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December 8, 2016

Rep. Amy Loudenberg
Chair, Study Committee on Preservation of Burial Sites
State Capitol, Room 306 East
Box 8952
Madison, WI 53708-8952

Re: December 8, 2016 meeting of Study Committee on Burial Sites

Dear Rep. Loudenberg:

I appreciate the opportunity to appear before this study committee for informational purposes concerning the penalties for various violations pursuant to Wis. Stat. 157.70 (10). My name is Dean Collins and I reside in the city of Brookfield. My interest in burial sites stems from my ordination as a Catholic deacon who regularly officiates at funerals, wakes, and committals as well as my office as the Department of Wisconsin chaplain for the Sons of Union Veterans of the Civil War. My further interest pertains to the enforcement provisions of Wis. Stat. 157.70 (10) as a retired Wisconsin law enforcement officer. I recently completed 47 years of police service, 32.5 years on the Milwaukee Police Department at the rank of Commander and 14.5 years as the assistant chief of police in Brookfield. In those ranks I performed the duties of legal and legislative liaison with the Milwaukee and Waukesha County district attorneys, the U.S. Attorney for the eastern district, as well as the Wisconsin Attorney General. Hence, I am appearing today as the representative of the Wisconsin chapter of the Fraternal Order of Police (FOP) and the Sons of Union Veterans of the Civil War.

I have reviewed the Wisconsin Legislative Council's Memo No. 7, "Penalties for Violations of the Burial Sites Preservation Law" dated December 1, 2016, and wish to provide information to the study committee for its consideration. The key point I wish to convey is the void in the statutes regarding the enforcement of State non-traffic forfeiture offenses (including those regarding burial sites) by local law enforcement officers (town, village, city, county).

The Wisconsin statutes have conferred enforcement/arrest authority for local law enforcement officers to stop; detain for identification/questioning/investigation; and arrest for specific categories of offenses:

Crimes [Wis. Stat. 968.07 (1)(d)]
Civil Alcohol Beverage violations [Wis. Stat. 125.14]
Civil Traffic violations [Wis. Stat. 345.22]
Civil Municipal ordinances [Wis. Stat. 800.02 (6)]

However, no such statutory authority exists for the enforcement/arrest of non-traffic State forfeiture offenses, including those pertaining to burial sites. This is a fact that is not well known or understood by many prosecutors and legislators. However, it is a fact which is known to the current Wisconsin attorney general since I have discussed it with him on numerous occasions.

There was an attempt to address this *lacuna* in the statutes in the 2011-12 session with 2011 AB-237. Even though it passed the Assembly's criminal justice committee unanimously, it died before final passage. (See attached copy.) While the above statutes authorize an "arrest", it is important to note that this concept of arrest embraces more than a ride to the station and a night in jail. It more importantly authorizes local officers to stop and detain a suspect on reasonable suspicion to identify the suspect, question the suspect, and investigate the offense. Without the word "arrest", the officer cannot prevent a suspect from just walking away from her. The U.S. Supreme Court (*U.S v. Mendenhall*) stated that a Fourth Amendment seizure occurs not just when a suspect is removed from the street (arrested) but also when a reasonable person concludes that they cannot leave the presence of the officer. Once the officer by word or act restrains the liberty of a person, that person has been 'seized' for purposes of the Fourth Amendment. I submit that an officer making such a seizure of the person without statutory enforcement authority is violating both the Federal and Wisconsin constitutions.

Why should this matter to this study committee. Simply put, the burial site forfeiture violations are currently unenforceable by local police agencies due to a lack of statutory enforcement authority. Although I have communicated this fact to the Wisconsin Chiefs of Police Association and the Wisconsin Police Executive Group chiefs in the past, there may be some chiefs who are allowing their officers to stop, detain, and/or arrest for these non-traffic State forfeiture offenses. They do so at their legal and financial peril. Some of these unenforceable offenses include the following:

distributing campaign literature within 100 ft. of a polling place, Wis. Stat. 12.035; 12.60 (1)(d)
tattooing of children, Wis. Stat. 948.70 (2)
misuse of laser pointers, Wis. Stat. 941.299 (3)(b)
restrictions on the use of facsimile firearms, 941.2965 (2)
intoxicated flying of aircraft, Wis. Stat. 114.09 (2)
disturbance of human graves, Wis. Stat. 157.70 (10)
trespassing/prowling on railroad tracks, Wis. Stat. 192.32, 192.55 (6)
jumping on/off a moving train, Wis. Stat. 192.321
hospitals not reporting gunshot wound to police, Wis. Stat. 255.40 (2)(c)
refusal to obey emergency management orders during a disaster, Wis. Stat. 323.28
There are many more of these unenforceable non-traffic State forfeiture offenses scattered throughout the statute books.

There is currently a danger in local police agencies enforcing these non-traffic State forfeiture offenses. The officers and/or their chiefs could be prosecuted for False Imprisonment under Wis. Stat. 940.30 which states: "Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony." (Emphasis added.) Since the legislature has not conferred statutory authority for detaining persons for violations of non-traffic State forfeiture offenses, no officer has "lawful authority" which would shield her from criminal prosecution. Similarly, officers could also be prosecuted for Misconduct in Public Office, Wis. Stat. 946.12 (2) which proscribes "an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is

forbidden by law to do in the officer's or employee's official capacity." (Emphasis added.) Because officers cannot legally seize or detain a person except upon statutory enforcement authority, such seizures are both illegal and unconstitutional under both the Federal and Wisconsin constitutions. The real issue is about stop/seizure and involuntary detention even without an 'arrest' being made. Furthermore, I have been advised by a U.S. Attorney for the eastern district that such seizures could trigger both Federal criminal and civil prosecutions for violations of civil rights under color of law, e.g. 42 USC 1983; 18 USC 242.

I am bringing these matters to your attention merely as information. As I mentioned earlier, I have discussed this issue with the attorney general. Although he has agreed with me in personal conversations throughout the years, he has promised me an opinion that definitively answers the following questions:

- 1.) "*City of Madison v. Ricky Two Crow*, 88 Wis.2d 156, 159 (Ct. App., 1979) requires specific statutory authority to arrest for/enforce State laws. Such specific authority is granted for civil alcohol beverage violations at Wis. Stat. 125.14, civil traffic regulations at Wis. Stat. 345.22, civil municipal ordinance violations at Wis. Stat. 800.02 (6), and for crimes at Wis. Stat. 968.07 (1)(d). Is there such general statutory authority for local (town, village, city, county) officers to enforce/arrest for State non-traffic forfeiture offenses? (Emphasis in original.) (Such State forfeiture offenses include distributing election campaign materials within 100 ft. of a polling place [Wis. Stat. 12.035 (3)(b)]; operating an aircraft while intoxicated [Wis. Stat. 114.09 (2)]; disturbance of human graves [Wis. Stat. 157.70 (1)]; and refusal to comply with official orders during an emergency management incident [Wis. Stat. 323.28]. There are many other State non-traffic forfeiture offenses scattered throughout the statute books."
- 2.) "*United States v. Mendenhall*, 446 U.S. 544, 554 (1980) stated: 'We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave (the presence of the officer).' In the absence of a specific statute authorizing local law enforcement officers to 'arrest' for State forfeiture offenses, may officers legally stop and/or involuntarily detain a person for questioning for such civil non-traffic offenses?"
- 3.) "If local officers make a stop or detain a person for questioning for a State non-traffic forfeiture offense without a specific statute granting them arrest/enforcement authority, would such officers be criminally liable for False Imprisonment under Wis. Stat. 940.30 as well as Misconduct in Public Office, Wis. Stat. 946.12 (2)?"

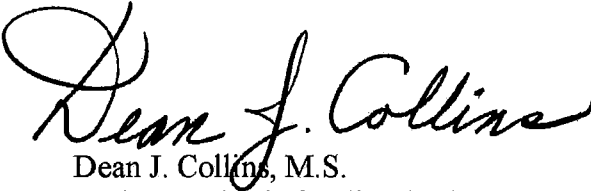
I should note that in State-wide training for law enforcement officers for the concealed weapon law known as Act 35 conducted by the attorney general's office power point slide (#29) specifically informed officers that there was no statute that authorized the enforcement of State non-traffic forfeiture offenses, including those created by Act 35 pertaining to concealed carry of weapons. In fact, this particular slide referenced 2011 AB-237 (although not by title) as a possible remedy although as mentioned above, that bill died at the end of the session. Hence, this is an issue that is not unknown to the Wisconsin Department of Justice since this slide was presented in the spring of 2012 for statewide law enforcement training purposes.

In conclusion, it is my opinion that the study committee may wish to consider various options to the enforcement of the grave desecration laws found at Wis. Stat. 157.70 (10). These include the following:

- 1.) Do nothing and the current anti-grave desecration laws will remain unenforceable.
[Note: Wis. Stat. 943.20 (3)(e) makes theft from a corpse a Class G felony. However, intent to steal must be proven beyond a reasonable doubt. If the disinterment is interrupted, this element may be difficult to prove.]
- 2.) Reintroduce 2011 AB-237 which would grant enforcement powers to local law enforcement officers for all non-traffic State forfeiture offenses.
- 3.) Use the language of 2011 AB-237 within Chapter 157.
- 4.) Change the word "forfeiture" in the burial site violations to "crime" thereby authorizing local law enforcement agencies to enforce the provisions of Chapter 157 as criminal offenses pursuant to Wis. Stat. 968.07 (1)(d). The monetary penalties would remain as they currently are and without any imprisonment as a punishment.

I thank the study committee for this opportunity and their indulgence for my lengthy presentation of a complex legal and constitutional conundrum. I am willing to discuss this matter further at any place or time upon request.

Sincerely,



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Attachments: 2011 AB 237
DOJ slide #29

cc: Mr. Brad Schimel, DOJ
Ms. Abigail Potts, DOJ
Wisconsin Chiefs of Police Assoc.
Wisconsin District Attorneys Assoc.
Badger State Sheriffs Assoc.
CVMIC



2011 ASSEMBLY BILL 237

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

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

Analysis by the Legislative Reference Bureau

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

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

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

ASSEMBLY BILL 237

SECTION 1

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

3 (END)

CRIMES/OFFENSES AND ENFORCEMENT

GENERAL ENFORCEMENT ISSUES

- ★ State forfeitures
- ★ County/local ordinances
 - Municipalities and counties can adopt ordinances that prohibit conduct which is the same as or similar to that prohibited by chapters 941 to 948. Wis Stat 66.0107 and 59.54(22).
- ★ Arrest powers for state forfeitures and local ordinances
 - No arrest power for state forfeitures. Legislation pending.
 - Municipal ordinances: Wis. Stats. 968.07, 818.02(8), 66.0014(1)(a).

GENERAL OVERVIEW

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LOCAL CONTROL/PREEMPTION

★ Local Governmental entities are prohibited from enacting or adopting an ordinance or resolution "That regulates the sale, purchase, purchase delay, transfer, ownership, use keeping, possession, bearing, transporting, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute." *Wis. Stat. 66.0409(2).*

★ Municipalities and counties can adopt ordinances that prohibit conduct which is the same as or similar to that prohibited by chapters 941 to 948.
Wis. Stat. 66.0107 and 59.54(22).

★ *Bill being considered by state legislature A.B. 237 re: arrests for forfeitures, but will need to include ordinance authority for 175 Stats.*