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Protecting Justice for all Since 1977

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August 20, 2015

Chairman Jim Ott
Assembly Committee on Judiciary

Chairman Van Wanggaard
Senate Committee on Judiciary and Public Safety

Dear Chairmen Ott and Wanggaard and members of the Committees,

Chairman Ott, Chairman Wanggaard, and members of the committees,

Thank you for the opportunity to provide information regarding Assembly Bill 90/Senate Bill 82, 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 represented throughout the process of drafting this bill.

The 4 major changes in AB 90/SB82 are 1) encouraging prompt disposition of misdemeanors; 2) reorganizing discovery rules; 3) clarifying inconsistent statutes; and 4) adding more than 20 new statutory provisions to clarify current statute and codify case law.

This long and technical 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 State Public Defender (SPD) recognizes the difficult decisions that went into the drafting of this legislation and achieving a compromise as a comprehensive bill. Our perspective is that this bill represents an opportunity to improve the procedures of the criminal justice system and was not and should not be a vehicle to provide an "advantage" or "edge" to any party.

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 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.

In the summer of 2014, at the request of the authors of 2013 Assembly Bill 383, the Criminal Procedure Committee was reconstituted as an ad-hoc committee to review any concerns with that version of the bill in preparation for the 2015-16 legislative session. The committee was made up of criminal defense experts, prosecutors, the Department of Justice, judges and academics. All committee members as well as outside groups were given the opportunity to submit any changes or additions to the bill as well as proposed alternative language. The committee met several times for all-day meetings to consider these submitted ideas. A majority of the recommended changes were approved unanimously.
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 2015 Assembly Bill 90, the Wisconsin Judicial Council (WJC) bill revising the Criminal Procedure Code – identifying those that the SPD advocated for or against and also those that are beneficial, problematic or otherwise significant from our perspective. We hope that this information will allow the members of the Assembly and Senate Committees, our SPD colleagues, and other criminal defense practitioners, to make informed decisions about this compromise bill.

I. Beneficial/Advocated for:

a) Juvenile in Need of Protective Services pleading requirement - 938.30 (3)
Clarifies the inconsistency in current law that a juvenile found incompetent to proceed must still claim to be knowingly and voluntarily waiving their rights in a JIPS proceeding by saying that the court can enter an order without taking a plea if the juvenile has been found incompetent.

b) Appearance excused (appearance by attorney) in misdemeanors - 967.13 (2)
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 clients' transportation challenges and allows employed clients to miss less work.

c) Release of arrested person by law enforcement officer - 969.17
Codifies discretionary authority of police to release a person arrested without a warrant and 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."

d) Requirement of probable cause finding within 48 hours after warrantless arrest - 969.19
Codification of *Riverside v McLaughlin*, 500 US. 44 (1991). Remedy is release.

e) 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)

f) A person arrested for an offense in another county may have bail set by the court in the county of arrest - 969.35
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
Applicable in cases involving mandatory arrest, arrest in another county, or offenses listed in the bail schedule.

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
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
Defines terms, makes agreements available in all case types (except OWIs per current law), makes agreements and statements inadmissible at later trial, and makes agreements enforceable in same manner as plea agreements.

j) Initial appearance in court required within 96 hours after arrest - 971.015 (1) (a)
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)
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) Release at initial appearance with non-monetary conditions - 971.027
States that if the criminal complaint or other valid charging document is not available at the initial appearance, then the defendant is entitled to release on non-monetary conditions.

m) 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)

n) DA shall provide discovery at initial appearance - 971.035
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.

o) Create a process to obtain evidence (documents and other tangible objects) by subpoena before trial - 971.49
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
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, that evidence is necessary to adequate defense, and that evidence 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)
Prevents unnecessary trials when only dispute is about the validity of the applicable statute, by allowing a challenge on appeal to the constitutionality of a statute after a defendant enters a guilty plea to the charge.

r) Consolidation provisions expanded - 971.09
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, and consent to read-in procedure for charges in other counties. Deletes the in-custody requirement.

s) Court may express reservations about appropriateness of a plea agreement's sentence recommendations before accepting plea - 971.08 (1) (ag)
Intended to decrease post-sentencing claims of "sandbagging" if the court accepts a plea and then exceeds a negotiated sentence recommendation.

t) 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, with the following changes:

975.33 (1) (f) and 975.36 (1), require that the examination and re-examination reports 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.

975.33 (2), allows a court to appoint a guardian ad litem for a defendant in a case in which competency has been raised as an issue.

975.34 (3), 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 change 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), based upon Rule 466 (f), *Uniform Rules of Criminal Procedure*, does not allocate the burden of persuasion to any party, and it 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), 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. This provision is intended to offer protection roughly equivalent to those facing civil commitment in terms of the burden of persuasion.

975.34 (7) (c), 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), 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 provision is in addition to the reports and hearings provided at 3, 6 and 9 month intervals under current law.

975.38, 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, 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).

u) 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, with the following changes:

975.52 (4) (b), 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, 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, 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.

v) Appointment of SPD counsel without a determination of indigency clarification - 977.07
Makes changes to clarify and provide consistency with other provisions in Chapters 48, 51, 55, and 938 that will allow for appointment of SPD counsel in two instances: when competency prohibits the determination of eligibility and for the representation of children involved in a termination of parental rights case.

II. Problematic/Advocated against:

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

b) Amending the charge after plea entered - 970.09
Codifies case law. New sub. (2) allows amendment after plea but before trial, with leave of the court and provided that the 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.

c) Process for disclosure of discoverable materials - 971.51
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; travel expense is prohibitive; or the fees are not reduced to reflect that defense staff made the copies. All of these logistical issues result in delay of the case.

III. Otherwise significant:

a) No-knock warrant execution - codification of case law - 968.465 (6)
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
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)
Clarifies the timing of a demand for speedy trial.

Thank you again for the opportunity to provide information on Assembly Bill 90/Senate Bill 82. If any committee members have questions, please feel free to contact us at any time.

Sincerely,

Adam Plotkin
Legislative Liaison
Wisconsin State Public Defender's Office

Senate Committee on Judiciary and Public Safety
Assembly Committee on Judiciary
Thursday, August 20, 2015

Statement Re: 2015 Senate Bill 82/2015 Assembly Bill 90

David E. Schultz
Professor of Law Emeritus
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 from the time it was first formed in 1992 until 2013.

On behalf of the Judicial Council, I want to express our appreciation to the Committees 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 and Sen Wanggaard for their assistance in helping us get to this point.

I will try to provide some background information about the bill 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 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.

The bill was introduced as 2013 Assembly Bill 383 and received a public hearing on September 26, 2013. Concerns and questions raised about the bill were reviewed during a series of hearings in the summer of 2014. Changes agreed upon during that review were incorporated in the current bills.

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. However, current law relating to the preliminary examination was restored to the bill as a result of the review in summer of 2014.

Cleaning up 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.]

• 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 SB 82/AB 90 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 the bills meet these goals.

Respectfully submitted,

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Senate Committee on Judiciary and Public Safety
Assembly Committee on Judiciary
Thursday, August 20, 2015

Testimony Regarding 2015 Assembly Bill 90 and 2015 Senate Bill 82

April M. Southwick, Attorney
Wisconsin Judicial Council

Good morning and thank you for the opportunity to be here today to discuss the proposed amendments to the rules of criminal procedure contained in Assembly Bill 90 and Senate Bill 82.

I am the staff attorney for the Judicial Council. I have staffed the Council and its study committees since May 2008. My testimony today is intended as a follow up to the testimony provided by Professor David Schultz.

2013 Assembly Bill 383, previously before the judiciary committees in 2013 for an informational hearing and a public hearing, was the predecessor to AB 90/SB 82. Following the second hearing, the Department of Justice and the Wisconsin District Attorneys Association expressed some reservations about AB 383. Representatives from their organizations that had participated in the original drafting of the bill were no longer with their organizations. They also suggested that their positions on some of the proposed amendments in the bill may have changed over the years. The Judicial Council acknowledged their concerns and offered to work with the concerned stakeholders.

The Judicial Council asked its standing committee on criminal procedure to meet with interested stakeholders to attempt to resolve the concerns that had been raised. The committee proposed expanding its membership to include representatives of the interested groups. As a result, the committee was expanded to sixteen members, including five prosecutors, five defense attorneys, two legislators, three judges, and one law professor. The attorney members included designees from the Department of Justice, the Wisconsin District Attorneys Association, the Association of State Prosecutors, the State Public Defender's office, the Wisconsin Association of Criminal Defense Lawyers, and the State Bar Criminal Law Section.

The committee began its work by compiling a list of provisions in AB 383 or the current criminal procedure code that any committee member proposed for further review and consideration. The list also included suggestions received from the Department of Health Services and several groups representing crime victims. From that list, the committee created a workplan that included over eighty provisions that were identified for further study. The committee held six meetings last summer to work through all of the provisions in the workplan, and held two public hearings to receive input from the criminal justice community.

Every contributor who suggested a change to AB 383 was given the opportunity to present to the committee and submit draft language for a proposed amendment. The committee then discussed each proposal. In many cases, the objections or proposed changes were voluntarily withdrawn following further study. If the objection or proposed change was not withdrawn, the committee voted on it. Pursuant to the guidelines unanimously adopted by the committee at the start of its work, the committee recommended revisions to the bill only when the proposed change received majority approval from the committee. Ultimately, when its work was complete, the committee recommended thirty amendments to AB 383. Not every committee member agreed with the resolution of every issue, but everyone was given an equal opportunity to participate in the process and everyone who participated was heard.

The full Judicial Council reviewed the committee's recommendations and approved them by an overwhelming majority. Those recommendations have been incorporated into 2015 AB 90/SB 82 before you today. The changes took a tremendous amount of time and work on the part of the committee members, but I believe all members would agree that AB 90 and SB 82 are better for the process.

OVERVIEW OF THE WISCONSIN JUDICIAL COUNCIL'S PROPOSED CRIMINAL PROCEDURE CODE COMPREHENSIVE REVISION

Prepared by:
Attorney April M. Southwick

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I. RATIONALE

A properly codified criminal procedure code will improve the quality of legal practice in this state and reduce the number of errors and appeals, increasing court efficiency and effectiveness.

II. WHY THE JUDICIAL COUNCIL?

- The last comprehensive revision (1969) was a Judicial Council project.

- Other significant criminal procedure revisions were Council projects:
  - Statutes relating to competency to stand trial (1981).
  - Rules relating to use of videotaped testimony of children (1985).
  - Statues relating to the "insanity defense" (1987).
  - Restitution procedures (1987).
  - Rules relating to conducting proceedings by telephone and audiovisual means (1988 and 1990).

- Uniform Commissioners on State Laws asked the Judicial Council to evaluate the Uniform Rules of Criminal Procedure (the Uniform Rules are based on the current version of the ABA Standards for Criminal Justice).

- The Judicial Council determined that the criminal procedure code needed a complete review:
  - Provisions were hard to find.
  - Organization had broken down as new provisions were added.
  - Case law needed to be codified.

III. PROCESS

A. Guiding Principle

Current practice should be reflected in the statutes and presented in a manner that makes it easy to find and understand – a well-intentioned, if inexperienced, prosecutor, defense lawyer, or judge, as well as the general public, ought to be able to rely on the statutes as a guide to criminal procedure.

B. General Approach

Each chapter of the Criminal Procedure Code (except Chapter 973 Sentencing) was completely reorganized.

- 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.
- The drafting committees were diverse, and included district attorneys, assistant attorneys general, public defenders, private defense lawyers, judges, and academics. The committees 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 endorsement of the full Council.

IV. MAJOR AMENDMENTS

A. Encourage Prompt Disposition of Misdemeanors

Purpose: Increase efficiency by avoiding unnecessary pretrial detention, and/or repetitive court appearances and pretrial conferences, and eliminate the time consuming practice of drafting long-form complaints.

How it's accomplished:

1. Encourage the use of citation over formal arrest and eliminate the long form complaint by allowing endorsement of the citation and its use as the charging document. Amended § 969.24 (Citation for misdemeanor) follows current § 968.085 with a few additions such as the following[1]:

969.24 Citation for misdemeanor.

[1] The shaded text represents the language contained in the draft bill as approved by the Judicial Council.

(1) NATURE. A citation under this section is a directive, issued by a law enforcement officer, that a person appear in court or the district attorney's office. The citation may be used as a criminal complaint if endorsed by the district attorney as provided in sub. (5).
(2m) RELEASE AFTER CITATION. A law enforcement officer citing a person for a misdemeanor shall release the person without a cash bond unless any of the following apply:
(a) The accused has not given proper identification.
(b) The accused is not willing to sign the citation.
(c) The accused appears to represent a danger of harm to himself or herself, another person or property.
(d) The accused cannot show sufficient evidence of ties to the community.
(e) The accused has previously failed to appear in response to a citation, subpoena, summons, or order of the court.
(f) Arrest or further detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.
(3) CONTENTS. The citation shall do all of the following:
(a) State essential facts constituting the crime the person allegedly committed and the statutory section that the person allegedly violated, including the date of the offense and the maximum penalty for the offense.
(b) State the name and address of the person cited, or other identification if the person's name or address cannot be ascertained.
(c) Identify the officer issuing the citation.
(d) Direct the person cited to appear at a specified location and at a specified time and date.
(5) REVIEW BY DISTRICT ATTORNEY. The district attorney shall review the citation and may issue a complaint by endorsing the citation with his or her signature or issue a separate complaint charging the cited person. If the district attorney reviews the case before the return date and declines to prosecute, he or she shall notify the law enforcement agency that issued the citation. The law enforcement agency shall attempt to notify the person cited that he or she will not be charged and is not required to appear as directed in the citation.
(7) FORM. The citation shall be in substantially the same form set forth in s. 969.26 (3).

*2. **Encourage arrest and release over detention.*** Amended § 969.17 (Release by law enforcement officer of arrested person) follows current § 968.08, without the requirement that the officer determine there are "insufficient grounds for the issuance of a criminal complaint." See V. D. 4. for full text of §§ 969.31-.33 (Eligibility for release, Types of release, and Conditions of release) - "Types of release" is a new provision.

969.17 Release by law enforcement officer of arrested person. Except as provided in s. 969.27 (5) (b) 1. [domestic abuse incidents] a law enforcement officer having custody of a person arrested without a warrant may release the person arrested with or without requiring the person to appear before a judge or the district attorney.

969.32 Types of release. In any case where release is allowed, the court shall do one of the following:
(1) Release the defendant to return on a date certain, without conditions.

(2) Release the defendant on a personal recognizance bond.
(3) Release the defendant on an unsecured appearance bond.
(4) Release the defendant on a secured appearance bond.

3. Eliminate the long form complaint by allowing endorsement of the citation and its use as the charging document. § 969.24 (Citation for misdemeanor), see text above. § 969.26 (3) contains a recommended form for the citation.

969.26 Forms.
(3) CITATION. A citation shall be in substantially the following form:
MISDEMEANOR CITATION
Section 969.26 Wis. Stats.

Deposit Permitted: $ ....

Circuit Court for .... County

The undersigned complains for and on behalf of the State of Wisconsin upon information and belief that on or about .... (day), ... (date of violation), at .... (time); in .... County, town/ village/ city of ....; .... (defendant's name); .... (date of birth), ...(sex), ... (street address, city, state, zip code), ... (race), ... (eye color), ... (hair color), ... (weight), ... (height); did the following .... (state facts of violation) in violation of section(s) .... of the .... (year) Wisconsin Statutes and requests that the defendant may be held to answer for the violation.

Dated ...., ... (year)
.... (Signature of officer)
Signed by .... (Name), ... (Dept./Agency)
.... (Title), ... (Badge Number)

You are hereby notified to appear in the
( ) Circuit Court named above
( ) District Attorney's Office
located at .... (street address, city)
on .... (date), at .... (time).

The maximum penalty for this violation is:
( ) Fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both (Class A Misdemeanor).
( ) Fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both (Class B Misdemeanor).
( ) Fine not to exceed $500 or imprisonment not to exceed 30 days, or both (Class C Misdemeanor).

PROMISE TO APPEAR

I have received a copy of this citation. I promise to appear in court at the time and place specified. Signing this citation is not an admission of guilt.
.... (Defendant's signature)
.... (Defendant's address)
.... (Defendant's phone number)

ENDORSEMENT BY DISTRICT ATTORNEY
I have reviewed this citation and approve its use as a criminal complaint under s. 696.10 (6).
Dated ...., ... (year)
.... (District Attorney's signature)
.... (Title)

4. Require access to police reports at the first appearance, and allow discovery even prior to first appearance.

971.015 Initial court appearance.
(4) DISCOVERY BEFORE THE INITIAL APPEARANCE. The district attorney may provide discovery before the initial appearance.

971.035 Discovery at the initial appearance. (1) MATERIAL IN THE DISTRICT ATTORNEY'S POSSESSION. At the initial appearance, the district attorney shall disclose, if in the district attorney's possession, law enforcement investigative reports relating to the case and a copy of the defendant's criminal record.
(2) TIME OF DISCLOSURE. Disclosure under this section shall be made after the defendant has obtained or waived legal representation.
(3) MANNER OF DISCLOSURE. Disclosure under this section shall be made in the manner provided in s. 971.51.
(4) DELAY FOR GOOD CAUSE SHOWN. For good cause shown, the court may allow a delay in disclosure under this section.

B. Reorganize Discovery Rules

Purpose: Make discovery rules more accessible and easier to understand.

How it's accomplished:

1. Break up extremely long statutes into a series of smaller statutes that are easier to find and understand.

Outline
CHAPTER 971
SUBCHAPTER IV
—DISCOVERY—

971.42 Purposes.
971.43 Disclosure by district attorney.
(1) TIME OF DISCLOSURE.
(2) MATERIAL TO BE DISCLOSED.
(3) CHARACTER, REPUTATION, OR OTHER ACTS EVIDENCE.
(4) ELECTRONIC SURVEILLANCE.
(5) ALIBI REBUTTAL.
(6) MATERIAL POSSESSED BY INVESTIGATIVE PERSONNEL.
(7) MATERIAL POSSESSED BY OTHER AGENCIES.
(8) NOTICE OF INTENT TO USE CODEFENDANT'S STATEMENT.
971.44 Defense disclosure.
(1) TIME OF DISCLOSURE.
(2) MATERIAL TO BE DISCLOSED.
(3) CHARACTER, REPUTATION, OR OTHER ACTS EVIDENCE.
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971.50 Continuing duty to disclose.
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971.52 Protective orders, other special procedures.
971.53 In camera proceedings.
971.54 Failure to use disclosed material at trial.
971.55 Remedies for noncompliance. 971.56 Obtaining nontestimonial information from defendant.
971.57 Nontestimonial discovery from 3rd parties.
971.58 Compelling certain examinations prohibited.

2. *New provision added to clearly define the purpose of discovery.*

971.42 Purposes. Discovery under this subchapter and s. 971.035 is intended, consistent with the constitutional rights of the defendant, to do all of the following:
(1) Promote fair and expeditious disposition of criminal charges, whether by deferred or suspended prosecution, plea, or trial.
(2) Provide the defendant with sufficient information to make an informed plea.
(3) Permit thorough preparation for and minimize surprise at trial.
(4) Reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving any procedural, collateral, or constitutional issues before trial.
(5) Minimize inequities among similarly situated defendants.
(6) Effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertion of issues, and reducing the number of separate hearings.
(7) Minimize the burden upon victims and witnesses.

3. Encourages prompt disposition of cases by requiring access to police reports at the first appearance, and allowing discovery prior to the initial appearance. See §§ 971.015 and 971.035, see text in IV. A. 4., above.

4. Clarify the process when calling expert witness.

971.46 Expert witnesses. Any party who intends to call an expert witness at trial shall, not less than 15 days before the trial or at the time set in the scheduling order, do all of the following:
(1) Notify the other party in writing of the expert witness's name, address, and qualifications.
(2) Furnish any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment, or comparison that the party intends to offer in evidence at trial.

5. Create a process to obtain evidence before trial and to address practical problems relating to production.

971.49 Motion to obtain evidence before trial. (1) Notwithstanding s. 908.03 (6m) (c), before trial and upon motion by either party, the court may issue a subpoena to require the production of documents and other tangible objects if it finds that the evidence sought may be material to the determination of issues in the case.
(2) A motion and subpoena under sub. (1) shall specify who shall produce the material, whether certified copies of documents may be submitted in lieu of appearance, and other conditions under which the evidence shall be produced.
(3) Any party, or any person subpoenaed under this section, may move to quash the subpoena if the movant under sub. (1) has not shown grounds for the subpoena or if compliance would subject the person subpoenaed to an undue burden, require the disclosure of information that is privileged or otherwise protected from disclosure, or otherwise be unreasonable.

6. Create a process for disclosure of discoverable material.

971.51 Manner of performing disclosure. (1) Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement or order of the court, the party having the duty to disclose shall provide a copy of the material to be disclosed.

(2) When the state public defender or a private attorney appointed under s. 977.08 requests copies, in any format, of any item that is discoverable under this section, the state public defender shall pay any fee charged for the copies from the appropriation account under s. 20.550(1)(f). If the person providing copies under this section charges the state public defender a fee for the copies, the fee may not exceed the applicable maximum fee for copies of discoverable materials that is established by rule under s. 977.02(9).

(3) Notwithstanding sub. (2), the fee for copies if disclosures may not exceed the actual, necessary, and direct cost of reproduction and transcription of the record.

7. Codify current law and practice relating to obtaining nontestimonial information from the defendant.

971.56 Obtaining nontestimonial information from defendant. (1) IN GENERAL. Upon motion by the district attorney, the court may order a defendant charged with a crime to participate in a procedure to obtain nontestimonial evidence relevant to whether the defendant committed the crime if the procedure is reasonable and does not involve an unreasonable intrusion into the body or an unreasonable detention of the defendant. An order under this subsection may direct the defendant to do any of the following:

(a) Appear, move, or speak for identification in a lineup or, if a lineup is not practicable, through some other reasonable procedure.

(b) Try on clothing and other articles.

(c) Provide handwriting and voice exemplars.

(d) Permit the taking of his or her photograph.

(e) Permit the taking of fingerprints, palm prints, footprints, and other body impression.

(f) Permit the taking of samples of blood, urine, saliva, semen, skin, breath, hair, or nails or materials under the nails.

(g) Submit to body measurements and other reasonable body surface examinations.

(h) Submit to reasonable physical and medical inspection, including X–rays, of the body.

(i) Participate in other procedures that comply with the requirements of sub. (1) (intro.).

(2) CONTENTS OF ORDER. An order under this section shall specify with particularity the authorized procedure; the scope of the defendant's participation in the procedure; the time, duration, and place of the procedure and other conditions under which it is to be conducted; and who may conduct the procedure. It may also direct the defendant not to alter substantially any identifying physical characteristics to be examined or destroy any evidence sought. The order shall specify that the defendant may not be subjected to investigative interrogation while participating in or present for the procedure and that the defendant may be held in contempt of court if he or she fails to appear and participate in the procedure as directed.

(3) SERVICE. The order shall be served by mailing or delivering a copy to the defendant's counsel and by delivering a copy of the order to the defendant personally.

(4) IMPLEMENTATION. (a) Counsel may accompany the defendant at a procedure ordered under this section, but the court may bar other individuals from attending.

(b) If the procedure involves an intrusion into the body, it shall be conducted by a qualified health care professional. Upon timely request by the defendant and approval by the court, a qualified health care professional designated by the defendant may observe any procedure involving intrusion of the body.

(c) The defendant may not be subjected to investigative interrogation at the procedure. No statement of the defendant made at the procedure is admissible against the defendant if made in the absence of the defendant's counsel.

8. Create a process to obtain nontestimonial discovery from third parties.

971.57 Nontestimonial discovery from 3rd parties. (1) Upon motion of a defendant, the court may issue a subpoena requiring an individual to participate in a procedure to obtain

nontestimonial evidence under s. 971.56 (1) if an affidavit or testimony shows probable cause to believe that the individual to be subpoenaed committed the crime with which the defendant is charged and that the evidence sought is necessary to an adequate defense and cannot practicably be obtained from other sources.

(2) A motion and order under sub. (1) shall specify with particularity the following information if appropriate:

(a) The authorized procedure.

(b) The scope of the 3rd party's participation.

(c) The time, duration, and place of the procedure and other conditions under which it is to be conducted.

(d) The name or job title of the person who is to conduct the procedure.

(3) Any party or any person subpoenaed under this section may move to quash the subpoena if the defendant has not shown grounds for the subpoena or if compliance would subject the person subpoenaed to an undue burden, require the disclosure of information that is privileged or otherwise protected from disclosure, or otherwise be unreasonable.

C. Clean Up Troublesome Statutes

1. Provisions regarding consolidation of charges from more than one county are modified to make the rules more accessible and easier to understand.

971.09 Consolidation; plea to or read–in of crimes committed in several counties. **(1)** IN GENERAL. Consolidation refers to the process by which charged and uncharged crimes pending in more than one county are resolved in a single proceeding in one county. Consolidation is a voluntary procedure, requiring the consent of the defendant and the district attorneys for all counties whose charges are resolved. Consolidated charged and uncharged crimes shall be resolved by the entry of a plea of guilty or no contest or by an agreement that charged and uncharged crimes be treated as read–in crimes. A defendant who has already been convicted of but not sentenced for a crime may apply for consolidation of any pending or uncharged crime committed.

(2) APPLICATION FOR CONSOLIDATION. A defendant may apply to the district attorney for a county in which a charge against the defendant is pending to resolve in a single proceeding in one county any pending cases. In the application, the defendant shall describe with particularity all the crimes that the defendant seeks to resolve in the single proceeding, indicate the county in which each of the crimes was committed, and indicate the county in which the defendant requests final disposition.

(3) NOTICE AND CONSENT. A district attorney who receives an application under sub. (2) shall send a copy of the application to the district attorney for each county in which a crime indicated in the application was committed. A district attorney who receives a copy of the application may execute a written consent to having any crime indicated in the application that is subject to disposition in his or her county resolved in a proceeding in another county. If a district attorney does not consent to having a crime that is subject to disposition in his or her county resolved in another county, the crime may not be resolved under this section.

(4) AMENDING THE CHARGE; PLEA; READ–IN CRIMES. (a) If the district attorney to whom the defendant submitted the application under sub. (2) consents to resolving a case that is subject to disposition in his or her county in a single proceeding under this section, the district attorney

shall file an amended complaint that charges the defendant with all crimes identified in consents executed under sub. (3) that are not to be treated as read–in crimes.
(b) To resolve crimes charged in the amended complaint under par. (a) in a single proceeding, the defendant shall waive in writing or on the record any right to be tried in the county in which a crime charged in the amended complaint was committed and enter a plea of guilty or no contest to each crime charged in the amended complaint.
(c) To resolve read–in crimes under this section, the defendant shall affirm his or her agreement to having the crimes considered at sentencing.
(d) A district attorney who executed a consent under sub. (3) need not be present when the defendant enters his or her plea but the district attorney's written consent shall be filed with the court.
(e) A charge that originated in a county may not be amended or dismissed without prior written approval of the district attorney for the county in which the charge originated.
(5) JUDGMENT. If it accepts the defendant's plea, the court shall enter judgment and sentence the defendant as though all crimes charged in the amended complaint were alleged to have been committed in the county where judgment is entered and may consider at sentencing any read–in crimes affirmed under sub. (4) (c). The clerk of the court for the county in which judgment is entered shall file a copy of the judgment of conviction with the clerk of the court for each other county in which charges addressed in the judgment or treated as read–crimes originated. The district attorney for each of the other counties shall then move to dismiss any charges that are pending in his or her county against the defendant for charges addressed in the judgment or as treated as read–crimes.
(6) RIGHTS OF CRIME VICTIMS. The duties of the district attorney under ch. 950 and s. 971.095 shall be discharged by the district attorney for the county in which the crimes occurred, unless otherwise agreed to by the participating district attorneys.
(7) COSTS OF PROSECUTION.The county where the plea is made shall pay the costs of prosecution if the defendant does not pay them, and is entitled to retain fees for receiving and paying to the state any fine which may be paid by the defendant. The clerk where the plea is made shall file a copy of the judgment of conviction with the clerk in each county where a crime covered by the plea was committed. The district attorney shall then move to dismiss any charges covered by the plea of guilty, which are pending against the defendant in the district attorney's county, and the same shall thereupon be dismissed.

3. Dividing current § 972.11(Evidence and practice) into separate statutes and moving several provisions to other chapters of the statutes.

§ 972.11 (1) is moved to § 967.24 (Evidence and practice; civil rules applicable)
§ 972.11 (2) (the "rape shield law") is moved to Chapter 904 (Evidence – Relevancy).

§ 972.11 (2m) is moved to Chapter 972 (Criminal trials) and renumbered § 972.20 (Child testimony by closed–circuit audiovisual means).
§ 972.11 (3) (prosecution under s. 940.22) is moved to §940.22 (Sexual Exploitation by a Therapist)
972.11 (3m) (exclusion of evidence in action for violation of s. 346.63) is moved to § 346.63 (Operating under influence of intoxicant or other drug).

§ 972.11 (4) is moved to Chapter 972 and renumbered §972.29 (Return of evidence).

4. Bail provisions are reorganized to make them more accessible and understandable.

969.30 Definitions. In this chapter:
(1) "Bail" means monetary conditions of release on bond.
(2) "Bond" means a promise by a person in custody to appear in court as required and to comply with other conditions.
(3) "Personal recognizance bond" means a bond without monetary conditions of release.
(4) "Secured appearance bond" means a bond with monetary conditions of release that require the depositing of cash or the pledging of property as security. The court may order that the bond be secured by the defendant or by a surety.
(5) "Serious bodily harm" means bodily injury that causes or contributes to the death of a human being; bodily injury that creates a substantial risk of death; bodily injury that causes serious permanent disfigurement; bodily injury that causes a permanent or protracted loss or impairment of the function of any bodily member or organ; or other serious bodily injury.
(6) "Surety" means a person who guarantees payment of the amount specified in a monetary condition of release if the defendant does not appear in court as required.
(7) "Unsecured appearance bond" means a bond with monetary conditions of release that do not require the depositing of cash or the pledging of property as security.
969.31 Eligibility for release. (1) BEFORE CONVICTION. Except as provided in s. 969.43 or 975.32, a defendant arrested for a crime is eligible for release before conviction under reasonable conditions designed to ensure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses.
(2) AFTER CONVICTION. In its discretion the trial court may allow release on conditions after conviction and prior to sentencing. This paragraph does not apply to a conviction for a 3rd or subsequent violation that is counted as a suspension, revocation, or conviction under s. 343.307, or under s. 940.09 (1) or 940.25 in the person's lifetime, or a combination thereof.
(3) AFTER SENTENCING. After sentencing and before service of the sentence begins, the trial court may continue the conditions of release or impose new conditions of release.
(4) PENDING APPEAL. Release after sentencing, pending appeal, is governed by ss. 809.31 and 974.08.
969.32 Types of release. In any case where release is allowed, the court shall do one of the following:
(1) Release the defendant to return on a date certain, without conditions.
(2) Release the defendant on a personal recognizance bond.
(3) Release the defendant on an unsecured appearance bond.
(4) Release the defendant on a secured appearance bond.
969.33 Conditions of release. (1) CONSIDERATIONS IN SETTING CONDITIONS OF RELEASE. In determining whether to release the defendant without monetary conditions, in fixing monetary conditions in a reasonable amount, or in imposing other reasonable conditions, the court, judge, or justice may consider, without limitation, any of the following:
(a) The ability of the arrested person to give bail.

(b) The nature, number, and gravity of the alleged offenses and the potential penalty the defendant faces.
(c) Whether the alleged acts were violent in nature.
(d) The defendant's prior criminal record and delinquency adjudications, if any.
(e) The character, health, residence, and reputation of the defendant.
(f) The character and strength of the evidence which has been presented to the judge.
(g) Whether the defendant is currently on probation, extended supervision or parole.
(h) Whether the defendant is already subject to other release conditions in other pending cases.
(i) Whether the defendant has in the past forfeited bond or violated a condition of release or was a fugitive from justice at the time of arrest.
(j) The policy against unnecessary detention of a defendant pending trial.

(2) RULES OF EVIDENCE DO NOT APPLY. Information stated in or offered in connection with any order entered under this chapter setting conditions of release need not conform to the rules of evidence, except as provided under s. 901.05 or 969.51.

(3) MONETARY CONDITIONS. The court may impose monetary conditions of release only if it finds that there is a reasonable basis to believe that they are necessary to ensure the defendant's appearance in court. In a misdemeanor case the amount of money specified in a monetary condition of release may not exceed the maximum fine provided for the crime charged.

(4) MANDATORY CONDITIONS. The following conditions shall be imposed as terms of any bond under s. 969.32 (2) to (4) and shall be printed on the bond:
(a) The defendant shall appear in the court having jurisdiction on a day certain and thereafter as ordered until discharged on final order of the court and shall submit to the orders and process of the court.
(b) The defendant shall give written notice to the clerk of any change in his or her address within 48 hours after the change.
(c) The defendant may not commit any crime.
(d) The defendant shall not violate, cause any person to violate, or permit any person to violate on the defendant's behalf ss. 940.22 to 940.45.

(5) OTHER CONDITIONS. Whenever a defendant is released on bond under s. 969.32 (2) to (4), the court may impose reasonable conditions other than those required under sub. (4), including conditions doing any of the following:
(a) Prohibiting the defendant from contacting, directly or indirectly, specified persons or going to specified places.
(b) Prohibiting the defendant from possessing any dangerous weapon.
(c) Prohibiting the defendant from consuming alcohol beverages.
(d) Restricting the travel, association, or place of residence of the defendant.
(e) Requiring that the defendant return to custody after specified hours. The charges authorized by s. 303.08 (4) and (5) do not apply under this paragraph.
(f) Placing the defendant under the supervision of a designated person or organization agreeing to supervise the defendant.

(6) COPY OF BOND TO DEFENDANT. The court shall provide the defendant a copy of his or her bond.

(7) MODIFYING CONDITIONS OF RELEASE. Upon motion by the state or the defendant, the court before which the action is pending may, following a hearing, modify conditions of release or grant release if it has been previously revoked under s. 969.41. Reasonable notice of the hearing shall be given to all parties.

969.34 Bail schedule. The judicial conference shall develop guidelines, which the supreme court shall adopt by rule, for releasing on bond persons accused of misdemeanors. The guidelines shall relate primarily to individuals and may be revised from time to time.

969.35 Release upon arrest in another county. (1) If the defendant is arrested in a county other than the county in which the offense may be tried under s. 970.14, he or she shall, without unreasonable delay and for the purpose of setting conditions of release, be brought before a judge either of the county where he or she was arrested or the county where the offense may be tried under s. 970.14. If the defendant is brought before a judge in the county where he or she was arrested, the judge shall release him or her on conditions imposed in accordance with this chapter to appear before a court in the county in which the offense was committed at a specified time and place.

(2) If a judge of a county other than the county where the offense may be tried under s. 970.14 released the defendant under sub. (1), the judge shall make a record of the proceedings, shall certify his or her minutes of the proceedings, and shall forward the bond to the court before whom the defendant is bound to appear.

969.36 Taking of cash deposit by law enforcement officer. When monetary conditions of release have been set before the initial appearance for a particular defendant, any law enforcement officer may take a cash deposit and release the defendant to appear at a specified time and place in accordance with the conditions stated in the bond. The law enforcement officer shall give a receipt to the defendant for the deposit and within a reasonable time deposit it with the clerk of the court where the defendant is to appear. A law enforcement officer may take a cash deposit only at a sheriff 's office or police station. This section does not require the release of a defendant from custody when an officer is of the opinion that the defendant is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. If a defendant is not released under this section, s. 971.015 (1) shall apply.

969.37 Return of cash deposit to a 3rd party. A person other than the defendant who has deposited cash to obtain the release of the defendant on a secured appearance bond, may, prior to the entry of a judgment of conviction or a judgment of forfeiture under s. 969.42, apply to the court for an order returning the deposit. After notice to the parties, the court shall hold a hearing at which the defendant must be present. The court shall determine whether to remit the cash deposit in whole or in part and may review and modify the conditions of release.

969.38 Disposition of cash deposits. (1) DEPOSIT APPLIED TO FINE OR COSTS. (a) When the court enters a judgment for a fine or costs or both in a case in which a cash deposit has been made on a secured appearance bond, the court shall apply the balance of the deposit, after deducting the bond costs, to the payment of the judgment. The court shall then return any remaining balance of the deposit to the person who made the deposit.

(b) All secured appearance bonds shall include notice of the requirements of par. (a).

(2) RETURN OF DEPOSIT. If the complaint against the defendant is dismissed or the defendant is acquitted in a case in which a cash deposit has been made on a secured appearance bond, the entire sum deposited shall be returned. A deposit by a surety shall be returned to the person who made the deposit.

(3) FORFEITURE EXCEPTION. Subsections (1) (a) and (2) do not apply if a cash deposit is forfeited under s. 969.42.

969.39 Sureties. (1) Every surety under this chapter, except a surety under s. 345.61, shall be a resident of the state.

(2) A surety under this chapter shall be a natural person, except a surety under s. 345.61. No surety under this chapter may be compensated for acting as such a surety.

(3) A court may require a surety to justify by sworn affidavit that the surety is worth the amount specified in the bond exclusive of property exempt from execution. The surety shall provide such evidence of financial responsibility as the judge requires. The court may at any time examine the sufficiency of the bail in such manner as it deems proper, and in all cases the state may challenge the sufficiency of the surety.

969.40 Surety may satisfy default. If a defendant fails to comply with the conditions of his or her bond, any surety may pay to the clerk the amount for which the surety was bound, or such lesser sum as the court, after notice and hearing, may direct, and thereupon be discharged.

969.41 Discharge of surety. When a surety desires to be discharged from the obligations of his or her bond, he or she may apply to the court for an order to that effect. After notice to the parties, the court shall hold a hearing at which the defendant must be present. The court shall determine whether to discharge the surety and may review and modify the conditions of release.

969.42 Forfeiture. (1) If the defendant does not comply with the conditions of the bond, the court may order the bail forfeited and a judgment of bail forfeiture entered. Immediately after the order is entered, the clerk shall mail notice of the order of judgment of bail forfeiture to the defendant and the defendant's sureties. No other notice is required.

(2) By entering into a bond, the defendant and any sureties submit to the jurisdiction of the court for the purposes of determining their liability under the bond. Their obligations under the bond may be enforced without the necessity of an independent action.

(3) If the court enters a judgment of bail forfeiture, any cash deposit made with the clerk pursuant to this subchapter shall be applied to the payment of costs. If any amount of the deposit remains after the payment of costs, it shall be applied to the payment of the judgment of bail forfeiture.

(4) Within 30 days after the entry of a judgment of bail forfeiture, the court may order the judgment set aside upon such conditions as the court imposes if it appears that justice does not require the enforcement of the judgment of bail forfeiture.

969.43 Pretrial detention; denial of release from custody. (1) In this section, "violent crime" means any crime specified in s. 940.01, 940.02, 940.03, 940.05, 940.06, 940.07, 940.08, 940.10, 940.19 (5), 940.195 (5), 940.21, 940.225 (1), 940.23, 941.327, 948.02 (1) or (2), 948.025, 948.03, or 948.085.

(2) A circuit court may deny release from custody under this section to any of the following persons:

(a) A person accused of committing an offense under s. 940.01, 940.225 (1), 948.02 (1) or (2), 948.025, or 948.085.

(b) A person accused of committing or attempting to commit a violent crime and the person has a previous conviction for committing or attempting to commit a violent crime.

(3) A court may proceed under this section if the district attorney alleges to the court and provides the court with documents as follows:

(a) Alleges that the defendant is eligible for denial of release under sub. (2) (a) or (b).

(b) Provides a copy of the complaint charging the commission or attempted commission of the present offense specified in sub. (2) (a) or (b).

(c) Alleges that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses.

(4) If the court determines that the district attorney has complied with sub. (3), the court may order that the detention of a person who is currently in custody be continued or may issue a warrant commanding any law enforcement officer to bring the defendant without unnecessary delay before the court. When the defendant is brought before the court, he or she shall be given a copy of the documents specified in sub. (3) and informed of his or her rights under this section and s. 971.027.

(5) A pretrial detention hearing is a hearing before a court for the purpose of determining if the continued detention of the defendant is justified. A pretrial detention hearing may be held in conjunction with a conditional release revocation hearing under s. 969.44 (5) (b), but separate findings shall be made by the court relating to the pretrial detention and conditional release revocation. The pretrial detention hearing shall be commenced within 10 days from the date the defendant is detained or brought before the court under sub. (4). The defendant may not be denied release from custody for more than 10 days prior to the hearing required by this subsection.

(6) During the pretrial detention hearing:

(a) The state has the burden of going forward and proving by clear and convincing evidence that the defendant committed an offense specified under sub. (2) (a), or that the defendant committed or attempted to commit a violent crime subsequent to a prior conviction for a violent crime.

(b) The state has the burden of going forward and proving by clear and convincing evidence that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses.

(c) The evidence shall be presented in open court with the right of confrontation, right to call witnesses, right to cross–examination and right to representation by counsel. The rules of evidence applicable in criminal trials govern the admissibility of evidence at the hearing.

(d) The court may exclude witnesses until they are called to testify, may direct that persons who are expected to be called as witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined.

(e) Testimony of the defendant given shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in perjury proceedings and for impeachment purposes in any subsequent proceeding.

(7) If the court does not make the findings under sub. (6) (a) and (b) and the defendant is otherwise eligible, the defendant shall be released from custody with or without conditions in accordance with ss. 969.31 to 969.33.

(8) If the court makes the findings under sub. (6) (a) and (b), the court may deny bail to the defendant for an additional period not to exceed 60 days following the hearing. If the time period passes and the defendant is otherwise eligible, he or she shall be released from custody with or without conditions in accordance with s. ss. 969.31 to 969.33.

(9) In computing the 10–day periods under sub. (5) and the 60–day period under sub. (8), the court shall omit any period of time found by the court to result from a delay caused by the defendant or a continuance granted which was initiated by the defendant. Delay is caused by the defendant only if the delay is expressly requested by the defendant.

(10) The defendant may petition the court to be released from custody with or without conditions in accordance with ss. 969.31 to 969.33 at any time.

(11) A person who has been detained under this section is entitled to placement of his or her case on an expedited trial calendar and his or her trial shall be given priority.

5. Provisions relating to competency to stand trial and the insanity defense are reorganized in a new Chapter 975, with minor changes.

Competency: Current law secs. 971.13 - .14 are re-codified and subtitled in proposed Subchapter II, COMPETENCY, secs. 975.30 - .39, with the following changes:

New s. 975.31(4) provides clear statutory authority for the court to appoint a guardian ad litem when the issue of competency has been raised.

New s. 975.33 (1) (f) and 975.36 (1) 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.

New s. 975.34 (3) 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.

New s. 975.34 (4), 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.

New s. 975.34 (6) (b) 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.

New s. 975.34 (7) (c) requires the commitment order to specify the number of days of sentence credit to be applied toward reduction of the maximum length of commitment.

Section 975.36 (3) contains a new provision that permits the court to delay the hearing for no more than 28 days to allow for the completion of an independent evaluation. DHS requested that this language be added because there is currently no deadline for a court to hold a hearing on a second opinion competency report.

New s. 975.38 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.

New s. 975.39 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).

Mental Responsibility: Current law secs. 971.15 - .17 are re-codified and subtitled in proposed Subchapter III, MENTAL RESPONSIBILITY, secs. 975.50 - .64, with the following changes:

New s. 975.52 (4) (b) 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).

New ss. 975.55 - .56 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.

Current law s. 971.17 (6) is revised in new s. 975.61 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.

6. Extremely long statutes are broken into separate statutes with captions to make the material more accessible and understandable.

For example, see the discovery outline in IV. C. 1., above.

V. NEW STATUTES

The following provisions create new authority, codify case law or clarify procedures:

1. Allows 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.

968.71 Disclosure of depositor status. (1) In this section:
(a) "Depository account" includes any monetary interest that a person maintains at a financial institution.
(b) "Financial institution" has the meaning given in s. 214.01 (1) (jn).
(2) Upon the request of the district attorney and a showing that the information requested is relevant to a criminal investigation, the court shall issue an order requiring any financial institution to disclose to the district attorney whether the person named in the order has a depository account with the financial institution or whether the person had a depository account with the financial institution at a prior specified time. Any person who unlawfully violates such an order may be compelled to do so under ch. 785.

2. Lists the ways a person's appearance in court can be secured – intended to clarify the available procedures.

969.15 Securing the defendant's initial appearance. The initial appearance of a person charged with a crime may be secured in any of the following ways:
(1) By the person's voluntary appearance.
(2) By the person's appearance in response to a citation.
(3) By the person's appearance in response to a summons.
(4) By the person's arrest, with or without a warrant.
(5) By the person's appearance in response to a condition of release from custody.
(6) By the person's appearance in response to a judicial order to produce a person already in custody.

3. Lists types of release, including release without condition other than appearing when required and release on a personal recognizance bond.

See bond statutes in IV. A. 2, above.

4. Allows return of a cash deposit to a third party.

969.37 Return of cash deposit to a 3rd party. A person other than the defendant who has deposited cash to obtain the release of the defendant on a secured appearance bond, may, prior to the entry of a judgment of conviction or a judgment of forfeiture under s. 969.42, apply to the court for an order returning the deposit. After notice to the parties, the court shall hold a hearing at which the defendant must be present. The court shall determine whether to remit the cash deposit in whole or in part and may review and modify the conditions of release.

5. Codifies case law regarding probable cause determination for warrantless arrest and providing a remedy for violation.

969.19 Probable cause determination for warrantless arrests. For any person who is arrested without a warrant and not sooner released from custody, within 48 hours after the arrest a judge shall determine whether there was probable cause to arrest the person. After 48 hours, including weekends and holidays, have elapsed from the arrest of the person with no judicial determination of probable cause the person shall be released under s. 969.32 (1) unless the delay is excused by the existence of a bona fide emergency or other extraordinary circumstance.

6. Codifies case law defining the prosecutor's authority to dismiss a complaint.

970.10 Dismissing the complaint. (1) If the district attorney moves to dismiss a complaint, the trial court shall grant the motion unless the court finds that dismissal is contrary to the public interest. The motion may not be granted during the trial without the consent of the defendant.

(2) Before a court dismisses a criminal charge under sub. (1), the court shall inquire of the district attorney whether he or she has complied with s. 971.095 (2).
(3) Granting a motion made under sub. (1) dismisses the action, and the clerk shall enter an order to that effect.

7. Creates 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; and it grants courts specific statutory authority to withhold entry of judgment.

970.15 Deferred and suspended prosecution agreements.
(1) DEFINITIONS. (a) "Deferred prosecution agreement " means an agreement under which a prosecutor does not file a criminal complaint but may do so in the future.
(b) "Suspended prosecution agreement" means an agreement under which further prosecution against a person is suspended after a prosecutor files a criminal complaint against the person.
(2) DEFERRED PROSECUTION AGREEMENTS. The same standards that apply to a district attorney's charging authority govern the district attorney's authority to enter into a deferred prosecution agreement. A deferred prosecution agreement is enforceable in the same manner as a plea agreement.
(3) SUSPENDED PROSECUTION AGREEMENTS. The same standards that apply to a court's authority to schedule cases and grant continuances apply to a court's authority to suspend prosecution when the parties have reached a suspended prosecution agreement. The court's authority to suspend prosecution includes the authority to defer or delay the acceptance of a plea or to withhold entry of judgment. A suspended prosecution agreement is enforceable in the same manner as a plea agreement.

8. Codifies current law and practice relating to plea agreements.

971.065 Plea agreements. (1) The district attorney and the defendant may participate in discussions to reach an agreement that if the defendant enters a plea of guilty or no contest the district attorney shall take or refrain from taking certain actions, including one or more of the following:
(a) Moving to dismiss or amend one or more charges.
(b) Reading in any crime that is uncharged or that is dismissed as part of the agreement.
(c) Recommending, or agreeing not to oppose the defendant's request for, a particular disposition.
(d) Agreeing that a specific disposition is appropriate.
(2) The court may not participate in discussions to reach an agreement under this section.

9. Describes the effects of the different pleas available to the defendant; it codifies current law to clarify the issues.

971.085 Effect of a plea of guilty or no contest. (1) A plea of guilty or no contest waives all nonjurisdictional defects and defenses except that the following may be reviewed upon appeal from a final order or judgment:
(a) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant.
(b) An order denying a motion to dismiss asserting that the statute under which the defendant is charged violates the United States or the Wisconsin constitution.
(2) The court shall permit a defendant who prevails on an appeal of an order under sub. (1) (a) or (b) to withdraw his or her plea.

10. Codifies current law relating to plea withdrawals.

971.093 Withdrawal of a plea of guilty or no contest.
(1) BEFORE SENTENCING. Unless the district attorney establishes substantial prejudice, the court shall grant a motion that is made before sentencing to withdraw a plea of guilty or no contest if a fair and just reason for doing so is established.
(2) AFTER SENTENCING. The court shall grant a motion that is made after sentencing to withdraw a plea of guilty or no contest if the defendant did not knowingly, voluntarily, and understandingly enter the plea or if withdrawal is required to prevent manifest injustice.
(3) REMEDY. When the court grants a motion to withdraw a plea of guilty or no contest under this section, the judgment of conviction is vacated, the original charge or charges reinstated, and the parties are restored to the position they were in before the plea and any related plea agreement was accepted.

11. Codifies powers regarding scheduling and pretrial conferences which courts have traditionally exercised under their inherent authority to manage litigation.

971.098 Scheduling orders; pretrial conferences. After the defendant enters a plea, the court may issue a scheduling order and may amend it as circumstances require. The order shall be in writing and may specify times for discovery, pretrial motions, notices of intent to offer an alibi or another defense required to be disclosed, pretrial conferences, trial, or other proceedings.

12. Codifies current law relating to motions to dismiss asserting that a statute is unconstitutional – intended to avoid unwitting waivers by failing to make proper service.

971.66 Motions to dismiss asserting that a statute is unconstitutional. If a defendant moves to dismiss a criminal prosecution by asserting that the statute under which he or she is charged violates the United States or Wisconsin Constitution, the defendant must serve a copy of the motion on the attorney general under s. 806.04 (11) as well as on the district attorney.

13. Codifies remedies for the so-called Bruton situation where one codefendant's statement is not admissible as to the other codefendant.

971.68 Joinder and severance motions. (1) IN GENERAL. Either party may move for joinder or relief from misjoinder or prejudicial joinder under s. 970.13.
(2) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants, the court may order separate trials of charges or defendants or provide whatever other relief justice requires.
(3) CODEFENDANT'S STATEMENTS. If a defendant moves for severance because a codefendant's out–of–court statement refers to, but is not admissible against, the movant, the court shall determine whether the state intends to offer the statement in evidence as part of its case in chief. If so, the court shall require the district attorney to elect one of the following:
(a) A joint trial at which the statement is not received in evidence.
(b) A joint trial at which the statement is received in evidence only after all references to the movant have been deleted, if admission of the statement with the deletions made will not prejudice the movant.
(c) A separate trial for the movant.
(d) With the approval of the court, a separate jury for each defendant sitting in a single trial.

14. Codifies current law allowing jurors to ask questions, in the discretion of the court.

972.075 Questioning of witnesses by jurors. (1) Before trial and after affording counsel the opportunity to be heard, the court may authorize the jurors to ask questions of witnesses.
(2) If the court authorizes juror questions, the court shall instruct the jury to propose only questions that tend to clarify information already presented and shall instruct the jury of the following procedure that shall be used for juror questions:
(a) After the parties have questioned a witness and before the witness leaves the stand, the court shall ask the jurors if they have any questions for the witness.
(b) If a juror has a question, he or she shall submit the question in writing to the judge.
(c) The judge shall show the question to the parties and allow the parties to object to the question without the knowledge of the jury.
(d) The judge shall review the question and any objections made by the parties and determine if the question is legally proper.
(e) If the question is legally proper, the judge may ask it of the witness.
(f) The court shall allow the parties to ask follow–up questions to any juror questions that are posed to a witness.

15. Codifies current law relating to the acceptance of stipulations.

972.19 Stipulations. (1) In this section, "stipulation" means an agreement between the parties that a specified fact is or shall be taken as established without need for proof.
(2) Stipulations shall be set forth on the record at the time they are accepted by the court.
(3) In a trial before a jury, the court shall instruct the jury that it is to take stipulated facts as conclusively proved.
(4) If stipulated facts establish an element of the crime, the court shall proceed as provided in s. 972.005 (2).

16. Codifies current law relating to return of the verdict.

972.24 Return of verdict. A verdict must be unanimous and returned in open court.

17. Requires an individual jury poll in all cases, to avoid unnecessarily litigating whether the defendant knew of and waived the right.

972.25 Polling the jury. The court shall poll the jury when a verdict proper in form is returned. The court or the clerk shall conduct the poll by asking each juror individually whether the verdict as returned was and is in the juror's verdict.

18. Codifies current law relating to accepting the verdict.

972.26 Accepting the verdict. (1) The court shall accept the verdict if it is proper in form and confirmed by the jury poll. When the verdict is accepted, the jury shall be discharged.
(2) After the verdict is accepted, the complaint shall be deemed amended as to technical variances to conform to the proof if no objection to the relevance of the evidence was timely raised.

19. Codifies current law relating to the defendant's presence at postconviction proceedings.

974.08 Defendant's presence at postconviction proceedings. (1) A defendant has the right to be present at a postconviction proceeding when the hearing will address substantial issues of fact as to events in which the defendant participated and those issues are supported by more than mere allegations.
(2) A defendant need not be present at the pronouncement or entry of an order granting or denying relief under s. 974.02, 974.03, 974.06, or 974.07. If the defendant is not present, the time for appealing the order shall commence after a copy has been served upon the defendant's counsel or, if he or she appeared without counsel, upon the defendant, except as provided in sub. (3). Service of such an order shall be complete upon mailing.
(3) A defendant appearing without counsel shall supply the court with his or her current mailing address. If the defendant fails to supply the court with a current and accurate mailing address, the defendant's failure to receive a copy of the order granting or denying relief shall not be a ground for tolling the time in which an appeal must be taken.

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To: **Members of the Senate Committee on Judiciary and Public Safety**
Members of the Assembly Committee on Judiciary

From: **Attorney General Brad Schimel**
Wisconsin Department of Justice

Date: **August 20, 2015**

Subject: **Opposition to Assembly Bill 90/Senate Bill 82 as proposed**

Thank you Chairman Ott, Chairman Wanggaard, and committee members for the opportunity to present you with written testimony on Assembly Bill 90 and Senate Bill 82. The Department of Justice appreciates your thoughtful consideration of this proposal.

I begin by recognizing the hard work by the Judicial Council over the years to complete their recommendations to update Wisconsin's Criminal Procedure Code. I served on the Judicial Council as the District Attorney representative for years, and greatly appreciate for the forum the Council provides to examine ways to enhance efficiency and improve the process by which we search for the truth in our state's judicial system. Council membership includes representatives from many disciplines with many different perspectives. With so many points of view and interests, it has often been difficult to reach consensus, and that was certainly true in the work behind this bill.

The Department of Justice opposes the bill as it is written. Like any area of the law, there is always room for improvement, and the bill proposes useful improvements. However, in its current form, there are some problems that will create new challenges for crime victims, law enforcement and prosecutors. The team at the DOJ looks forward to working with the legislature to attempt to amend the bill so that it avoids these challenges. I do not intend to list all of the concerns or issues that exist, but will discuss some general areas of concern and provide some examples.

The Judicial Council worked on this project for over 20 years. The committee members, as well as the council members, changed many times during those years. Because of the enormous scope of the endeavor, incoming members did not have a historical perspective. As the statutes and case law continually changed over the decades, the document did not always keep up with the changing landscape, and parts of the original work are now out of date. Some problems that needed addressing 20 years ago have since been resolved in a different fashion.

For instance, there were some who originally wished to eliminate the preliminary hearing and

replace it with a different type of hearing. It is my understanding that those who opposed elimination of preliminary hearings sought something in exchange for reaching a consensus on the issue. Part of the compromise was to insert a provision that would require prosecutors to provide discovery materials at the initial appearance. In some cases that is not difficult, but in many cases that requirement would pose significant challenges for law enforcement and prosecutors. It is not clear what the consequences of failure to meet the new statutory deadline might be, but district attorneys are rightly concerned that they could face sanctions if for some reason they fail to provide discovery as quickly as is contemplated by the bill.

All of this might still be a worthwhile exchange if prosecutors were still receiving the benefit of the bargain. However, several years ago the legislature made changes to the preliminary hearing process such that those who sought to eliminate the preliminary hearing no longer see that as necessary or desirable. The provisions eliminating the preliminary hearing were removed from the proposal, but the expedited discovery provisions remain in the bill.

The proposal has also not kept up with technology that has evolved over the past two decades. For example, it does not adopt practices that reflect current technology such as electronic signatures on certain documents, including criminal complaints, electronic filing and electronic discovery.

The bill proposes changes to the subpoena process that expand the ability to obtain private documents from crime victims and third parties, which could include victim service agencies. It could subject victims to uncontrolled fishing expeditions into their private records, such as treatment and health care records. The burden appears to be on the victim or other third parties to take legal action to protect their privacy. The burden should never shift that way, and we cannot let our criminal procedure code cause further harm to crime victims.

The bill also expands the types of evidence that law enforcement agencies must retain after the case has been resolved in court and even beyond the conclusion of all appeals. These provisions should be examined carefully.

Representative Ott has already met with representatives from DOJ and the Wisconsin District Attorneys Association, and it appears likely that many of the concerns raised by prosecutors will be addressed by amendments. I am encouraged by the willingness of the bill sponsors to work with prosecutors, law enforcement and victim advocates to address these groups concerns, and look forward to working together to try to modify the bill in ways that will serve the efficient and fair administration of criminal justice in Wisconsin.

Supreme Court of Wisconsin
DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Patience D. Roggensack
Chief Justice

16 East State Capitol
Telephone 608-266-6828
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J. Denis Moran
Director of State Courts

Testimony
Of
Nancy Rottier
Legislative Liaison

In Support of
2015 Assembly Bill 90 and Senate Bill 82
Relating to Criminal Procedure

Assembly Committee on Judiciary
Representative Jim Ott, Chair
Senate Committee on Judiciary and Public Safety
Senator Van Wanggaard, Chair
August 20, 2015

Thank you very much. My name is Nancy Rottier and I am the Legislative Liaison for the state court system. I am appearing here in favor of the two companion bills, on behalf of the Legislative Committee of the Judicial Conference.

The Judicial Conference is made up of all the judges in the state: circuit court, Court of Appeals, and Supreme Court. The Legislative Committee is an elected 10-member committee that evaluates legislation to determine the impact on the court system. We primarily look at workload-related issues, but we do advocate for and against particular pieces of legislation.

The Legislative Committee is very familiar with the work of the Judicial Council and this particular legislation. Members of the judiciary have known for many years that the Council was working on revising the criminal procedure code, but that knowledge was very general. Both our Legislative Committee and our Committee of Chief Judges have been briefed by Judicial Council members and staff and have looked more closely at the specifics of the legislation.

We strongly support the work of the Judicial Council, and I want to emphasize the importance of the Judicial Council's work to the court system. The Council has been in existence for over 50 years and has provided support to the court on issues of practice and procedure. While it has tackled a wide variety of issues, some of its projects have been very large ones like the one you have before you today. The Judicial Council developed the Civil Procedure Code back in the 1970s. It developed the Evidence Code. In the early 1990s, the Judicial Council developed the Alternative Dispute Resolution rules that are part of our statutes and Supreme Court Rules.

The reason the work of the Judicial Council consistently receives strong support from the judiciary is because the process it uses in developing legislation or rules changes is a very inclusive one. There is input from all the stakeholders in the legal system – judges, lawyers, government agencies, legal scholars and others.

The judiciary is represented on the Judicial Council. There are four circuit court judges who are elected by the Judicial Conference to serve terms on the Judicial Council. The statute provides that a Court of Appeals judge and a Supreme Court Justice are members of the Judicial Council. The Director of State Courts is also an ex officio member of the Judicial Council. So we are actively involved in the work of the Council.

The Judicial Council operates in much the same way as the study committees of the Legislative Council that meet in the interim between legislative sessions. The Legislative Council's study committees include experts and others familiar with the subject area in order to develop a deep understanding of the issue studied and have many viewpoints represented. This inclusive process is one of the reasons Legislative Council study committee bills have a much higher rate of passage than other bills.

And that's the way the Judicial Council operates for issues of the judicial system. It's an inclusive development process that leads to broad acceptance of its work product.

I also want to emphasize how the Judicial Council used this inclusive process over the last year to address concerns that were raised during the last legislative session about the predecessor bill, 2013 AB 383. Its Criminal Procedure Committee was expanded to include even more members of the criminal justice community. All the stakeholders were represented and spent many, many hours going over every objection and every suggested change to the previous bill.

As with the original bill, not everybody got what they wanted. For instance, the committee voted to reinstate preliminary hearings. Most circuit court judges, based on our Legislative Committee discussions, would prefer that preliminary hearings be eliminated. Nevertheless, we are supportive of this bill because this was an open, inclusive process that tried its hardest to reach consensus. That process should be respected and supported by all the stakeholders.

Finally, these bills are important because the time for rewriting these chapters of the statutes is long overdue. They have not been rewritten for more than 30 years. I think there is general agreement that reorganizing, modernizing and updating these statutes is sorely needed.

There is no question this is a huge undertaking that has led to a long and complicated bill that is in front of you. We recognize it's a big task for you to take on.

To help our judges, and hopefully this committee, have a better idea of what the statutes would look like if this bill is adopted, I have prepared and attached to my testimony a document that shows the chapter, subchapter and section headings for the chapters covered by the bill. (This is not an official LRB document.) What this document does is give all of us a type of "road map" of how the realigned statutes would address the criminal process. I think this document also shows the logical progression of the rewritten statutes and how much easier it will be to locate the statutes governing the parts of the criminal process.

These bills follow the usual process the Legislature uses to update our statutes. In the last several years there have been major rewrites of other large chapters of the statutes. Here are four examples:

- Revision of ch. 45 relating to veterans was adopted as 2005 WI Act 22
- Chapter 55 relating to protective placement was revised in 2005 WI Act 264
- Recodification of the Juvenile Justice Code, chapter 938, was accomplished in 2005 WI Act 344
- Chapter 767 relating to actions affecting the family was revised by 2005 WI Act 443

Those have been done by Legislative Council study committees. The charge to the committees was generally to reorganize the statutes to fit in a logical manner, renumber and retitle sections and subsections, consolidate related sections, modernize the language, resolve ambiguities in language, codify court decisions and make minor substantive changes.

In each of these cases, the Legislature was faced with a bill of daunting size and complexity, not unlike what you have before you today. Each of the four examples I cited resulted in bills of more than 150 pages, with the chapter 938 revision being over 300 pages. But the Legislature was able to accomplish rewrites in those cases. We ask you to do the same with this rewrite and support these bills.

I would be happy to take questions. Thank you.

WISCONSIN JUDICIAL COUNCIL

2015 AB 90 AND SB 82

CRIMINAL PROCEDURE CODE AMENDMENTS

(Chapter, Subchapter and Subsection titles as they would appear in revised statutes.)

CHAPTER 967

CRIMINAL PROCEDURE—GENERAL PROVISIONS

CHAPTER 968

COMMENCEMENT OF CRIMINAL PROCEEDINGS

CHAPTER 969

SECURING A DEFENDANT'S APPEARANCE; RELEASE

CHAPTER 970

COMMENCEMENT OF PROSECUTION

SUBCHAPTER I
GENERAL PROVISIONS

SUBCHAPTER II
PARTICULAR OFFENSES

CHAPTER 971

PRETRIAL PROCEDURES

CHAPTER 972

CRIMINAL TRIALS

CHAPTER 973

SENTENCING

CHAPTER 974

CRIMINAL PROCEDURE—APPEALS, NEW TRIALS AND WRITS OF ERROR

CHAPTER 975

MENTAL ISSUES IN CRIMINAL PROCEEDINGS: COMPETENCY AND RESPONSIBILITY

CHAPTER 976

UNIFORM ACTS IN CRIMINAL PROCEEDINGS

CHAPTER 977

STATE PUBLIC DEFENDER

CHAPTER 978

DISTRICT ATTORNEYS

CHAPTER 979

INVESTIGATION OF DEATHS

CHAPTER 980

SEXUALLY VIOLENT PERSON COMMITMENTS

testimony

Wisconsin Coalition Against Domestic Violence
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Phone: (608) 255-0539 Fax: (608) 255-3560
tonyg@endabusewi.org

To: Assembly and Senate Judiciary Committees

From: Tony Gibart, Public Policy and Affairs Director

Re: Opposition to AB 90 / SB 82

Chairpeople Ott and Wanggaard and Members of the Committees, thank you for the opportunity to provide written testimony today regarding Assembly Bill 90 and Senate Bill 82. I regret that I am unable to testify in person. End Domestic Abuse Wisconsin (formerly the Wisconsin Coalition Against Domestic Violence) is the statewide voice for victims of domestic violence and domestic violence victim service providers and shelters across Wisconsin. As you know, these bills represents a comprehensive revision of Wisconsin's criminal procedure statutes and were developed by the Wisconsin Judicial Council. This legislation has the potential to have a deep impact on victims of crime, especially victims of sensitive crimes such as domestic violence.

End Domestic Abuse Wisconsin appreciates the significant effort and good intentions that have gone into the legislation and the changes that were made after the last legislative session to improve the bill and address some of our concerns. While we agree with the overall goals of improving the efficiency of the criminal justice system, we continue to have a number of specific concerns that are discussed below.

Expansion of the Subpoena Power (page 152)

AB 90 / SB 82 significantly expands the ability to subpoena private documents in criminal cases through proposed s. 971.49. This expansion will place high burdens on crime victims and third-parties, such as domestic violence shelters, rape crisis centers and health-care providers. Under current law in Wisconsin, a subpoena for the production of documents or other objects may only be issued in connection with a hearing, trial or other proceeding. *See* Wis. Stat. § 805.07(1) and *State v. Schaefer*, 2008 WI 25, ¶44, 746 N.W.2d 457, 308 Wis. 2d 279. In contrast, the proposal would allow a party to move for the production of documents or other tangible things at any time before trial, and any materials are potentially subject to a subpoena if the materials, "may be material to the determination of issues in the case." Under the proposal, parties seeking information from third parties would have no disincentive to seek broad and intrusive subpoenas and to force third-parties (or their party opponents) to move to quash through protracted litigation. And, because threshold of issuing the subpoena under the proposal is quite low, many intrusive and broad requests for subpoena will likely be successful.

We believe that many defendants in domestic violence and sexual assault cases would seek production of sensitive documents, such as medical records and records of domestic violence shelters and sexual assault service providers. Defendants surely would also seek phone records, emails and or entire computers, arguing that the information contained therein "may be material to the determination of issues in the case." Because motions for subpoenas need not be made in conjunction with trial or other motion

hearing, there will be little limit on defendants' desire or ability to attempt to use the subpoena power to intrude on victims' privacy or to harass them.

The expansion of subpoenas will also burden third-party custodians or owners of documents that may be of interest to defendants. These third-parties, including our member domestic violence service providers will routinely be required to assert privilege and privacy protections on behalf of victims. One may argue that prosecutors can readily move to quash subpoenas in these instances; however, victims' privacy rights and the interests of the state do not always align. Moreover, under the proposal the person or party seeking to quash would have the burden of asserting privilege or show that the production would cause an "undue burden" or is "unreasonable."

In some cases, victims would not have notice of, and not have the ability to object to, defendants' attempts to obtain sensitive documents. If a third-party is in possession of the documents, the subpoena will be directed at the third-party. Neither the court, nor the state, nor the defendant would be required to give the victim notice. Even if victims are somehow notified of subpoenas to third-parties, the proposal does not appear to give victims standing to object to the release of information pertaining to them when the subpoena is directed at a third-party custodian.

If the proposal is enacted, victims and litigants would be faced with a great deal of uncertainty and upheaval as defendants and the state test the contours of the expanded subpoena power in the courts. The relevant terms of the proposal (*i.e.*, "may be material to a determination of the issues in the case," "other tangible objects," "undue burden," "otherwise protected for disclosure," "otherwise...unreasonable") will undoubtedly be the subject of extensive litigation, and, even if these terms are eventually defined in ways that afford victims a level of protection, there will be many victims of sensitive crime victims whose privacy will be shattered, whose cases will be compromised, and who will lose trust in the criminal justice system until the scope of law becomes clear.

For the purpose of comparison, Federal Rule of Criminal Procedure 17(c) illustrates a number of ways in which proposed s. 971.49 lacks safeguards against broad and intrusive subpoenas.

Similar to the proposal, Fed. R. Crim. P. 17 gives federal criminal courts discretion to order that the documents or objects be turned over to the court "before trial or before they are to be offered in evidence." However, the similarities end there; under Fed. R. Crim. P. 17, the ability to subpoena documents pre-trial is subject to several limitations. Under well-established caselaw, a party seeking a subpoena for documents or objects has the burden of making several showings. "[T]o require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Importantly, the federal courts have repeatedly said that Fed. R. Crim. P. 17, "was not intended to provide a means of discovery for criminal cases." *Id.* Rather, it was meant as a mechanism to expedite trials. *Id.* Moreover, with respect to victims' rights, Fed. R. Crim. P. 17 has a specific safeguard:

> (3) *Subpoena for Personal or Confidential Information About a Victim.* After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

The chart below describes the various ways in which proposed section 971.49 is more expansive that Fed. R. Crim. P. 17.

Fed. R. Crim. P. 17 Comparison to Proposal

	Fed. R. Crim. P. 17	Proposed s. 971.49
Moveant must show the documents are relevant	Yes	No, must show they "may" be relevant ("material to a determination of the issues in the case").
Moveant must show the documents are admissible	Yes	No
Moveant must show the documents are not obtainable through other reasonable means	Yes	No
Moveant must show that pre-trial production is necessary	Yes	No
Moveant must show the request is specific (i.e., "not a fishing expedition").	Yes	No
Victim notice required when subpoena to third-party for victim information.	Yes	No

Arrest of Victims and Witnesses (page 91)

AB 90 / SB 82 (s. 969.52) authorizes the preemptive arrest of witnesses in any criminal proceeding when a party shows "probable cause...that it may become impracticable to secure the person's presence by subpoena." We are opposed to this provision. Current law does not expressly authorize arrests in these situations and, to the extent arrest is implicitly authorized, the authority is limited to felony proceedings. Witnesses, who are often the victims of crime, should not be subject to arrest on the suspicion they will not appear in court, especially when they have not violated any law or court order. Treating victims like criminals will only erode their trust in the criminal justice system and make it less likely they will want to participate in that system or report abuse to law enforcement in the first place.

Expedited Discovery (page 106)

AB 90 / SB 82 gives district attorneys the ability to make discovery disclosures prior to the initial appearance and requires that police reports in the possession of the district attorney's office be disclosed at the initial appearance (s. 971.035). We oppose this expedited and inflexible timeline for discovery because it will prevent district attorneys from protecting victims from potential retaliation.

To protect themselves and their children, sometimes victims will minimize and deny to offenders that they made inculpatory statement to the police. Prosecutors tend to understand victim and perpetrator dynamics and the risks involved; and therefore, will sometimes delay the release of reports to the defendant so that the victim has enough time to take steps to protect his or her safety.

AB 90 / SB 82 creates a significant barrier to prosecutors exercising these precautions. The new requirement means, as a practical matter, defendants will have access to police reports a very short amount of time after the initial arrest. Therefore, defendants will be able to learn exactly what victims reported to law enforcement during a period of time when victims are already vulnerable and before they might be able to take steps to protect themselves, like relocating or obtaining a restraining order. Under

the bill, judges would most likely require a hearing to authorize a delay in discovery. Because this will entail additional work and require additional court time, delays will be infrequently requested and granted.

Release after Citation (page 76)

The quality of frontline law enforcement response to domestic violence varies widely across Wisconsin. Some departments do an exemplary job. As high-profile cases illustrate, other officers still have difficulty recognizing domestic violence cases, applying the mandatory arrest law and understanding the risk involved in many domestic violence situations. We are concerned that encouraged use of citations in misdemeanor cases could amplify the lack of quality attention to domestic violence cases, the vast majority of which enter the criminal justice system as misdemeanors. Moreover, even though cases that meet the definition of domestic abuse would not be eligible for use of a citation, domestic violence cases that involve the same dynamics and danger would be affected. For example, violence between non-cohabiting intimate partners often is not technically considered domestic abuse in criminal justice system. Offenders in these cases would be eligible for citation and release.

Conclusion

Thank you again for the opportunity to provide written testimony. Again, we appreciate the hard work that has gone into the drafting of this bill. We are remain willing to discuss our concerns and possible solutions with the authors and proponents of the bill. If you have any questions, please feel free to contact me at tonyg@endabusewi.org or (608) 237-3452.

WISCONSIN SHERIFFS & DEPUTY SHERIFFS ASSOCIATION

DAVID GRAVES, EXECUTIVE DIRECTOR
W4778 Potter Road
Elkhorn, WI 53121
email: dgraves@wsdsa.org

To: Members, Assembly Committee on Judiciary
Members, Senate Committee on Judiciary and Public Safety

From: Dave Graves, Executive Director, Wisconsin Sheriffs and Deputy Sheriffs Association

Date: August 20, 2015

Re: Statement on AB 90 / SB 82 - Criminal Procedure and Providing Penalties

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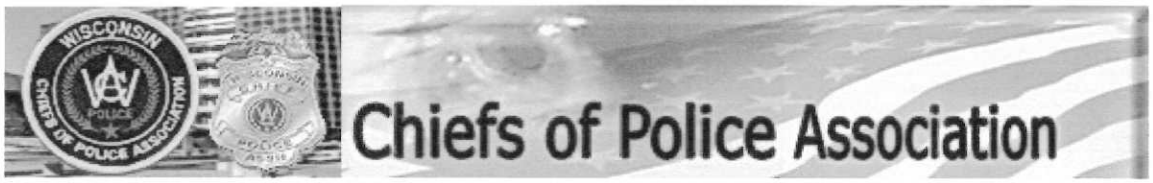
The Wisconsin Sheriffs and Deputy Sheriffs Association (WS&DSA) appreciate the opportunity to provide comments on AB 90/ SB 82. WS&DSA submit this memo for the purposes of information only.

The bill, among other items, modifies the execution of a search warrant, slightly revises components of the strip search process, creates a new section related to discovery from third parties and amends the release and citation procedures. While some of these changes may not appear to be significant, we are carefully reviewing and discussing these changes internally to ensure that there are no unforeseen implications.

Furthermore, there are changes in this bill that could affect law enforcement training and procedures. Given this, we look forward to further discussion with the bill authors regarding the intent and impact of the policy once pragmatically applied.

We understand the considerable amount of time and effort that has been put into the development of the current draft of AB 90/ SB 82; however, we are concerned with the length and complexity of this bill. We respectfully request the committees consider it be split into separate bills addressing each chapter of the criminal code.

Again, WS&DSA looks forward to working with the authors on the bill and appreciate the opportunity to provide our input at this point in the process.



August 19, 2015

To: Members of the Senate Committee on Judiciary and Public Safety, and the members of the Assembly Committee on Judiciary

From: Police Chief Dave Funkhouser – WCPA President
Police Chief Greg Leck and Police Chief Steve Riffel, WCPA Legislative Co-Chairs

RE: OPPOSE SB 82/AB 90

The Wisconsin Chiefs of Police Association represents 580 law enforcement members throughout Wisconsin and applauds the efforts of the Wisconsin Judicial Council to update statutes related to the criminal procedure code. We look forward to working with the chairs of this proposal to address our remaining concerns.

Since there is no law enforcement representative on the Judicial Council nor was law enforcements opinion sought on the potential impact of the proposed changes—process, fiscal or law enforcement duties-- we look forward to working with the various stakeholders to amend the final bill before it moves forward to address our concerns. Our specific concerns with language in the bill remain around DNA evidence collection and storage, no knock warrants, third party discovery and how dangerous weapons will be legally disposable.

Thank you for your consideration. We look forward to working with you to remove our opposition.

WISCONSIN COALITION AGAINST SEXUAL ASSAULT

To: Members of the State Assembly Committee on Judiciary and the State Senate Committee on Judiciary and Public Safety
From: Wisconsin Coalition Against Sexual Assault
Re: Criminal Procedure Bill: AB 90 / SB 82
Date: August 20, 2015

Good morning, my name is Ian Henderson, director of legal and systems services for the Wisconsin Coalition Against Sexual Assault (WCASA). WCASA is a statewide membership agency comprised of organizations and individuals working to end sexual violence in Wisconsin. Among these are the 51 sexual assault service provider agencies throughout the state that offer support, advocacy and information to survivors of sexual assault and their families.

WCASA appreciates the efforts and good intentions that have gone into AB 90 / SB 82. We are supportive of the overall goals of improving the efficiency of the criminal justice system. While we do have specific concerns outlined below, we are not opposed to changes that reorganize the statutes to make them easier to understand nor are we opposed to codifying well-established case law.

However, we are very concerned about the proposal regarding motions to obtain evidence before trial under 971.49. This provision is a significant expansion of the subpoena power in criminal cases and one that will have a negative impact on sexual assault victims.

Under current law, a subpoena for the production of documents or other objects may only be issued in conjunction with a hearing, trial or other proceeding. Wis. Stat § 805.07(1). State v. Schaefer, 2008 WI 25, ¶44, 746 N.W.2d 457, 308 Wis. 2d. 279. The proposed language in 971.49 would allow the court to issue a subpoena for the production of documents and other tangible objects if it finds the evidence "*may be material* to the determination of issues in the case" (emphasis added). We are extremely concerned that this provision will shift the burden of protecting privacy interests to the party possessing the documents or objects in question.

For sexual assault victims, concerns over privacy are paramount after an assault. This expansion of the subpoena power could lead sexual assault victims to increasingly defend their privacy interests via pretrial litigation, and water down privacy protections enshrined in Wisconsin's Crime Victim Rights Laws (See Wis. Stat. § 950.04(1v)(ag), "*To be treated with fairness, dignity, and respect for their privacy* …) Even if survivors were able to keep their information out of court, the damage could already be done. The criminal justice system can already be traumatizing for sexual assault victims. We do not need to increase barriers to their willingness to report the sexual assault or to remain engaged with the criminal justice system.

The expansion of subpoena power contained in 971.49 could also weaken another crime victim right contained in Chapter 950. Under Wis. Stat. 950.04(1v)(k), crime victims have the right to "a speedy disposition of the case in order to minimize the length of time they must endure the stress of their responsibilities connected to the matter." As discussed above, we are concerned about increased pretrial litigation associated with the provisions contained in 971.49. The potential for multiple opportunities for additional pretrial hearings as both sexual assault victims

and third parties defend against subpoenas means victims have to wait even longer for justice. All of this serves to water down the speedy disposition provisions contained in Chapter 950.

Finally, we note that the expanded subpoena power puts Wisconsin out of step with the Federal Rules of Criminal Procedure. Unlike the provisions in AB 90 / SB 82, the Federal Rules of Criminal Procedure contain safeguards against broad and intrusive subpoenas. For example, under Federal Rule of Criminal Procedure 17, the party seeking a subpoena for documents must show:

- The documents are relevant
- The documents are admissible
- The documents are not obtainable through other reasonable means
- Pre-trial production is necessary
- The request is specific (i.e., not a "fishing expedition").

The proposed language in 971.49 contains no such safeguards. In fact, the party seeking the documents need only show the documents "may" be relevant, a low standard that increases the likelihood of intrusions on victim privacy and delays described above.

Thank you for your consideration. If you have any questions, please feel free to contact me at attorney@WCASA.org or at the phone number above.

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Daniel K. Tushaus, Chief of Police

August 18, 2015

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

Sen. Van Wanggaard, Chair
Senate Judiciary Committee
Box 7882
Madison, WI 53707-7882

RE: 2015 AB-90 and SB-82, Criminal Procedure Code Revision; Lack of Authority to Enforce State Civil Forfeiture Offenses

Dear Gentlemen:

Again I wish to bring to your attention a significant void in Wisconsin law which can be easily addressed in your criminal procedure code revision, to wit: the lack of general statutory authority for the enforcement of State civil forfeiture offenses. Your bills would be most appropriate vehicles to address this pressing issue since there are various **State forfeiture offenses contained within the criminal code.**

Although there are numerous State civil forfeiture offenses scattered throughout the Wisconsin statute books, these are only a few found in the criminal code:

947.012 (2)	Unlawful use of telephone
947.0125 (3)	Unlawful use of computerized communication systems
947.013 (1m)	Harassment
948.605 (2)	Gun-free school zones
948.70 (2)	Tattooing of children
941.25	Manufacturer to register machine guns
941.2965 (2)	Restrictions on use of facsimile firearms
941.297 (2)	Sale or distribution of imitation firearms
941.299 (3)(b)	Restrictions on the use of laser pointers
943.455(4)(a)	Theft of commercial mobile service
943.47(3)(a)	Theft of satellite cable programming

These are only a few of the State civil forfeiture offenses found in the other portions of the statutes:

114.09 (2)	Intoxicated or reckless flying of aircraft
134.96	Hotel rooms used for underage alcohol or drugs
167.31 (2)(e)	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 gunshot wounds/crime wounds to police
323.28	Refusal to obey official orders during an emergency management incident, e.g. curfew, restricted access to prevent looting, etc.

As the result of a lack of legislative enforcement authority, Wisconsin law enforcement officers may not legally stop, detain, question, or arrest a violator for any of the above statutes. This obviously places 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 under Wis. Stat. 940.30 should they stop, detain, or arrest a violator no matter how egregious or repetitive the forfeiture offense might be.

The solution to this dilemma is simple: incorporate the language of 2011 AB-237 into 2015 AB-90/SB-82 (copy attached). 2011 AB-237 was endorsed by the Wisconsin Chiefs of Police Association, the Badger State Sheriffs Association, the Wisconsin District Attorneys Association, the League of Wisconsin Municipalities, the Milwaukee County Law Enforcement Executives Association, the Waukesha County Chiefs of Police Association, then Waukesha County District Attorney Brad Schimel, and Milwaukee County District Attorney John Chisholm. More recently, the Wisconsin Chiefs of Police Association, the Wisconsin District Attorneys Association, the Waukesha County Chiefs of Police Association, and Attorney General Brad Schimel have reaffirmed their support for addressing the lack of enforcement authority for State forfeiture offenses.

I request that you place this letter in the committee files for future reference. I must pose to you an existential public policy question: **why pass laws that can't be enforced?** As always, I am willing to meet with anyone at any place to discuss this matter further.

Sincerely,

Dean J. Collins

Dean J. Collins
Assistant Chief of Police

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

cc: Rep. Joel Kleefisch
Rep. Rob Hutton
Rep. Robin Voss, Assembly Speaker
Sen. Scott Fitzgerald
Sen. Leah Vukmir
Sen. Fred Risser
Atty. Gen. Brad Schimel
D.A. Sue Opper

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.

AN ACT ***to create*** 175.39 of the statutes; **relating to:** authorization to make 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:

SECTION 1. 175.39 of the statutes is created to read:

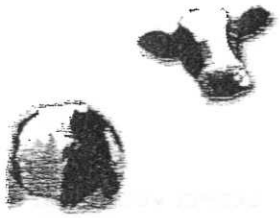
175.39 Arrest by a law enforcement officer. In addition to the arrest powers under s. 968.07, a law enforcement officer may arrest a person for a law

violation that is punishable by a civil forfeiture if the arresting officer has reasonable grounds to believe that the person is violating or has violated the law.

(END)

NOTE: The above language is almost identical to the enforcement/arrest authority granted for the following offenses:

a. Crimes:	Wis. Stat. 968.07 (1)(d)
b. Civil alcohol beverage violations:	Wis. Stat. 125.14
c. Civil traffic violations:	Wis. Stat. 345.22
d. Civil municipal ordinance violations:	Wis. Stat. 800.02 (6)



Wisconsin Lawyer

Vol. 85, No. 9, September 2012

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.)

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