. This work continued from 2000 through 2013, involving review of several iterations of LRB drafts.

2007 Wisconsin Act 20 restored the Judicial Council as an independent agency and re-appropriated funding for a full-time staff attorney. With the aid of staff, the Council was able to renew its efforts to work with the LRB to create a draft bill. Over the next several years, the draft bill, which now exceeded 360 pages, went through many revisions. Finally, with a nearly-complete product in-hand, the Judicial Council spent months editing the bill and authoring additional amendments to bring it up to date with current practice and case law. Members completed their work in the summer of 2012.

Summary of Significant Changes in the Revision

A major purpose of the revision is to reorganize and clarify current law, but a number of substantive changes are also made. The most significant clarifications, reorganizations, and substantive changes are described below.

Encouraging prompt disposition of misdemeanors.

While some counties have efficient procedures in place for dealing with misdemeanor prosecutions, the Committee concluded that encouraging more prompt disposition statewide was an important goal. The Committee realized that achieving this goal depends as much on a change in

approach and legal culture as on statutory change. Several changes are included in the revision that are intended to facilitate the prompt resolution of minor cases:

- Encourage the use of citation over formal arrest.

- Encourage arrest and release over detention.

- Eliminate the requirement that a long form criminal complaint be prepared in every case by allowing endorsement of the citation and its use as the charging document.

- Require access to police reports at the first appearance and allow discovery even before the first appearance.

The purpose of these changes is to avoid unnecessary pretrial detention and eliminate statutory obstacles to prompt disposition of misdemeanors. The time saved can be better spent on providing early discovery and preparing to resolve the case at or shortly after the initial appearance, without the delay occasioned by repetitive and unnecessary court appearances and pretrial conferences.

Elimination of the preliminary examination in felony cases.

Early in its deliberations, the Committee decided to propose doing away with the preliminary examination. The Committee concluded that the preliminary examination was of extremely limited utility in its then-current form. Its official function, to identify weak cases and dismiss them, is rarely carried out. This is especially true in light of court decisions holding that credibility of witnesses is not to be considered and competing inferences are not to be weighed. This is even more true since the passage of 2011 Wisconsin Act 285, which provided for the admissibility of hearsay at the preliminary examination. The unofficial functions of the preliminary examination – previewing witnesses, obtaining discovery, evaluating the strength of the case – are of limited value in light of limits on scope of the preliminary and in light of the high number of waivers of the preliminary. Again, in some counties, the preliminary continues to work moderately well but even then its value is outweighed by the resources consumed: court time; the time of witnesses, often involving overtime for police officers; and, the time of prosecutors and defense lawyers.

The functions of the preliminary examination, official and unofficial, can better be served directly. The revision includes provisions that are intended to do so:

- Encourage earlier and more complete discovery; for example: police reports before or at the initial appearance. [See §§ 971.015(4) and 971.035.]

- Allow a motion for pretrial dismissal to address the rare situation where uncontroverted evidence shows case cannot be proved. [See § 971.69.]

Cleaning up of troublesome statutes.

Several statutes that were either hard to understand or the source of practical difficulties were revised. Some examples follow:

- Consolidation of charges from more than one county. [Compare § 971.09 of current law with § 971.09 of the bill.]

- John Doe procedures. The original Council draft changed current § 968.26 to eliminate citizen-initiated John Does. This has been changed in the bill to incorporate the current statute, which had been amended by the legislature to solve most of the problems the original revision had attempted to address. [§ 968.105 of the bill.] The bill does eliminate the authority for a court to issue a complaint under former § 968.02(3), which is repealed; this recognizes that, as a practical matter, only the district attorney can prosecute a charge.

- Discovery rules. The substance of current rules is retained but is reorganized to make it more accessible and understandable. [See Chapter 971, Subchapter IV.]

- Bail provisions. The substance of current rules is retained but is reorganized to make it more accessible and understandable. [See Chapter 969, Subchapter II.]

- Peremptory challenges and alternate jurors. The substance of current rules is retained but is reorganized and clarified; the number of peremptory challenges is made the same for felonies and misdemeanors and the procedure for identifying which jurors are "alternates" is clarified. [See §§ 972.03 and 972.04.]

- Mental issues relating to competency to stand trial and the insanity defense. New Chapter 975 reorganizes material found in a few extremely long statutes in current law; breaking the material into separate statutes and adding captions makes the material more accessible and understandable.

New provisions.

Several statutes are created to provide new authority or to clarify procedures. Some examples follow:

- Allow the district attorney to apply for an order requiring a financial institution to disclose a person's status as a depositor – intended to facilitate access to this basic information without going through formal procedures such as a John Doe. [See § 969.71.]

- List the ways a person's appearance in court can be secured – intended to clarify the available procedures. [See § 969.15.]

• Allow the district attorney to release a defendant on bond before the initial appearance – intended primarily for cases where the defendant is likely to be released without monetary conditions after the initial appearance. [See § 969.25.]

• Codify case law defining the prosecutor's authority to dismiss a complaint. [See § 970.10.]

• Create a single, general, statute authorizing deferred and suspended prosecution agreements; it replaces several separate statutes that purport to govern agreements in specified types of cases. [See § 970.16.]

• Describe the effects of the different pleas available to the defendant; it codifies current law to clarify the issues. [See §§ 971.06 and 971.085.]

• Codify current case law relating to plea agreements. [See § 971.065.]

• Codify current law relating to motions to dismiss asserting that a statute is unconstitutional – intended to avoid unwitting waivers by failing to make proper service. [See § 971.66.]

• Codify remedies for the so-called Bruton situation where one codefendant's statement is not admissible as to the other codefendant. [See § 971.68.]

• Codify current law allowing jurors to ask questions, in the discretion of the court. [See § 972.075.]

• Codify current law relating to the acceptance of stipulations. [See § 972.25.]

• Require an individual jury poll in all cases, to avoid unnecessarily litigating whether the defendant knew of and waived the right. [See § 972.25.]

• Create a process to obtain evidence before trial and to address practical problems relating to production. [See § 971.49.]

• Codify current law and practice relating to obtaining nontestimonial information from the defendant. [See § 971.56.]

• Create a process to obtain nontestimonial discovery from third parties.[See § 971.57.]

• Codify current law relating to the defendant's presence at postconviction proceedings. [See § 974.08.]

Conclusion

The revision of the criminal procedure statutes reflected in AB 383 represents one of the

biggest projects the Judicial Council has undertaken. It is faithful to the principles that the Council originally set forth for the project: to develop fair and efficient procedures that will improve the quality of legal practice and cut down on a number of errors and appeals; and, presenting these procedures in the statutes in a manner that makes them easy to find and to understand. I believe AB 383 meets these goals.

Respectfully submitted,

David E. Schultz
Professor of Law
University of Wisconsin Law School
608-262-6881
deschult@wisc.edu

Wisconsin State Public Defender

315 N. Henry St. - 2nd Floor
PO Box 7923 Madison, WI 53707-7923
Office Number: 608-266-0087 / Fax Number: 608-267-0584
www.wisspd.org

Kelli S. Thompson
State Public Defender

Michael Tobin
Deputy State
Public Defender

October 10, 2013

Chairman Jim Ott
Chairman Glenn Grothman
State Capitol
Madison, WI

Chairmen Ott and Grothman,

Thank you for the opportunity to provide information regarding Assembly Bill 383, which makes many changes to Wisconsin's criminal procedure code. As a statutory member of the Wisconsin Judicial Council, the State Public Defender (SPD) has been ably represented throughout the process of drafting this bill by our Appellate Division Director, Marla Stephens. Aside from Professor Dave Schultz, Ms. Stephens has been the longest serving member of the Council for the 15-year process of researching, compiling, analyzing and ultimately drafting this legislation. In addition to providing information on specific provisions in the bill, Marla is an excellent source of information on the history, reasoning, and impact of provisions in the bill.

The 5 major topic areas of the bill are 1) encouraging prompt disposition of misdemeanors, 2) eliminating the preliminary examination in felony cases, 3) reorganizing discovery rules, 4) cleaning up inconsistent statutes, and 5) adding more than 20 new statutory provisions to clarify current statute and codify case law.

Practically, this long and detailed bill represents not only a significant time and work investment by the Judicial Council, but also significant policy decisions and agreements by parties in the criminal justice system. The package of revisions in this draft represents years of work and compromise among prosecutors, defense counsel, judges and other criminal justice stakeholders. The SPD recognizes the difficult decisions that went into the drafting of this legislation and achieving a compromise as a comprehensive bill.

The Judicial Council created the Criminal Procedure Committee in May 1992, as one of its two ongoing study committees. The Committee's charge was to study a complete revision of Chapters 967 - 976 of the statutes. The rationale behind the project was stated as follows:

> *A properly codified criminal procedure code may improve the quality of legal practice in this state and cut down on a number of errors and appeals.*

There were several reasons for the Council's decision to take on this task. First, the Council had been responsible for the last comprehensive revision of the criminal procedure statutes. In 1967, the Wisconsin Legislature funded a Judicial Council Criminal Rules Committee "to prepare a complete redraft of those statutes which deal with procedure in criminal cases." That effort resulted in a bill enacted as Chapter 255, Laws of 1969, which became effective on July 1, 1970. The bill created Chapters 967 to 976 and stated its purpose as follows: "[This bill] attempts to codify statutory and case law in systematic form beginning with the initiation of the criminal process and ending with post conviction remedies." This statement of purpose mirrors the intent of the current revision. Further, the

earlier revision was based on study of various model acts, such as the American Law Institute's Model Code of Pre-Arraignment Procedure and the then-new ABA Standards for Criminal Justice. This connection with model rules also exists in the current revision.

After the 1970 revision, the Council sponsored several significant study committees on criminal procedure topics. These resulted in the revision or creation of statutes and rules relating to competency to stand trial; the insanity defense; restitution procedures; conducting proceedings by telephone and audiovisual means; and the use of videotaped testimony. The Judicial Council continued to be significantly involved with the criminal procedure statutes.

In the years leading up to the creation of the Criminal Procedure Committee, several criminal procedure issues had been referred to the Council and put on hold, in the anticipation that they would eventually be dealt with together. One of these referrals was a request from Uniform Commissioners on State Laws to evaluate the Uniform Rules of Criminal Procedure. The Uniform Rules are based on the current version of the ABA Standards for Criminal Justice.

Finally, and more generally, several members of the Council were convinced that the criminal procedure statutes needed a complete review: provisions were hard to find; the Code's organization had broken down as new provisions were added; and case law needed to be codified. The situation appeared to be very much like the one that had existed before the 1970 revision.

With this background, the guiding principle for the Committee was that current procedures should be reflected in the statutes and presented in a manner that made them easy to find and understandable. A well-intentioned, if inexperienced, prosecutor, defense lawyer, or judge ought to be able to rely on the statutes as a clear and accessible guide to criminal procedure.

The Committee began its work during the summer of 1992 and proceeded in the manner that was then typical for Judicial Council study committees: the Committee's membership comprised Council members who elected to participate, augmented with selected ad hoc members, selected for their expertise in the criminal law. The drafting committee was diverse, including district attorneys, assistant attorneys general, public defenders, private defense lawyers, judges, and academics. It operated by compromise – not every committee member was wholeheartedly in favor of every item, and not every member preferred each item as it was finally approved. But the final product carried the unanimous endorsement of the drafting committee.

The Committee was staffed by the Judicial Council's executive secretary, James L. Fullin, who maintained minutes of the Committee's discussion and prepared all draft material considered by the Committee.

The Committee's progress was interrupted when, effective July 1, 1995, the Judicial Council's budget, and its two staff positions, were eliminated.

The Committee of volunteers decided to finish its work despite lacking the staff assistance that had to this point been the rule for Council projects of this scope. Work was resumed on the complete review of the Criminal Procedure Code, proceeding statute by statute, word by word, through the material. The Committee operated by consensus, reaching general agreement on each section before it was approved.

The 1999 final draft included a complete revision of the Criminal Procedure Code, consisting of Chapters 967 through 975 and Chapter 979, with one exception: Chapter 973, Sentencing, was not

included. Each chapter was completely reorganized; a great deal of material was moved from one chapter to another. Longer chapters were broken down into subchapters. Long statutes were divided into separate statutes. Subsections within lengthy statutes were provided with captions. All these changes were intended to make the statutes easier to use by making their contents more readily apparent. All significant revisions were followed by Comments that explain the nature and purpose of the change.

The final product carried the unanimous endorsement of the Criminal Procedure Committee. Not everyone was wholeheartedly in favor of every item; not everyone preferred each item exactly as it was drafted. But, on balance, all committee members endorsed and recommended adoption of the draft. The revision was unanimously approved by the Judicial Council on December 10, 1999 (Justice Crooks abstaining). The draft was forwarded to the Legislative Reference Bureau [LRB] with the request that a draft marked "Preliminary Draft – Not Ready For Introduction" be prepared. The idea was that while the technical work was being done by the LRB, the draft could be circulated to various interested groups before it appeared to be in a final form. Drafts were shared with the following groups: Criminal Law Section of the State Bar; State Public Defender; Wisconsin Association of Criminal Defense Lawyers; Wisconsin District Attorney's Association [WDAA]; and Chief Judges. Presentations were made during the year 2000 to most of these groups.

Code revision remains a relevant topic. A properly codified criminal procedure code will improve the quality of legal practice in this state, reduce the number of errors and appeals, and foster court efficiency and effectiveness.

Current practice should be and would be reflected in the statutes and presented in a manner that is easy to find and understand. Prosecutors, defense lawyers, judges, and members of the general public will be better able to rely on the statutes as a guide to criminal procedure.

Each chapter of the Criminal Procedure Code (except Chapter 973 Sentencing) has been completely reorganized, following the chronological order of a case from arrest to judgment.

- Overly long chapters were broken down into subchapters.
- Overly long statutes were divided into separate statutes.
- Subsections within lengthy statutes were provided with captions.
- A "plain language" drafting style was adopted to the fullest extent possible.

We have catalogued some of the provisions of 2013 Assembly Bill 383, the Wisconsin Judicial Council (WJC) bill revising the Criminal Procedure Code – identifying those that the SPD advocated for or against, and that are beneficial, problematic or otherwise significant from our perspective. We hope it will allow the members of the Assembly and Senate Committees, our SPD colleagues, and other defenders, to make informed decisions about this compromise bill.

From the beginning of this ambitious and inclusive project, the abolition of the preliminary hearing was evident. Our efforts were consequently focused on providing for alternatives to the preliminary hearing process that would allow the defense bar to satisfy their ethical duties to investigate the allegations against their client and identify any available defenses to the charges.

References are to the proposed new statutory section number in AB 383 and the page number in the September 2013 WJC red-lined version of the bill draft. Information in brackets refers to the 12/1/99 draft of the bill submitted to the Legislative Reference Bureau by the WJC.

I. Beneficial/Advocated for:

a) Appearance excused (appearance by attorney) in misdemeanors.
967.13 (2), at RL 7-8 [967.04 (2), at 4].
Misdemeanor defendant may authorize attorney to act, and with prior leave of the court may be excused from attendance; except for guilty or no contest plea, sentencing or other proceeding at which a right personal to defendant is waived. Ameliorates indigent client's transportation challenges, and allows employed client to miss less work.

b) Release of arrested person by law enforcement officer.
969.17, at RL 67 [969.04, at 3].
Codifies discretionary authority of police to release a person arrested without a warrant, eliminates current law qualifier in s. 968.08 "when there are insufficient grounds for issuance of a criminal complaint" because, per draft WJC Comment, it does "not recognize all the bases for exercise of this authority."

c) Requirement of probable cause finding within 48 hours after warrantless arrest.
969.19, at RL 68 [969.05, at 3].
Codification of *Riverside v McLaughlin*, 500 US. 44 (1991). Remedy is release.

d) Law enforcement officer authorized to issue citation for misdemeanor, and all persons cited for a misdemeanor shall be released without cash bond, with enumerated exceptions.
969.24 (2) and (2m), at RL 70-71 [969.10, at 7].

e) Release before initial appearance on bond by district attorney.
969.25, at RL 71-72 [969.11 (b) (2), at 10-11].
DA may require enumerated non-monetary conditions of release.
Comment to WJC draft states: This section is new and is intended to create an additional option for release…pending initial appearance. While district attorneys are under no obligation to allow release…may be preferable to detaining arrested persons who are likely to be released without monetary conditions after initial appearance. This option may also serve the interests of victims by allowing conditions to be imposed …without waiting for a court appearance. Release conditions are limited…monetary conditions, or more intrusive restrictions on arrestee…are reserved for judicial determination.

f) A person arrested for an offense in another county may have bail set by the court in the county of arrest.
969.35, at RL 81
Allows release without unnecessary delay and expense - current law requires transporting defendant to county where offense occurred so bail can be set by that court.

g) Police may take cash deposit at police station if cash bail is set before the initial court appearance.
969.36, at RL 81
Applicable in mandatory arrest, arrest in another county, and bail schedule cases.

h) Elimination of current s. 969.14 (1) authority of sureties (persons who make a cash deposit to secure appearance bond) to arrest defendant and deliver him or her to sheriff.
969.41, at RL 82 [967.27, at 21-22].
Sureties who wish to be discharged from obligations of bond may apply to court for an order to that effect under new s. 969.37.

i) Deferred and suspended prosecution agreements.
970.15, at RL 92-93 [970.16, at 7-8].
Defines terms, makes agreements available in all case types (except OWIs per current law), agreement and statements inadmissible at later trial, agreements enforceable in same manner as plea agreements.

j) Initial appearance in court required within 96 hours after arrest.
971.015 (1) (a), at RL 97 [971.02 (1) (a), at 3].
Clarifies current s. 970.01's general requirement that it occur "within a reasonable time."

k) DA may provide discovery before initial appearance.
971.015 (4), at RL 97 [971.02 (4), at 3].
Comment to WJC draft provides: Delaying the initial appearance in non-custody cases and allowing discovery before that appearance can be important attributes of a system that allows prompt disposition of misdemeanors – a development this revision intends to encourage and facilitate.

l) Right to counsel – unless the defendant makes a knowing and voluntary waiver of the right to counsel at the initial appearance, the court shall not permit an unrepresented defendant to enter a plea other than not guilty.
971.027 (1), at RL 99 [971.03 (1), at 4].

m) DA shall provide discovery at initial appearance.
971.035, at RL 100 [971.04, at 5].
All police investigative reports and defendant's criminal record in DA's possession. Disclosure of all other material governed by general discovery rules in s. 971.43.

n) Require earlier disclosure of discoverable material by both parties under general discovery rules.
971.43 - .44, at RL 140-142.
Facilitates trial preparation and early settlement by requiring disclosure of all materials within a reasonable time before the pretrial conference or the time set in a scheduling order. Current law requires disclosure 10 days before trial.

o) Create a process to obtain evidence (documents and other tangible objects) by subpoena before trial.
971.49, at RL 143.
Process intended to facilitate settlement or trial preparation. Subpoena must be issued by court, motion to quash available.

p) Create a process to obtain non-testimonial discovery from a third party prior to trial.
971.57, at RL 146.
Defendant may obtain a subpoena requiring a third party to participate in a procedure to obtain non-testimonial evidence (under new s. 971.56, at RL 145). Defendant must show probable cause to believe the person subpoenaed committed the crime with which the defendant is charged, and that evidence is necessary to adequate defense and cannot practicably be obtained elsewhere. Subpoena must be issued by court, motion to quash available.

q) Exception to guilty-plea waiver rule for challenges to constitutionality of statute.
971.085 (1) (b), at RL 103 [971.07 (1) (b), at 7-8].
Prevents unnecessary trials, by allowing a challenge to the constitutionality of a statute to be raised on appeal after a defendant enters a guilty plea to the charge.

r) Consolidation provisions expanded.
971.09, at RL 104-105 [971.08, at 8-9].
Comprehensive revision of current s. 971.09, intended to make consolidation of cases pending in different counties more widely available. Allows consolidation for no-contest pleas as well as guilty pleas, consolidation after judgment of conviction, allows defendant to consent to read-ins in other counties, and deletes the in-custody requirement.

s) Allow a motion to dismiss to address rare situation where uncontroverted facts show that case cannot be proved.
971.69, at RL 148-149.
New provision intended to serve the official function of the preliminary hearing – to identify weak cases that should not continue to trial. .
Defense must 1) allege the element of offense, or other essential fact, that the state cannot prove at trial because there is no genuine issue of material fact, and 2) allege the evidence or lack of evidence that is uncontroverted and establishes the grounds stated in the motion. Court must deny motion without a hearing if the allegations, even if true, would not justify dismissal or demonstrate that a material issue of fact exists that must be resolved at trial. If the allegations, if true, would justify dismissal, then the court may allow the prosecutor to file a written response to the motion. The court may allow testimony if it will resolve a question whether a material question of fact exists.

t) Court may express reservations about appropriateness of a plea agreement's sentence recommendations before accepting plea.
971.08 (1) (ag), at RL 103 [971.09 (2), at 9].
Intended to decrease post-sentencing claims of "sandbagging" if the court exceeds a negotiated sentence recommendation.

u) Changes to competency to stand trial procedures.
Current law secs. 971.13 - .14 are re-codified and subtitled in proposed Subchapter II,

COMPETENCY, secs. 975.30 - .39, RL at 230-237, with the following changes:
975.33 (1) (f) and 975.36 (1), RL at 232-233, 235, require the examination and re-examination reports to contain an opinion about whether a person who is not likely to regain competency meets the criteria for commitment under ch. 51 or 55, to facilitate the decision whether to pursue civil commitment or protective placement.

975.34 (3), RL at 233, changes the burden of going forward with evidence at a competency hearing. It reflects the Council's conclusion that the procedures would be simpler and clearer if the burden of going forward was assigned to the prosecution in all cases. This eliminates the current law requirement of asking the defendant what he or she claims in order to allocate the burdens of proof.

975.34 (4), RL at 233, based upon Rule 466 (f), *Uniform Rules of Criminal Procedure*, does not allocate the burden of persuasion to any party, and provides that the defendant shall be found competent only if the court, after hearing the evidence or reviewing the report or both, finds by the greater weight of the evidence that the defendant is competent.

975.34 (6) (b), RL at 233, establishes a "greater weight of the evidence" standard for finding that the defendant is likely to regain competency if treated. Outpatient treatment can be ordered with no additional findings. Inpatient treatment may be ordered if "clear and convincing evidence" is present that the defendant can be restored to competency within the maximum commitment period, and is intended to offer protection roughly equivalent to those facing civil commitment in terms of the burden of persuasion.

975.34 (7) (c), RL at 234, requires the commitment order to specify the number of days of sentence credit to be applied toward reduction of the maximum length of commitment.

975.36 (2), RL at 235, requires reports, and hearings within 14 days of receipt of the report, at any time that the department determines that the defendant is competent or is unlikely to regain competency within the commitment period. This is in addition to the reports and hearings provided at 3, 6 and 9 month intervals under current law.

975.38, RL at 236, requires that a decision be made promptly at the end of the commitment to either discharge the defendant or pursue the transition to a civil commitment or protective placement.

975.39, RL at 237, codifies standards and procedures for challenges at the post-conviction stage, consistent with ***State v. Debra A.E.***, 188 Wis. 2d 111, 523 N.W.2d 727 (1994).

v) Changes to procedures in trials following a plea of not guilty by reason of mental disease or defect.
Current law secs. 971.15 - .17 are re-codified and subtitled in proposed Subchapter III, MENTAL RESPONSIBILITY, secs. 975.50 - .64, RL at 238-250, with the following changes:

975.52 (4) (b), RL at 241, replaces current s. 971.165 (3) (b) and provides that the commitment order entered under s. 975.57 is the final order in the case, from which the defendant has a right to appeal, codifying ***State v. Smith***, 113 Wis. 2d 497, 508-511, 355 N.W.2d 376 (1983).

975.55 - .56, RL at 242-243, allow an immediate, temporary commitment to the department for additional investigation and examination, to last until a hearing on the final commitment can be held under s. 975.57.

971.17 (6) is revised in new s. 975.61, RL at 248, to require notice to the corporation counsel of the expiration of the commitment order because it is corporation counsel's duty to initiate civil commitment or protective placement proceedings. The current law provision allowing the court to "order the proceeding" if the county does not proceed under ch. 51 or 55 is deleted.

II. Problematic/Advocated against:

a) Arrest warrant without criminal complaint if probable cause to believe person named committed offense.
969.20 (2), at RL 68 [969.06, at 4-5].
Warrant may issue based on filed affidavit or after examination under oath.
Comment to 12/1/99 draft says it is intended for situation where subject can't immediately be located "and where a chance to speak with the person may clarify whether issuing a criminal charge is appropriate."

b) Elimination of preliminary hearing.
Repeal current law s. 970.03.

c) Amending the charge after plea entered.
970.09, at RL 90 [970.05, at 3].
Codifies case law. New sub. (2) allows amendment after plea but before trial, with leave of the court provided defendant's rights are not prejudiced. Sub. (4) amends current s. 971.29 (2), and limits amendments after verdict to "technical variances" to conform to the proof.

d) Process for disclosure of discoverable materials.
971.51, at RL 143.
SPD believes that both parties should be required to provide copies of discoverable material to the other side.
Problems obtaining discovery from the prosecution, in the years since this provision was drafted, have been reported by SPD staff and the private defense bar. Some prosecutors require the defense to visit the DA office and allow access to the file to make copies only at specified times. Sometimes the hours are unworkable, attorneys or other staff are unavailable or do not have sufficient time to make copies, sometimes travel expense is prohibitive, or the fees are not reduced to reflect that defense staff make the copies. All result in delay of the case.

e) Allows an alternate juror to replace a juror after deliberations have begun.
972.23 (2), at RL 168-169.
Court must ensure that alternate juror does not discuss case with anyone, and instruct the new jury to begin deliberations anew. SPD believes that the only way to ensure that substituting an alternate juror is not prejudicial to the defendant is to allow it only with the defendant's consent. SPD is not opposed to allowing it only with both parties consent, however. Such a rule would be consistent with the current rule allowing waiver of a trial by jury and allowing trial by a jury of less than 12 on stipulation by the parties. *See* Wis. Stats. § 972.02.

III. Otherwise significant:

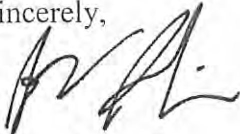
a) No-knock warrant execution - codification of case law.
968.465 (6), at RL 48-49 [968.46 (4), at 27-28].
Warrant may authorize execution without announcement when reasonable suspicion is shown that announcement and delay would be dangerous or futile or would inhibit effective investigation of the crime, by, for example, allowing the destruction of evidence.

968.485, at RL 50 [968.48 (2) (a), at 29].
Knock and announcement rule, with exceptions for warrant and for unforeseen circumstances existing at time of execution.
Comment to s. 968.46 (4), p. 27-28 in 12/1/99 draft of bill, provides: Sub (4) is new and is created to require that, when the basis for a "no-knock" entry is known at the time the warrant is applied for, it should be presented to the issuing judge and a provision for such entry included in the warrant. *Richards v Wisconsin*, 117 S.Ct. 1416 (1997); *State v Cleveland*, 118 Wis. 2d 615, 626 (1984). The reasonable suspicion for a no-knock entry must continue at the time the warrant is executed, however. See *State v Cleveland* and s. 968.48 (2) (a).

b) Complaint = information for purpose of state constitutional right to speedy trial.
970.06 (4), at RL 88 [970.01 (4), at 1].
Clarifies the timing of a demand for speedy trial.

Thank you again for the opportunity to provide information on Assembly Bill 383. If any committee members have questions, please feel free to contact us at any time.

Sincerely,



Adam Plotkin
Legislative Liaison
Office of the State Public Defender

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 11, 2013

TO: Members, Assembly Judiciary Committee & Senate Judiciary and Labor Committee

FROM: Kevin Potter, Administrator, Department of Justice Division of Legal Services

RE: Assembly Bill 383, relating to criminal procedure

Dear Chairman Ott, Chairman Grothman, and Members:

Thank you for the opportunity to provide information to you and the Committees as you hear and consider 2013 Assembly Bill 383.

The bill before you is the work product of the Wisconsin Judicial Council. It recommends vast changes to the Wisconsin statutes that govern criminal procedure. The Council's process was collaborative, moving from issue to issue over the span of over a decade. While the process attempted consensus, membership and circumstances changed dramatically over time, much like the composition of the legislature has changed, and did not include all criminal procedure stakeholders. This observation is not intended to impugn the Council's work or best intentions, but rather is intended to make it clear to the legislature that premise the bill reflects a current consensus of experts is false.

In fact, while the Wisconsin Department of Justice participated in discussions regarding the draft document as a statutorily-designated member of the Council, we expressed to the Council in a letter dated December 14, 2011, our concern that our participation would eventually be construed and represented as tacit agreement with each individual aspect of the draft document. As a matter of good practice, the Department preferred to withhold its judgment until the Council completed its work and the draft document became an actual bill.

Having reviewed the product, the Department does not endorse this bill. Any assertion to the contrary is erroneous.

When considering any legislation purported to make comprehensive changes to a system, proponents should be able to answer one very important question:

> What about the current state of the criminal code requires comprehensive changes, on the timeline, and in the manner put forward by the Council as now contained in 2013 Assembly Bill 383?

While members and invited guests, one of which was a representative of the Department of Justice, were publicly briefed by the Council on September 26, 2013, no such rationale for change was presented. The only reason presented was that this was a consensus product. "We worked for a long time on this, trust our judgment, and pass 372 pages of reform so you don't have to do the hard work we did," was the proffered reason. But as explained above, this bill does not reflect a current consensus among stakeholders and the process to date does not include the views of all stakeholders. Moreover, the time it took to develop the proposal undermines, not supports, an argument for passing the bill as is. Things have changed since this process was initiated, but the Council's "consensus" decisions made many years ago were not updated to reflect that change. Finally, nothing can substitute for the scrutiny of the legislative process, where the bill's defects can be identified and revisions considered. And a clear understanding of this bill may be yet incomplete.

In our view, no rationale other than the "authority of hardworking experts" was presented for passing AB 383 because there is no need for comprehensive reform. In general, Wisconsin's current criminal procedure code together with judicial decisions informing the code's application are well understood by practitioners and enables the fair, just, and speedy resolution of criminal cases. The system protects the due process rights of defendants and the reliability of outcomes in criminal cases. Without a sound rationale that would remedy established shortcomings in the current state of the law, any change may be superfluous and lead to unintended consequences. In our view, without a foundational case for change, there should be no change.

In addition, we are concerned about the significant yet indefinite costs associated with adoption of this proposal. Practitioners and judges will have to be trained, not only leading to direct costs but leading to the loss of productivity while practitioners are engaged in retraining while displacing current routine workloads. Thousands of criminal justice professionals will be required to understand and administer wholly new chapters of the law they currently work with and from – practitioners from whom no complaint about the current law is in evidence. Moreover, for every change, there will be uncertainty and appeals on unique issues – ironically, increasing the possibility that we will truly need another reform.

Our concerns with the bill should not be viewed as a rejection of all of the bill's provisions. Aspects of the criminal procedure code can certainly be improved. We believe, however, that the legislature is certainly capable of independently reviewing individual proposals, through the normal legislative process, and without accepting or having to wade through whatever "tradeoffs" were made in a 372-page comprehensive package. This is what the legislature did in its recent reform of preliminary hearings, when it chose to protect crime victims from needlessly testifying at hearings where a defendant's fair trial rights were not at stake. That is what the legislature did when it authorized the use of e-signatures on criminal complaints, to save law enforcement resources – again, without limiting a defendant's fair trial rights.

Last, it is important that the committee understand the nature of some of the

substantive objections (or at least areas for further scrutiny) the Department has identified. Below is a listing of those issues that have been identified as problematic for the reasons attached to each. This list is far from comprehensive, but establishes further specific questions about elements and the advisability of AB 383 which remain unanswered - in addition to the fundamental question of necessity. They are:

1) **Department of Health Services (DHS)** - The Legislative Reference Bureau bill analysis states that several sections of the bill impact DHS. The bill specifically requires an additional report from DHS and a requirement that the court schedule a review of this additional report within 14 days.

   Did the Council check with DHS and trial judges regarding the impact of this provision?

   Given the heavy caseload carried by trial judges in the circuit court, how likely will a judge have available court time to schedule complex hearings dealing with mental health and legal issues with such short notice?

2) **Sexual Predators** – The bill repeals the existing provisions of chapter 975 and the analysis states that mental health issues affecting a criminal prosecution will be moved to chapter 975. Chapter 975 presently is the chapter addressing sex crimes law. Both mental health issues and sex crimes law involve legal questions that may impact the work performed by DHS.

   Did the Council check with DHS regarding: 1) the impact repealing Chapter 975 would have on the DHS; 2) whether the current version of Chapter 975 involves DHS providing sex offenders with specialize treatment; and 3) whether any sex offenders would be released into the community without completing treatment under the bill?

3) **Pretrial Dismissal** - The analysis states that the bill permits a defendant to move for a pretrial dismissal of the complaint. The bill anticipates a motion from the defendant along with a written response by the district attorney. The court then may hold an evidentiary hearing with testimony. The bill anticipates this procedure as a replacement for the preliminary hearing, which the bill repeals. The legislature authorized hearsay at preliminary hearings in 2011 Wisconsin Act 285, in part, to spare victims from having to testify repeatedly in court.

   Given this legislation repeals 2011 Wisconsin Act 285 and replaces the existing preliminary hearing with a pretrial dismissal statute that anticipates testimony, might the proposed pretrial dismissal provision cause more victims to testify?

   Domestic abusers commonly pressure victims to recant so wouldn't this pretrial dismissal statute provide an incentive to a defendant to further pressure a victim to recant?

Did the Council check with any victim/witness professionals or victim advocacy organizations regarding the impact this proposal would have on crime victims?

4) **Discovery** – The analysis states that the bill requires the district attorney to provide discovery at the initial appearance, provided that the defendant has obtained or waived legal representation. The bill appears to require an initial appearance within a "reasonable time" after arrest and not more than 96 hours or 4 days.

   If an arrest happened on a Thursday afternoon with a holiday on the following Monday, does the bill anticipate that the initial appearance generally would occur on Friday?

   When there is an arrest in the late afternoon or evening, is it fair to assume that the police department may not forward the police report to the district attorney until the following day?

   Does the bill generally require the district attorney to provide the law enforcement investigative reports at the initial appearance?

   Do law enforcement investigative reports commonly include incriminating statements made by crime victims against defendants?

   Could a defendant waive counsel and then receive the police reports only a day or few days after the crime?

   Did the Council check with victim/witness professionals or victim advocacy organizations regarding the impact this process would have on crime victims?

5) **Change in Time Limits** - The bill changes several time limits within criminal procedure. For example, on page 228, the bill reduces the speedy trial in misdemeanor actions from 60 to 45 days for defendants in custody. On page 263, the bill reduces the number of days DHS and the county department has to present a conditional release plan from 21 to 14 days. The bill also reduces the number of days from 60 to 14 days that DHS and the county department has for submitting a plan to the court. On page 356, the bill creates a new statute section, 975.62(4), which imposes a 7-day deadline upon the district attorney or DHS to make a victim notice requirement to the Department of Corrections.

   Did the Judicial Council check with DHS or victim/witness professionals & organizations regarding the impact these changes in time limits might have on the DHS and witnesses?

6) **Subpoena for Documents** - The analysis states that the bill creates a defendant's increased access to the production of documents and other objects. On pages 295-296, the bill creates a statute that allows a defendant to request a subpoena for the production of documents and other tangible objects whenever

the evidence "may be material" to the case. On pages 298-299, the bill creates a new statute for a defendant to obtain a subpoena for the non-testimonial discovery from 3rd parties. The bill also changes the discovery statute to permit a defendant to test physical evidence, as stated on pages 277-278, while leaving primarily in place the scientific testing discovery statute, as stated on page 281. These changes may have an impact on evidence chain of custody.

Does the bill allow a defendant, whether represented or unrepresented, to obtain documents through subpoena in a new discovery statute?

Does the bill allow a defendant, whether represented or unrepresented, to subpoena and require a 3rd party to participate in the proceeding by providing non-testimonial evidence?

Does the bill amend the discovery statute by adding a new provision that allows a defendant, whether represented or unrepresented, to test physical evidence in the case?

7) **Arrest and Release of a Defendant** - The analysis states that the bill contains several provisions changing the arrest and release of a defendant. For example, the bill amends current statutes by allowing a law enforcement officer to release a person without making a determination that there are insufficient grounds to charge the person in a criminal complaint, as provided for in section 448 on pages 134-135. The bill also creates a statute for the release of defendants on bond by the district attorney in section 634 on pages 198-200.

   Did the Council check with the law enforcement community regarding the impact of this bill on law enforcement?

   Would the district attorney become a witness or have a conflict of interest in any prosecution for bail jumping under this new statute?

   Does transferring bond authority traditionally in the judicial branch of government to the district attorney in the executive branch create any concern with the separation of powers between the branches?

   Does release on bond by a district attorney remove the circuit court and defense attorney (*e.g.* public defender) from the process?

8) **Costs to Law Enforcement** - The analysis states that the bill "includes provisions intended to expedite the processing of misdemeanors." In section 696, on page 216, the bill creates a new statutory subsection that requires the court to hold the initial appearance "as soon as practicable" for a defendant in custody in another county. Although video-conferencing is common, it is not used in every county or by every circuit court judge. And, even if video-conferencing is available, some counties or judges prefer in-person initial

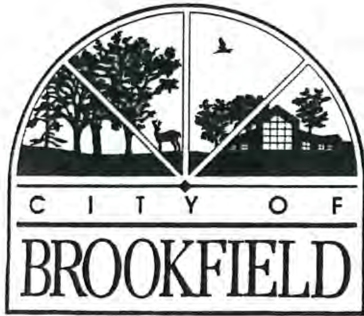
appearances, particularly when requested by a defendant or defendant's attorney.

What is the fiscal impact to law enforcement agencies, particularly sheriff's departments, to transport incarcerated defendants to out-of-county court hearings?

As indicated, these are just some potential issues with the bill. The Department of Justice does not endorse the bill, and respectfully urges the committee to refuse to vote out the bill rather than work through a cumbersome amendment process. Proposals within AB 383 that have merit can always be taken up by separate legislation where they can receive a more focused and meaningful review.

Sincerely,

Kevin Potter, Administrator
Division of Legal Services
Department of Justice



POLICE DEPARTMENT

2100 North Calhoun Road
Brookfield, Wisconsin 53005-5054
(262) 787-3566 24-Hour Fax (262) 782-8757
Administrative Fax (262) 796-6701
Daniel K. Tushaus, Chief of Police

October 7, 2013

COPY

Rep. Jim Ott, Chair
Assembly Judiciary Committee
Box 8953
Madison, WI 53708-8953

RE: **2013 AB-383, Criminal Procedure Revision Bill and Lack of Statutory Authority for Enforcement of State Forfeiture Offenses**

Dear Rep. Ott:

I wish to bring to your attention a serious *lacuna* in Wisconsin law concerning the enforcement of State forfeiture offenses which I request you consider for inclusion in AB-383. For many years, those in law enforcement and the legal profession assumed that police officers and deputy sheriffs had legal authority to enforce State forfeiture offenses. It was not until the passage of 2011 Act 35 that it became evident that such is not the case. The Attorney General's staff which conducted State-wide training for law enforcement officers regarding the creation of carrying concealed weapons licenses advised them that there was no general statutory authority to enforce State forfeiture offenses. A recent study of this issue in connection with 2013 AB-252 conducted by the Wisconsin Legislative Council came to the same conclusion.

Enforcement powers can only be conferred by the sovereign, i.e. the legislature. N.B. *City of Madison v. Ricky Two Crow*, 88 Wis.2d 156 (Ct. App. 1979). Police have arrest/enforcement authority for crimes under Wis. Stat. 968.07, for civil traffic regulations under Wis. Stat. 345.22, and for civil municipal ordinance violations under Wis. Stat. 800.02 (6). However, **no statute confers similar authority to enforce/arrest for State forfeiture offenses.**

Many law enforcement executives are now aware of this *lacuna* in the law and some have instructed their officers not to stop, detain, or arrest for State forfeiture offenses for fear of a Federal civil rights lawsuit under 42 USC 1983. Furthermore, confining or restraining a person without lawful authority constitutes the felony of False Imprisonment (Wis. Stat. 940.30). The net result is that a plethora of State forfeiture violations are not being enforced throughout Wisconsin. While such a situation may thwart the will of the legislature, only the legislature can remedy this matter by reintroducing and passing 2011 AB-237 which would confer enforcement authority for State forfeiture offenses. (This bill died in the Assembly's rules committee.)

While AB-383 is styled as a criminal procedure bill, it is a fact that State forfeiture (civil) offenses are scattered throughout the Wisconsin criminal code (Wis. Stat. 939.01) as well as throughout the other volumes of the statutes. Hence, it is entirely appropriate for AB-383 to be

amended to create general enforcement authority for State forfeiture offenses no matter their location within the statutes.

The following is only a small sample of unenforceable State forfeiture offenses contained in the Wisconsin criminal code:

947.012 (2)	Unlawful use of telephone
947.0125 (3)	Unlawful use of computerized communication systems
948.605 (2)	Gun-free school zones
948.70 (2)	Tattooing of children
941.25	Manufacturer to register machine guns
941.2965 (2)	Restrictions of use of facsimile firearms
941.297 (2)	Sale or distribution of imitation firearms
941.299 (3)(b)	Restrictions on the use of laser pointers
943.22	Use of cheating tokens
943.225 (2)	Refusal to pay for a motor bus ride
943.45 (3)(a)	Theft of telecommunications service
943.455 (4)(a)	Theft of commercial mobile service
943.47 (3)(a)	Theft of satellite cable programming

Other unenforceable State forfeiture offenses can be found in other chapters of the statutes:

114.09 (1)(b)	Intoxicated or reckless flying of aircraft
134.96	Hotel rooms used for underage alcohol or drugs
167.31 (2)	Safe use and transportation of firearms and bows
157.70 (10)	Disturbance of human graves
192.32	Trespassing/prowling on railroad tracks
192.321	Jumping on/off a moving train
255.40	Hospitals not reporting to police gunshot wounds or wounds caused by crime
323.28	Refusal to obey official orders during an emergency management incident

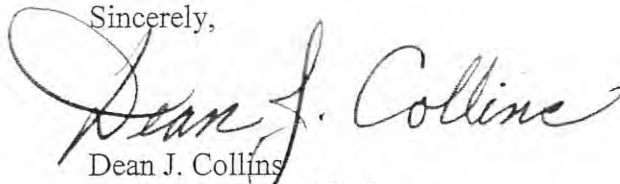
As the result of a lack of legislative enforcement authority, Wisconsin law enforcement officers may not legally stop, detain, question, or arrest a violator of the above statutes. This obviously puts our law enforcement agencies in a very difficult position. Without such legislative enforcement authority, officers risk a Federal civil rights lawsuit under 42 USC 1983 and possible criminal prosecution for False Imprisonment.

I have attached for your information an article I authored for the September, 2012, edition of the *Wisconsin Lawyer* magazine regarding this matter. I am also attaching a copy of

2011 AB-237 which I strongly urge the committee to incorporate into 2013 AB-383. 2011 AB-237 was endorsed by the Wisconsin Chiefs of Police Association, the Badger State Sheriffs Association, the Wisconsin District Attorneys Association, the Milwaukee County Law Enforcement Executives Association, the Milwaukee County Chiefs of Police Association, the Waukesha County Chiefs of Police Association, Milwaukee County D.A. John Chisholm, Waukesha County D.A. Brad Schimel, and the League of Wisconsin Municipalities.

I am willing to meet with anyone at any time to discuss this important matter in greater detail.

Sincerely,



Dean J. Collins
Assistant Chief of Police

(262) 787-3567
collins@ci.brookfield.wi.us

Attachments:

Sept., 2012 Wisconsin Lawyer article
2011 AB-237

THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

SEPTEMBER 2012 VOLUME 85 NUMBER 9

Read/Post Comments

Letters

Enforcement Lacuna in Statutes

I read with interest the article "Wisconsin's Concealed Carry Law" by Mark R. Hinkston (July 2012), explaining the many provisions of 2011 Act 35, which regulates the carrying of weapons. This is an issue of obvious importance to law enforcement officers, prosecutors, and the defense bar. The article mentioned that Act 35 created a number of state forfeiture offenses for certain violations of the Act. I and many other law enforcement executives attended a series of seminars held throughout the state that were sponsored by the Wisconsin Attorney General to explain the intricacies and mechanics of the concealed carry law. This Act and the Attorney General's seminar surfaced a much broader issue concerning a void in the Wisconsin statutes.

When questions arose regarding enforcement of Act 35, the assistant attorneys general present stated what had been known to only a handful of police and legal professionals: there is no general statutory authority for law enforcement officers to enforce state forfeiture violations.

While the legislature has authorized arrests for crimes (Wis. Stat. § 968.07), traffic regulations (Wis. Stat. § 345.22), and municipal ordinance violations (Wis. Stat. § 800.02(6)), there is no similar statutory authority to enforce state forfeiture violations. Without such authority, law enforcement officers cannot legally stop, detain, question, cite, or take into custody the violator of a state forfeiture offense without thereby inviting a federal civil rights lawsuit.

Why should this lacuna in the statutes concern the legal community? Simply put, without statutory enforcement authority, a significant number of state forfeiture laws are unenforceable nullities. Hence, the legal remedies created by the legislature are unavailable to clients and to the public at large. The following are only a minute number of such state forfeitures: flying aircraft while impaired by alcohol or drugs (Wis. Stat. § 114.09(1)(b)); prisoners engaged in telephone solicitations (Wis. Stat. § 134.73); disposal of records containing personal information (Wis. Stat. § 134.97); felons installing burglar alarms (Wis. Stat. § 134.59); illegal transport of weapons (Wis. Stat. § 167.31(2)); disturbance of

human graves (Wis. Stat. § 157.70(10)); and refusal to obey emergency management orders during emergency situations, natural or human-caused (Wis. Stat. § 323.28). There are many other state forfeiture violations scattered throughout the five volumes of the statutes for which local law enforcement officers cannot take enforcement action.

2011 A.B. 237 would have granted Wisconsin law enforcement officers the authority to enforce state forfeitures. This bill was endorsed by the Wisconsin Chiefs of Police Association, the Milwaukee and Waukesha counties police chiefs, the Badger State Sheriff's Association, the League of Wisconsin Municipalities, and the Wisconsin District Attorneys Association. It passed the Assembly's Criminal Justice Committee on a bipartisan 9-0 vote and then died in the Assembly Rules Committee at the end of the legislative session. Unless this bill is reintroduced and passed in the next session of the legislature, expect your local police agency to tell you "there's nothing we can do" when you ask them to enforce a state forfeiture violation on behalf of your client or organization.

(The opinions in this letter are the author's alone and do not necessarily reflect those of the city of Brookfield or its police department.)

Dean J. Collins
Assistant Chief of Police, City of Brookfield

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-0404/1
CMH:jld:rs

2011 ASSEMBLY BILL 237

August 30, 2011 – Introduced by Representatives KLEEFISCH, DANOU, FARROW and KNILANS, cosponsored by Senator WANGGAARD. Referred to Committee on Criminal Justice and Corrections.

1 AN ACT *to create* 175.39 of the statutes; **relating to:** authorization to make
2 arrests for activities punishable by civil forfeiture.

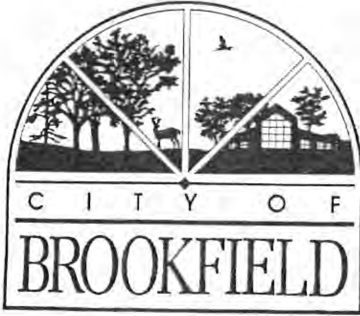
Analysis by the Legislative Reference Bureau

Current law grants specific authority to law enforcement officers to arrest for violations of criminal procedures, noncriminal traffic offenses, and ordinances and grants specific authority to law enforcement officers employed by cities to arrest for violations of any law. This bill specifies that any law enforcement officer may arrest a person for violating a law that constitutes a civil forfeiture if the law enforcement officer has reasonable grounds to believe that the person is violating or has violated the law.

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

3 SECTION 1. 175.39 of the statutes is created to read:
4 **175.39 Arrest by a law enforcement officer.** In addition to the arrest
5 powers under s. 968.07, a law enforcement officer may arrest a person for a law

1 violation that is punishable by a civil forfeiture if the arresting officer has reasonable
2 grounds to believe that the person is violating or has violated the law.
3 (END)



POLICE DEPARTMENT
2100 North Calhoun Road
Brookfield, Wisconsin 53005-5054
(262) 787-3566 24-Hour Fax (262) 782-8757
Administrative Fax (262) 796-6701
Daniel K. Tushaus, Chief of Police

October 3, 2013

Reps. Krug, Bies, A. Ott, Wachs,
T. Larson, Loudenbeck, Vruwink, Sinicki

Senators Lassa, Lehman

RE: 2013 AB-391, Display and Sale of Novelty Lighters and Providing a Penalty

Dear Representatives and Senators:

I have reviewed the provisions of the above-captioned bill and wish to inform you that the bill as currently drafted cannot be enforced by Wisconsin law enforcement officers. That is because the Legislature has failed to grant our officers general authority to enforce State forfeiture violations. These violations are civil rather than criminal offenses. Hence, officers cannot stop, detain, or arrest those persons violating the provisions of AB-391. Any officers who attempt to enforce such State forfeitures are liable to a Federal civil rights lawsuit under 42 USC 1983 as well as the agency employing such officer.

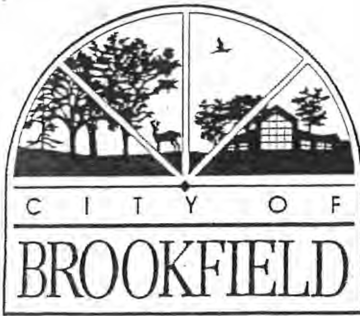
The Wisconsin Attorney General and the Wisconsin Legislative Council are both aware of this *lacuna* in police enforcement powers. A legislative solution to this problem was introduced in the last legislative session but died in the Assembly's rules committee; that bill was 2011 AB-237 (copy enclosed). I am also enclosing a copy of an article I wrote that appeared in the September, 2012, *Wisconsin Lawyer* magazine which will provide some further detail on this matter.

Unless 2011 AB-237 is reintroduced and passed in the current session, almost all Wisconsin forfeiture violations will remain unenforceable by Wisconsin law enforcement officers. Without such passage, creating additional State forfeiture violations is nothing more than an exercise in futility. They are, in effect, simply null and void since they are unenforceable.

I would be happy to meet with any or all of you to discuss this matter further. You may contact me at (262) 787-3567 or collins@ci.brookfield.wi.us.

Sincerely,

Dean J. Collins
Assistant Chief of Police



POLICE DEPARTMENT

2100 North Calhoun Road
Brookfield, Wisconsin 53005-5054
(262) 787-3566 24-Hour Fax (262) 782-8757
Administrative Fax (262) 796-6701
Daniel K. Tushaus, Chief of Police

June 28, 2013

Rep. Garey Bies
Assembly Committee on Criminal Justice
Box 8952
Madison, WI 53708-8952

RE: 2011 AB-237 (Enforcement of State Forfeiture Violations) and **2013 AB-252 (Disposal of Fetal Remains)**

Dear Rep. Bies:

On June 26, 2013, we spoke over the phone about your bill, 2013 AB-252, concerning a proposed State forfeiture penalty for the illegal disposal of fetal remains. I asked you how it might be enforced. Since we have a major hospital and numerous other medical facilities within our jurisdiction, our interest in your bill is not merely academic. (We believe that other police agencies throughout Wisconsin might also share our concern about enforcement.)You assumed that local police officers and deputy sheriffs would take enforcement action. Given that there is no statutory authority to enforce State forfeiture violations (your bill included), I strongly doubt that local law enforcement agencies would want to risk a Federal civil rights lawsuit to do so.

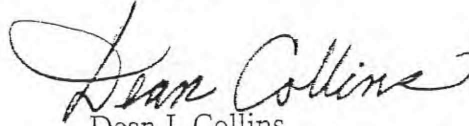
2011 AB-237 was proposed (and passed your committee unanimously on October 25, 2011) before it died as the result of a deliberate campaign of misinformation. 2011 AB-237 would have granted local law enforcement agencies the authority to enforce State forfeitures. While the word "arrest" was contained in that bill, it was a necessary 'word of legal art' to match the other statutes conferring enforcement authority for crimes, traffic regulations, and municipal ordinance violations. In point of fact, without the word "arrest", police cannot stop, detain, or question a suspect of a State forfeiture violation without thereby possibly inviting a Federal civil rights lawsuit under 42 USC 1983.

Again, I don't know who is intended to enforce 2013 AB-252 if it passes nor who people should contact if they discover fetal remains or wish to report a possible violation. I am merely raising the question since you are the principal sponsor of the bill. I have attached for your information copies of correspondence regarding this issue for 2011 AB-237; you will note that you were copied on almost all of these letters as were numerous other legislators. I wish to reiterate that almost all of the State forfeiture violations contained in the statutes will remain unenforceable unless 2011 AB-237 is reintroduced in the current session. After all, why pass laws that can't be enforced?

As always, I am most willing to come to Madison at any time or place to speak to you or any other legislators about this issue. I have spent 44 years of my life in professional, full time law enforcement in my current agency and the Milwaukee Police Department. As a fellow law enforcement veteran I trust you will understand the import of this issue for every law enforcement agency throughout Wisconsin as well as the legislature itself.

Please advise me of your position on the appropriate enforcement mechanism for 2013 AB-252.

Sincerely,



Dean J. Collins
Assistant Chief of Police

Attachment

cc: Mayor Steven V. Ponto
Rep. Joel Kleefisch
Rep. William Kramer
Sen. Glenn Grothman
Sen. Leah Vukmir
Sen. Paul Farrow
Sen. Mary Lazich