

59 NW (2d) 800, and *State v. Kennedy*, 15 W (2d) 600, 113 NW (2d) 372.

The ruling of a court on the sufficiency of evidence to go to the jury or sustain a verdict in a criminal case is a ruling on a question of law reviewable on the state's appeal from a judgment of acquittal, with the permission of the trial judge. (*State v. Nall*, 248 W 584, overruled.) *State v. Kennedy*, 15 W (2d) 600, 113 NW (2d) 372.

Where a defendant was tried before the court without a jury for an alleged violation of a rule of the conservation commission, and was acquitted on the ground that such rule was unconstitutional, the appeal by the state was within the provision of 958.12 (1), Stats. 1961. *State v. Herwig*, 17 W (2d) 442, 117 NW (2d) 335. See also *State v. Gecht*, 17 W (2d) 455, 117 NW (2d) 340.

958.12 (1), Stats. 1965, permits appeal from a final order dismissing the action after jeopardy has attached if it presents a question of law. The ruling by the trial court on the sufficiency of the evidence is a ruling on a question of law reviewable on the state's appeal from an order dismissing the complaint in a criminal case. *State v. Fleming*, 38 W (2d) 365, 156 NW (2d) 485.

See note to 274.37, on criminal actions, citing *State v. Hutnik*, 39 W (2d) 754, 159 NW (2d) 733.

974.06 History: 1969 c. 255; Stats. 1969 s. 974.06.

Comment of Judicial Council, 1969: This represents the first Wisconsin attempt at a comprehensive post-conviction statute which will afford an all encompassing remedy for defendants challenging their convictions. It is taken directly from Title 28, USC, s. 2255. The section is designed to supplant habeas corpus and other special writs.

Sub. (2) provides that the remedy is invoked by a defendant bringing the motion as a part of the original criminal case.

Sub. (3) requires the appointment of counsel, the written response of the district attorney to the motion, a hearing and a determination of issues by the court except where the motion and the files and records conclusively show the prisoner is entitled to no relief. This contemplates that motions may be summarily denied if they show no arguable merit. Appointment of counsel and hearings are automatic.

Sub. (4) is taken from the Uniform Post-Conviction Procedure Act and is designed to compel a prisoner to raise all questions available to him in one motion.

Sub. (5) provides that the presence of the prisoner is not necessary, although he certainly must be produced at an evidentiary hearing.

Sub. (8) provides that if this section is not utilized or if relief is sought and denied, habeas corpus is not available. This provision has been held not to be an abridgement of a defendant's right to habeas corpus. (See *Stirone v. Markley*, 345 F. 2d 473 cert. den. 382 U.S. 829, 86 S. Ct. 67.) [Bill 603-A]

Editor's Note: This section superseded sec. 958.07, Stats. 1967, which was derived from

sec. 146, ch. 631, Laws 1949, and later legislation; it gave statutory recognition to the common-law writ of error coram nobis and it regulated the issuing of the writ. Citations of relevant cases are as follows: *In re Ernst*, 179 W 646, 193 NW 978; *Gelosi v. State*, 218 W 289, 260 NW 442; *State v. Dingman*, 239 W 188, 300 NW 244; *State v. Stelloh*, 262 W 114, 53 NW (2d) 700; *Wilson v. State*, 273 W 522, 78 NW (2d) 917; *Houston v. State*, 7 W (2d) 348, 96 NW (2d) 343; *State v. Kanieski*, 30 W (2d) 573, 141 NW (2d) 196; *State v. Kopacka*, 30 W (2d) 580, 141 NW (2d) 260; *Parent v. State*, 31 W (2d) 106, 141 NW (2d) 878; *State v. Randolph*, 32 W (2d) 1, 144 NW (2d) 441; and *Hansen v. State*, 33 W (2d) 648, 148 NW (2d) 4.

CHAPTER 975.

Sex Crimes Law.

Comment of Judicial Council, 1969: Chapter 975 is a restatement of s. 959.15, the Sex Crimes Law. Aside from some language clarification there are few changes. Section 975.06 incorporates the decision of the supreme court in *Huebner v. State*, 33 Wis. 2d 505; 147 NW 2d 646, requiring that a defendant be afforded a hearing on the issue of the need for specialized treatment. The hearing will be to the court without a jury. To prevent harassment of officials who have no knowledge of a particular case, s. 975.06 (5) designates the person who is to be subpoenaed to obtain department records. Section 975.12 broadens the existing law to afford persons committed as sex deviates the same rights as other prisoners in earning "good time" for parole eligibility. (Bill 603-A)

On prosecutions (limitations imposed by the Fourteenth Amendment) see notes to sec. 8, art. I; and on crimes against sexual morality see notes to various sections of ch. 944.

Wisconsin's sex deviate act. *Motz*, 1954 WLR 324.

Criteria for commitment under the Wisconsin sex crimes act. *Jesse*, 1967 WLR 980.

Application of criminal due-process safeguards. 1967 WLR 1011.

975.01 History: 1969 c. 255; Stats. 1969 s. 975.01.

975.02 History: 1969 c. 255; Stats. 1969 s. 975.02.

Where an accused is charged with having committed both a sex crime for which a presentence examination is mandatory under 959.15 (1), and a crime for which a presentence examination may be ordered under 959.15 (2), Stats. 1965, the mere fact that one crime was a sex crime does not prevent the trial court from exercising its discretion to determine whether the second crime was or was not a sex crime. *State v. Clarke*, 36 W (2d) 263, 153 NW (2d) 61.

975.03 History: 1969 c. 255; Stats. 1969 s. 975.03.

975.04 History: 1969 c. 255; Stats. 1969 s. 975.04.

975.05 History: 1969 c. 255; Stats. 1969 s. 975.05.

975.06 History: 1969 c. 255; Stats. 1969 s. 975.06.

340.485, Stats. 1953, does not authorize a commitment to the custody of the state department of public welfare of a person convicted only of disorderly conduct as defined in 348.35. *Wood v. Hansen*, 268 W 165, 66 NW (2d) 722.

Under 959.15 (6), Stats. 1965, there are only 2 alternatives available to the trial court when the department of public welfare recommends specialized treatment: The defendant is either placed on probation, with the condition that he or she receive prescribed inpatient or outpatient treatment, or is committed to the department. After care is suggested, the trial court has no authority whatsoever to impose any sentence as such. It is only when the department determines that no treatment is required that the trial court is free to sentence the defendant as provided by law for the offense. *State v. Sorenson*, 31 W (2d) 368, 142 NW (2d) 785.

When a person is convicted of a sex crime and subject to a presentence social, physical and mental examination and the report of the department of public welfare recommends specialized treatment, before a court can place such person on probation in the department with treatment or commit him to the department for treatment under 959.15 (6), Stats. 1965, he must be afforded a hearing on the issue of the need for specialized treatment for his mental or physical aberrations unless such hearing is expressly waived by him. The defendant must be afforded such hearing with counsel, process to compel attendance of witnesses, production of evidence, an examination by a doctor or psychiatrist of his own choosing, and if he is unable to provide counsel, he must have counsel appointed for him at public expense, all as provided in 959.15 (14), for hearings after commitment to the department. After such hearing the court must make its finding and either sentence the defendant under criminal law as provided in 959.15 (5) or commit him to the department under the alternatives of 959.15 (6). The department's recommendation is not mandatory on the court, which must hold a hearing thereon and make its determination upon the issues. *Huebner v. State*, 33 W (2d) 505, 147 NW (2d) 646.

The hearing to determine whether a defendant convicted of a sex crime should, as recommended by the department, be committed for treatment under the sex crimes act or sentenced to prison under the criminal law, is no longer part of the guilt-determining process, and its purpose is not to determine the criminal punishment to be imposed but whether treatment and the protection of the public are necessary. The state is not required to prove the need (for specialized treatment) beyond a reasonable doubt, but its burden of proof is to satisfy the court to a reasonable certainty by the greater weight of the credible evidence. *Goetsch v. State*, 45 W (2d) 285, 172 NW (2d) 688.

975.07 History: 1969 c. 255; Stats. 1969 s. 975.07.

975.08 History: 1969 c. 255; Stats. 1969 s. 975.08.

975.09 History: 1969 c. 255; Stats. 1969 s. 975.09.

975.10 History: 1969 c. 255; Stats. 1969 s. 975.10.

975.11 History: 1969 c. 255; Stats. 1969 s. 975.11.

975.12 History: 1969 c. 255; Stats. 1969 s. 975.12.

975.13 History: 1969 c. 255; Stats. 1969 s. 975.13.

Where the department made an order under 959.15 (13) for continuance of control of a sex offender, but the reviewing court did not timely notify the prisoner of the hearing nor of his right to counsel, the order for continuance was only procedurally erroneous and could be cured by a later proper hearing. *State ex rel. Stroetz v. Burke*, 28 W (2d) 195, 136 NW (2d) 829.

959.15, Stats. 1967, which provides for court review of a departmental order retaining custody of a convicted sexual offender because of the department's finding that his release would be dangerous to the public, does not involve the charge of any crime, but determination of (1) whether he had recovered from his mental aberrations, and (2) whether his release would constitute a danger to the public. *Buchanan v. State*, 41 W (2d) 460, 164 NW (2d) 253.

975.14 History: 1969 c. 255; Stats. 1969 s. 975.14.

975.15 History: 1969 c. 255; Stats. 1969 s. 975.15.

975.16 History: 1969 c. 255; Stats. 1969 s. 975.16.

975.17 History: 1969 c. 255; Stats. 1969 s. 975.17.

975.18 History: 1969 c. 255; Stats. 1969 s. 975.18.

CHAPTER 976.

Uniform Acts in Criminal Proceedings.

976.01 History: 1969 c. 255; Stats. 1969 s. 976.01.

Editor's Note: For foreign decisions construing the "Uniform Act for the Extradition of Prisoners as Witnesses" see Uniform Laws, Annotated.

976.02 History: 1969 c. 255; Stats. 1969 s. 976.02.

Editor's Note: For foreign decisions construing the "Uniform Act for the Extradition of Witnesses in Criminal Cases" see Uniform Laws, Annotated.

976.03 History: 1969 c. 255; Stats. 1969 s. 976.03.

Editor's Note: For foreign decisions construing the "Uniform Criminal Extradition Act" see Uniform Laws, Annotated.