



STATE OF WISCONSIN JUDICIAL COUNCIL

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April 1, 2013

Cathlene Hanaman, Deputy Chief
Legislative Reference Bureau
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P.O. Box 2037
Madison, WI 53701-2037

Re: Criminal Procedure Draft Bill -- LRB-0031/P1

Dear Cathlene:

The Judicial Council has completed its review of the consolidated criminal procedure bill draft (LRB-0031/P1) prepared by the Legislative Reference Bureau (LRB). The Criminal Procedure Workgroup has prepared responses to the LRB Notes embedded in the bill and the Drafter's Note, dated October 22, 2012. The group also requests a few additional amendments to the draft.

Responses to LRB Notes:

- ✓ 1. In response to the LRB note on page 34 of the draft bill, the workgroup reviewed s. 59.40 (2) (c) and approved the change.
- ✓ 2. In response to an LRB note on page 48 of the draft bill, the workgroup reviewed s. 175.60 (11) (a) 2. b. and approved the cross-reference.
3. On page 126 of the draft, the LRB note indicates that the drafter did not change proposed s. 969.50 to provide bench warrants for witnesses because "without more review, we thought such changes would be redundant given s. 967.20 and the matter does not seem to fit in chapter 969 which is titled 'Securing a Defendant's Appearance; Release.'"

Per the LRB note, the workgroup again reviewed this issue and concluded that the change is not redundant because if it were executed, the newly created s. 967.20 would be deleted. The workgroup did not share the drafter's concern regarding the chapter title. The workgroup renewed its support for the change previously requested by the Council, as follows: Sec. 967.20

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should be incorporated back into s. 969.50. The title of s. 969.50 should read: "Bench warrant for defendant or witness on failure to appear." Throughout sub (1), references should be to defendant or witness. The phrase "...violates a term or condition of release..." should be amended to read "...violates condition of release..." Sub. (3) should reference "...a defendant or witness arrested..."

4. On page 127 of the draft, the LRB note contains the following issue and question: "Property or kinds of property" does not seem to include "people" if they are to be seized per the search warrant. I'm not sure if "things" did either, but should a broader term be used here?

The workgroup noted that LRB-0021/P2 amended s. 968.465 (1) "designated property or kinds of property" to read "designated things." The Council previously asked LRB to restore current law, which prompted the above question. The workgroup responded that people are not seized under a search warrant. The workgroup approved the language in the most recent draft (LRB-0031/P1), which reads, "...for the purpose of seizing designated property or kinds of property."

5. On page 132, the LRB note asks the Council to please review the following text:
SECTION 466. 968.17 of the statutes is renumbered 968.506, and 968.506 (1), as renumbered, is amended to read:

968.506 (1) The return of the search warrant shall be made, with a written inventory of any person or property seized, within 48 hours after execution to the clerk designated in the warrant. ~~The return shall be accompanied by a written inventory of any property taken. Upon request, the clerk shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the search warrant if either requests it.~~

The workgroup noted that the Council did not request any amendments to this section. The workgroup reviewed the changes made by the LRB drafter and requested that this section be returned to current law with no amendments.

6. On page 139, the LRB note asks if s. 968.375 (12) should be amended to mirror the amended language in s. 968.465 (4). The workgroup responded in the negative -- current law in s. 968.375 (12) should be retained. Further, s. 968.465 (4), as amended by the LRB drafter, introduces confusion to this provision. The workgroup reaffirmed that current law should also be retained in s. 968.465 (4).

7. On page 170, the LRB note states: "As you noted, we removed this provision because it is merely informational. Informational provisions that do not make law or that do not qualify any provision that makes law are not included in the statutes."

The Council's redrafting instructions actually stated, "The draft deleted s. 968.475 (3), perhaps on the assumption that it simply provided instruction regarding where to look for something else in the statutes and therefore did not add anything of substance. The Council noted that post-

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Zurcher v. Stanford Daily, documents possessed by innocent third parties must be obtained with a subpoena, not a search warrant. Sec. 968.475 (3) is not informational. It codifies case law and identifies an exception to the general rule. The workgroup again instructs that sub. (3) should be retained in the bill.

971.09 (3)
8. On page 176 of the bill, s. 974.09 contains an LRB note asking: "Should s. 704.16 (1) (b) 4. and (3) (b) 2. d. reference s. 974.09—conditions of release pending appeal? How about 781.04 (1), 911.01 (4) (c), ~~938.18 (8)~~, ~~938.35 (1) (cm)~~, ~~938.396 (2g) (d)~~, ~~946.49 (1) (intro.)~~, 950.08 (2g) (e), and 967.08 (1) and (3) (a)? And with the change of chapters, the "this chapter" in ss. ~~969.08 (8)~~, ~~969.09 (3)~~, ~~969.12 (1) and (2)~~, and ~~969.13 (5) (a)~~, will need to be looked at, too."

✓ The workgroup agreed that the reference to s. 974.09 is sufficient in ss. 704.16 and 781.04. In s. 911.01 (4) (c), the workgroup requests the addition of the following phrase, "Proceedings with respect to release on bond pending appeal under s. 974.09..." In s. 938.18 (8), the workgroup agreed that because it relates only to pretrial detention in a juvenile case, the reference should remain "ch. 969." The workgroup agreed that a reference to s. 974.09 is sufficient in s. 938.35 (1) (cm). Members questioned why the drafter suggested referencing it in s. 938.396 (2g) (d) because the provision has nothing to do with bail. The workgroup concluded that the reference is not necessary. With regard to s. ~~946.49 (1) (intro.)~~, s. 950.08 (2g) (e), and s. 967.08 (1) and (3) (a), the workgroup agreed that the references to s. 974.09 are appropriate.

The workgroup noted that s. 974.09 (1) (a) only references s. 809.31 and requests the addition of references to ss. 969.32, 969.33, and 969.37-.42.

9. On page 198, s. 971.015 (3) contains an LRB note to review the reference to videoconferencing under subch. III of ch. 885. The workgroup approved the reference as drafted.

10. On page 203, the LRB drafter incorporated 2011 Wisconsin Act 285 into s. 971.026. The workgroup reviewed this provision as requested. The workgroup determined that s. 971.026 should be deleted, and references to s. 971.027 are unnecessary. The references to hearsay at juvenile probable cause hearings should be moved to s. 971.75. The following sentence should be added to s. 971.75 (1): "Notwithstanding s. 908.02, hearsay is admissible in a hearing under this section." The following sentence should be added to s. 971.75 (3) (b): "The court may base its finding of probable cause in whole or in part on hearsay admitted under sub. (1)."

11. On page 204, the LRB note asks the Council to review the language in s. 970.06 (4) to ensure it is what the Council intended. The workgroup asked if the LRB is aware of any reason why a complaint can't be an information for constitutional law purposes. The workgroup is unaware of any issue, so unless the LRB advises otherwise, the workgroup reviewed the language and confirmed that it is what was intended by the Council.

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12. On page 209, the LRB drafter noted 3257/P2 and 4648/P1 both renumber 971.04 (3). The 3257/P2 treatment is retained and the bill creates 974.08 (2) and (3). The workgroup approved this treatment.

13. On page 231, the LRB note indicates that the drafter did not restore "forthwith." The workgroup did not renew its request to revise it.

14. On page 262, the LRB note indicates that each of the sections mentioned should contain a cross-reference to s. 975.525, applicability. The drafter notes that if the Council approves of how this section is drafted, the drafter can do that in the next version. The drafter asks the Council to make sure this list is complete, and indicates that they can also recombine ss. 975.57 to 975.64 into a single section.

The workgroup requested that s. 975.525 should be moved to the final section of subch. III of ch. 975 and that it should be revised as follows:

~~975.525~~ 975.65. Applicability of ~~ss. 975.57 to 975.64~~. ~~This section governs Subch. III Sections 975.53, 975.54, 975.55, 975.56, 975.57, 975.58, 975.59, 975.60, 975.61, 975.62, 975.63, and 975.64~~ governs the commitment, release, and discharge of persons adjudicated not guilty by reason of mental disease or mental defect for offenses committed on or after January 1, 1991. The commitment, release, and discharge of persons adjudicated not guilty by reason of mental disease or mental defect for offenses committed prior to January 1, 1991, ~~shall be~~ are governed by s. 971.17, 1987 stats., as affected by 1989 Wisconsin Act 31.

15. On page 276, the LRB note requests that the Council review the placement and content of s. 971.515, including the cross-references. It was created as s. 971.23 (11) in 2011 Wisconsin Act 284. This renumbers it as a separate statute. The workgroup agreed that the placement is fine and the cross-references are correct.

16. On page 280, the LRB note requests that the Council review the treatment of s. 971.31 (10) in light of 2009 Wisconsin Act 27. The drafter asks if the Council wants to add reference to appeal upon a final order in addition to appeal from a judgment of conviction.

The workgroup noted that s. 971.085 is titled "Effect of a plea of guilty or no contest." It preserves the rule in current s. 971.31(10) and adds orders denying a motion to dismiss on the ground that a statute is unconstitutional. The current intro. to the statute refers to appeal from a final order or judgment. 2009 Act 27 added the reference to "final order" to the statute; the draft preserves it. The workgroup determined that there is no issue with the modified language proposed by the Council. However, the workgroup determined that the phrase "occurring prior to the plea" should be added to s. 971.085 (1) (intro) as follows: "A plea of guilty or no contest waives all nonjurisdictional defects and defenses occurring prior to the plea except that the

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following may be reviewed upon appeal from a final order or judgment..." This revised language more accurately codifies case law. *See State v. Riekkoff*, 112 Wis.2d 119, 122-123, 332 N.W.2d 744, 746 (1983).

17. In the draft, s. 974.01 (2) of the statutes is renumbered s 809.40 (4). On page 329 of the draft bill, the LRB note asks the Council to review the proposed renumbering. (The statutory unit moves from a section on misdemeanor appeals to a section on other specific appeals.) The workgroup determined that this is incorrect. The rules of appellate procedure have been amended so current law should be retained. The workgroup instructs that in Section 1075 of the bill draft there should be no repeal of s. 974.01 (1). In Section 1076 of the bill draft there should be no renumbering of s. 974.01 (2).

18. On page 360, the LRB note asks the Council to please review the repeal of 979.08 (6). The workgroup notes that this subsection was not repealed. It was renumbered as s. 968.055 (5), with amendments. The workgroup approved the placement, but preferred current law. The workgroup asked the LRB to please explain why the drafter deleted the requirement that the judge validate and sign the verdict. The workgroup instructs retention of current law (s. 979.08) with the exception of moving it to s. 968.055 and striking out the references to court commissioner.

Response to LRB Drafter's Note, dated October 22, 2012:

1. From the LRB drafter: "Please review ss. 968.325 and 968.335, as renumbered in the bill; we removed any stylistic changes not clearly permissible in s. 13.92 (1) (bm), but we did retain any changes that make the introduction and provisions following from the introduction consistent with current drafting style. We left those in as the revising attorney will make them (under s. 13.92 (1) (bm)) after the bill passes so it is better if we leave them in so you can review them rather than adding them later without your review."

The Council's original drafting committee did not want to revise these sections because they are based on federal statutes and the precise language is very important. Upon review, the workgroup has no concerns regarding the change to the references and the purely stylistic changes in ss. 968.325 and 968.335. However, the workgroup noted that the drafter's change to s. 968.335 (7) (b) is a substantive change. While the change creates parallel structure to the sentence, it also changes the law by expanding the amount of information that is subject to disclosure for good cause. Because it changes the law, the workgroup disagreed that this is a change permissible under s. 13.92 (1) (bm). The Council has not approved any expansion of the law in this area so the workgroup requested that the language in s. 968.335 (7) (b) be returned to current law, including removal of the phrase "and other papers and records" (see pg. 153, line 8 of the draft).

2. From the LRB drafter: "Please review s. 968.645 — although I would have to look at the file because these provisions predate my involvement, I believe that most of the changes were incorporated per the department and law enforcement agencies. "Physical evidence" seemed to include the whole item whereas "biological material" included only the material needed. In other words, the department and the law enforcement agencies thought that current law would require preservation of an entire couch or car if biological material were found on a cushion or a carseat. The changes would require preserving only the material necessary. I will look into the drafting file for further information if you would like."

okay

The workgroup would like the drafter to obtain further information from the drafting file regarding why the drafter made these changes to this section because no law enforcement agencies participated with the drafting of this bill.

3. From the LRB drafter: "The cross-references to bail and bond are not necessary in section 969.30 because they are defined in s. 967.02 and apply to chs. 967 to 979. A note directing the reader to those definitions can be found at the beginning of ch. 969 in the statutes."

no

The workgroup understands that it is not strictly necessary, but one of the goals of these amendments is to make information easier to find. A cross-reference at this location would be very helpful to the reader. The workgroup again requests a cross-reference in s. 969.30 to refer the reader to the definitions of "bail" and "bond."

Additional Amendments:

1. Add another box to check for "Other" in proposed s. 969.26 (3), citation form. ✓
2. The workgroup noted that s. 969.02 (6), which was created by 2005 Act 447, should be retained. It should be added to s. 969.38 (1) (a) of the draft bill. ~~Current ss. 969.02 (2m) and 969.03 (1m) regarding acceptance of credit cards should also be added as a new s. 969.33 (8). Additionally, a heading should be created for sub. (8) titled "Credit Cards Accepted."~~
3. The phrase "at the time set in the scheduling order" should be amended to read "at another time set by the court" in s. 971.46 (intro).
4. In s. 972.075, delete "Before trial and after affording counsel the opportunity to be heard, the court may authorize the jurors to ask questions." Replace it with the following: "After selection of a jury, the court may authorize the jurors to ask questions."

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5. The new s. 946.77 (previously 968.255 (4)) on page 142, lines 1-4 of the draft bill does not make sense as amended by the LRB drafter. The phrase "if the person who is subject to the search is a detained person" should be deleted.

968.255(2) - but OK

6. On page 180, line 1 of the draft bill, the new s. 969.43 (5) (previously s. 969.035) references a section that does not exist (969.44 (5) (b)). The reference should be to s. 969.51 (1).

7. Sec. s. 971.09 (5) contains multiple references to "read-crimes" on page 216 of the draft bill. It should be "read-in crimes."

(2)

The Council renews its request that you please draft the bill analysis and prepare the bill for introduction. Please let me know if you have any questions, or if I can be of any assistance.

Once again, the Council conveys its thanks for your continued assistance with this project!

Sincerely,

April M. Southwick, Attorney
Wisconsin Judicial Council

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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).
 - Statutes 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 committee was diverse, and included 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 full Council has spent the past seven months reviewing the draft that was created in bill form by the Legislative Reference Bureau. The Council has approved a number of additional amendments, and one issue is still being studied (substitution of jurors). The Council anticipates that the LRB will have the bill and an analysis completed this summer.

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 following¹:

969.24 Citation for misdemeanor.

(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." § 969.25 (Release on bond by district attorney) is a new provision. 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.

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

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.

969.25 Release on bond by district attorney. (1) (a) Except as provided in s. 969.24, upon consent of the district attorney, an individual who has been arrested and taken into custody may be released before the initial appearance upon signing a bond, obligating the individual to appear in court for an initial appearance at a time and place specified in the bond and to comply with any other specified conditions required by the district attorney under sub. (2).

(b) In determining whether to consent to release on bond, the district attorney may consider whether any of the following applies:

1. The defendant has provided proper identification.
2. The defendant is willing to comply with the conditions of the bond.
3. The defendant appears to pose a danger to himself or herself, another person, or property.
4. The defendant can show sufficient evidence of ties to the community.
5. The defendant has previously failed to appear in response to a citation, subpoena, summons, or order of court.
6. Further detention appears necessary to carry out legitimate investigative activities.

(2) The district attorney may not impose monetary conditions of release under this section. If he or she releases a defendant under this section, the district attorney shall impose the conditions mandated by ss. 969.33 (4) and 969.27 (6) and may also impose any of the following conditions:

- (a) The defendant shall report any change of address within 48 hours to the district attorney.
- (b) The defendant shall appear at specified times and places for investigative purposes.
- (c) The defendant may not contact, directly or indirectly, specified persons.
- (d) The defendant may not possess any dangerous weapon.
- (e) The defendant may not consume any alcoholic beverage.
- (f) The defendant may not go to designated geographical areas or premises.
- (g) The defendant shall submit to supervision by a qualified person or organization agreeing to supervise the defendant.
- (h) Any other reasonable, nonmonetary condition.

(3) Any bond executed under this section shall include all of the following:

- (a) The conditions of release.
- (b) Notice that the violation of any condition of release is punishable under s. 946.49.
- (c) Notice that the defendant is entitled to the assistance of counsel and instructions for obtaining such assistance if he or she is indigent.
- (d) Notice that the defendant may move the court to modify the conditions of release.

(4) Conditions of release under this section expire upon the initial appearance unless continued by the judge. Signing a bond under this section does not preclude the individual from seeking judicial relief from its terms.

(5) A defendant shall be given a copy of the bond.

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. Eliminate the Preliminary Examination in Felony Cases

Purpose: Increase efficiency by preserving court time, the time of witnesses – often involving overtime for police officers – and, the time of prosecutors and defense lawyers. The current preliminary is of extremely limited utility – its official function, to identify weak cases and dismiss them, is rarely carried out. Credibility of witnesses is not to be considered, competing inferences are not to be weighed, and hearsay is now admissible for all purposes. Unofficial functions – previewing witnesses, obtaining discovery, evaluating the strength of the case – are of limited value in light of current limits on scope of the preliminary and the high number of waivers.

How it's accomplished:

1. Repeal § 970.03

2. Encourage earlier and more complete discovery. For example, police reports at the initial appearance and allow discovery prior to the initial appearance. See § 971.035 (Discovery at the initial appearance) and § 971.015 (Discovery before the initial appearance), see text in IV. A. 4., above.

3. Allow a motion for pretrial dismissal to address the rare situation where uncontroverted facts show the case cannot be proved. § 971.69 (Pretrial dismissal of complain) is a new provision.

971.69 Pretrial dismissal of complaint. (1) A defendant may move for pretrial dismissal of the complaint or of any count in the complaint. The defendant may provide one or more affidavits in support of the motion. The motion shall state with particularity the grounds upon which it is based and shall specify all of the following:

(a) The elements of the crime charged or other facts the state is required to prove at trial that the defendant believes the state cannot prove because there is no genuine issue as to any material fact.

(b) The evidence or absence of evidence, including any statement of a witness, that the defendant believes is uncontroverted and that establishes the grounds stated in the motion.

(c) If applicable, any crime included within the crime charged, as provided in s. 939.66, that the defendant also believes, for the grounds specified, the state cannot prove at trial because there is no genuine issue as to any material fact.

(2) If the grounds stated in the motion, if true, would not justify granting the dismissal motion, or if the allegations in the complaint demonstrate that there is a genuine issue of material fact as to those grounds, the court shall deny the motion.

(3) If the grounds stated in the motion, if true, would justify granting the dismissal motion and the allegations in the complaint do not demonstrate that there is a genuine issue of material fact as to those grounds, the court shall allow the district attorney to file a written response presenting any facts or expert opinions that the district attorney believes establish the elements or other facts that the state is required to prove at trial. The court may request that the district attorney and defense counsel present arguments and may allow testimony where it would resolve the questions whether a genuine issue of material fact exists.

(4) Unless the court denies the motion under sub. (2), the court shall rule on the motion based on the complaint, the material submitted by the defendant in support of the motion, and material, testimony, or argument presented under sub. (3). The court shall rule on the motion as to the crime charged and any included crime specified in the motion. If the court concludes, for the reasons specified in the motion, that there is no genuine issue as to any material fact, the court shall do one of the following:

(a) Grant the motion.

(b) Allow the district attorney to amend the complaint.

(5) A complaint or charge dismissed under this section may not be reissued unless the district attorney has or discovers additional evidence supporting the complaint or charge.

(6) The defendant shall raise all grounds that can be raised under this section in a single motion, unless good cause is shown.

C. 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.
- (4) NOTICE OF ALIBI.

971.45 Witness lists.

971.46 Expert witnesses.

971.47 Deoxyribonucleic acid evidence.

971.48 Scientific testing; preservation of evidence.

971.49 Motion to obtain evidence before trial.

971.50 Continuing duty to disclose.

971.51 Manner of performing disclosure.

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, the party having the duty to disclose shall do one of the following:

- (a) Provide a copy of the material to be disclosed.
- (b) Notify the other party that the material may be inspected, copied, or photographed during specified reasonable times and make the material available to the other party at the time specified. The party having the duty to disclose shall, unless it provides copies, make available suitable machinery for making copies.

(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).

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.

D. 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 charges 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 charges shall be resolved by the entry of a plea of guilty or no contest or by an agreement that charged 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, 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. 975.33 (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.

New s. 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 is in addition to the reports and hearings provided at 3, 6 and 9 month intervals under current law.

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. 971.7 (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. Allows the district attorney to release a defendant on bond before the initial appearance – intended primarily for cases where the defendant is likely to be released without monetary conditions at the initial appearance.

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

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. Codifies current law relating to plea withdrawals.

971.093 Withdrawal of a plea of guilty or no contest.

- (1) BEFORE SENTENCING. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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).

17. Allows an alternate to replace a juror after deliberations have begun, and creates a process modeled on Rule 24(c) of the Federal Rules of Criminal Procedure.

- 972.23 Dismissal of alternate jurors.** (1) If the court required selection of additional jurors under s. 972.04 (1) so that alternates may be available, and, at the time the case is submitted to the jury for deliberation, the number of jurors remains greater than the number of jurors required for deliberation, the court shall determine by lot which jurors shall not participate in deliberations. For good cause, the court may discharge additional jurors other than by lot.
- (2) The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

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

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

19. 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.

20. 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.

21. 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.