not preclude a prisoner from seeking relief under ch. 974. [Bill 603-A]

973.14 History: 1969 c. 255; Stats. 1969 s. 973.14.

Comment of Judicial Council, 1969: This section is designed to permit the administrative transfer of prisoners between local institutions within a county without the requirement of court proceedings. [Bill 603-A]

973.15 History: 1969 c. 255; Stats. 1969 s. 973.15.

Comment of Judicial Council, 1969: Present s. 959.07. [Bill 603-A]

A stay of execution granted by the trial court pending the determination of the case on a writ of error is in effect an order that the term of imprisonment shall not commence until the case is determined by the reviewing court, and is effectual to postpone the term of imprisonment as though a day had been named. State v. Grottkau, 73 W 589, 41 NW 80 and 1063.

Upon conviction of a defendant in a single trial of several distinct offenses, the court may impose separate sentences for each, making a term of imprisonment for one offense begin in the future upon the expiration or termination of the term imposed for one of the others. But upon successive convictions in separate trials the term for each begins upon the day of sentence, and any 2 or more that have not expired or that have been terminated run concurrently. Application of McDonald, 178 W 167, 189 NW 1029.

Where the court did not specify that a sentence imposed on a second count was to run concurrently with a sentence on the first count, the sentence for the second count commenced at expiration of the sentence for the first count. Final statement of the sentence orally pronounced constituted the sentence defendant must serve, where the court subsequently in defendant's absence restated the sentence in writing. Siegel v. State, 201 W 12, 229 NW 44.

Where defendant is convicted on 2 counts and the court imposed one sentence, defendant cannot object if the sentence is not in excess of the statutory maximum for any one conviction. State v. Christopherson, 36 W (2d) 574, 153 NW (2d) 631.

A sentence to the state prison ran concurrently with a sentence to the reformatory in the case of a prisoner who broke his parole, was sentenced to the state prison for one year, escaped from the sheriff on the way to prison and, on being recaptured, was returned to the reformatory, where he served the balance of the sentence, which was more than one year; the prisoner must be discharged at expiration of the term at the reformatory. 19 Atty. Gen. 13.

The phrase "the same to date from the day of original sentence" in commutation of a sentence does not relieve the prisoner from the provision that his sentence does not begin until actual imprisonment under it. 20 Atty. Gen. 54.

A commutation providing that a commuted sentence is "to commence as of the date of the commencement of the sentence imposed by the court" was not intended to refer to the date of pronouncement of the sentence where the sentence provided that the prisoner be held in the county jail as a material witness and that the period of such detention should be part of his term. 20 Atty. Gen. 806.

A sentence to begin at termination of imprisonment for former crime is valid. 21 Atty. Gen. 555.

Where defendant has been found guilty on 4 counts, the judgment sentencing him to indeterminate sentences to run consecutively after serving the minimum term for each count is valid. 21 Atty. Gen. 866.

Where defendant is sentenced on 2 counts, the second sentence to begin after service of minimum time under the first sentence, the sentences must be construed as consecutive. 25 Atty. Gen. 26.

Sentences of one to 3 years on each of 4 counts, the sentences for the first year to run consecutively and after that concurrently, are valid. 25 Atty. Gen. 108, 388.

Two or more sentences imposed by a court at the same time run concurrently unless the court at the time of imposition of the sentence specifies they shall run consecutively. 26 Atty. Gen. 439.

A sentence for a general indeterminate term of not less than one year and not more than 10 years, "in addition to the former sentence which you are now serving," is construed to mean that the sentence would commence at expiration of the sentence which the prisoner was then serving. 27 Atty. Gen. 601.

Commutation of a sentence is construed to mean that 2 sentences run concurrently after the second sentence was imposed. 28 Atty. Gen. 41.

When a convict on parole from the state prison violates his parole by committing a misdemeanor for which he is sentenced to a county jail or house of correction, the state prison sentence is tolled from the date of violation until he is returned to the state prison and time spent in the county jail or house of correction does not count toward service of such prison sentence. (30 Atty. Gen. 218 followed and applied.) 31 Atty. Gen. 24.

Sentences in the state prison and the Milwaukee county house of correction may run concurrently. 34 Atty. Gen. 163.

973.16 History: 1969 c. 255; Stats. 1969 s. 973.16.

Comment of Judicial Council, 1969: Present s. 959.08. [Bill 603-A]

973.17 History: 1969 c. 255; Stats. 1969 s. 973.17.

Comment of Judicial Council, 1969: Sub. (1) is present s. 959.10 restated.

Sub. (2) is language found in s. 954.017 except that this section is applicable to felonies as well as misdemeanors.

Sub. (3) is present s. 959.11. [Bill 603-A]

CHAPTER 974.

Appeals, New Trials and Writs of Error.

974.01 History: 1969 c. 255; Stats. 1969 s. 974.01.

Comment of Judicial Council, 1969: This section conforms the practice on misdemeanor appeals to that found in s. 299.30 which governs appeals in small claims and municipal ordinance violations. The trial de novo provision of the present misdemeanor appeals statute is eliminated. [Bill 603-A]

On jurisdiction of circuit courts see notes to sec. 8, art. VII, and notes to 252.03.

In criminal as in civil actions, an appeal confers no jurisdiction upon the appellate court, where the lower court had no jurisdiction of the subject-matter of the action. Klaise v. State, 27 W 462.

If the trial court has jurisdiction to render judgment, but loses it by rendering a void judgment, appeal in such case confers jurisdiction on the circuit court. State v. Haas, 52 W 407, 8 NW 248.

Appeal from a conviction of contempt of court in county court lies to the supreme court, not the circuit court under 958.075 (1), Stats. 1961. State ex rel. Jenkins v. Fayne, 24 W (2d) 476, 129 NW (2d) 147.

The appeal provisions of 958.075, Stats. 1965, were enacted not so much as a direct benefit to defendants as to provide an economical administration of justice by having most misdemeanor cases tried to the court or to a six-man jury. State ex rel. Murphy v. Voss, 34 W (2d) 501, 149 NW (2d) 595.

A crime defined by statute as a misdemeanor is not converted or changed to a felony for the purposes of applying statutory proceedings relating to appeal, as a consequence of invoking the provisions of the recidivist statute. Harms v. State, 36 W (2d) 282, 153 NW (2d) 78.

Since it is clearly provided in 958.075 (1), Stats. 1963, that appeals in misdemeanor cases are to the circuit court for the county, that appeal procedure is exclusive. Harms v. State, 36 W (2d) 282, 153 NW (2d) 78.

974.02 History: 1969 c. 255; Stats. 1969 s. 974.02.

Comment of Judicial Council, 1969: This section governs new trials and is designed to conform the practice in criminal proceedings with that in the civil law. (See s. 270.49.)

Sub. (1) provides that a motion for a new trial must be heard and decided within 90 days after conviction unless the court extends the time. If the motion is not decided within this period, it is deemed overruled.

Sub. (5) makes it clear that in trials to a judge without a jury a motion for a new trial is not necessary to review errors. [Bill 603-A]

Editor's Note: In State v. Leonard, 39 W (2d) 461, 159 NW (2d) 577, the supreme court adopted the following rule, for prospective application, on the issue of increased punishment on resentencing: On resentencing following a second conviction after retrial, or mere resentencing, the trial court should be barred from imposing an increased sentence unless (1) events occur or come to the sentencing court's attention subsequent to the first imposition of sentence which warrant an increased penalty; and (2) the court affirmatively states its grounds in the record for increasing the sentence.

On discretionary reversal see notes to 251.09; and on reversible errors see notes to 274.37.

Where a petition for a new trial is not presented the supreme court is without power to to reverse a conviction because of insufficiency of evidence. Yanke v. State, 51 W 464, 8 NW 276.

If the evidence fairly tends to prove the guilt of the accused, the trial judge should not set aside a verdict of guilt and grant a new trial because he may entertain doubts as to the sufficiency of the evidence. Williams v. State, 61 W 281, 21 NW 56.

A new trial may be granted under sec. 4719, R. S. 1878, within the time prescribed, although after a previous motion for a new trial has been denied judgment was rendered and affirmed by the supreme court on a writ of error. State ex rel. Turner v. Circuit Court for Ozaukee County, 71 W 595, 38 NW 192.

A judge is not legally disqualified from hearing and passing upon a motion for a new trial in a case tried before him simply because he has expressed, for publication, the opinion that the conviction was justified by the evidence. Zoldoske v. State, 82 W 580, 609, 52 NW 778.

The court is not bound to hear arguments on each of the several grounds on which a motion for a new trial is based, where counsel has been fully heard on all the questions involved during the course of the trial. Frank v. State, 94 W 211, 68 NW 657.

The granting of a new trial when it appears to the court that justice has not been done is discretionary and will not be reversed unless an abuse of discretion appears. Fitzgerald v. State, 109 W 677, 85 NW 510.

The jury having been carefully and fully admonished not to give any consideration to comments of counsel for the state addressed to the court in their hearing, and to disregard certain portions of the argument to them which the trial court deemed improper, there was no error in denying a motion for a new trial on the ground of such improper comments and argument. Schissler v. State, 122 W 365, 99 NW 593.

Upon a motion to set aside the verdict and grant a new trial on the ground that some of the jurors, during the progress of the trial, had read certain newspaper articles which, it was claimed, prejudiced their minds against the defendant, the decision of the trial court that no improper influence had affected the verdict was not against the clear weight of the evidence. Schissler v. State, 122 W 365, 99 NW 593.

The refusal of the trial court to grant a new trial on the ground that the evidence was insufficient to support a conviction will not be disturbed where the record contains evidence from which the guilt of the accused can fairly be deduced. Vogel v. State, 138 W 315, 119 NW 190.

An order granting a new trial, made for an erroneous reason, should not be set aside if a new trial should have been granted on some

other ground stated in the motion. State v. Labuwi, 172 W 204, 178 NW 479.

The presumption being that by due diligence a party can discover and produce relevant and material evidence, a motion for a new trial on the ground of newly discovered evidence is received with great caution and is not entertained favorably. Musso v. State, 160 W 161, 151 NW 327.

Under the circumstances, the denial of a new trial, on the ground of newly discovered evidence, because of lack of diligence to procure such evidence in advance of trial was within the discretion of the trial court. Wilson v. State, 184 W 636, 200 NW 369.

The affidavit of one juror and the written statements of 7 others that it was their belief that defendant's case had not been fully and properly presented, did not constitute grounds for granting a new trial. Wilson v. State, 184 W 636, 200 NW 369.

An order setting aside a verdict in a prosecution for murder and granting a new trial based on a ground of newly discovered evidence, and because justice had not been done, is deemed, under the facts shown, to have been entirely justified. State v. Lavanias, 185 W 146, 200 NW 672.

A motion for a new trial in a criminal case is a request for another judicial examination of the issues between the state and the defendant; in the absence of prejudicial error and if all material facts were properly before the court and the issues correctly determined, there is no occasion for further proceedings and the motion should be denied. Duenkel v. State, 207 W 644, 242 NW 179.

Failure of the district attorney to hold an inquest is not cause for reversal of a conviction of manslaughter. A defendant is not entitled to a new trial based on newly discovered evidence, where all the circumstances to which it related were carefully gone into upon the trial. State v. Doran, 213 W 130, 250 NW 771.

As a general rule, the supreme court will not overthrow the refusal of a trial court to grant a new trial in a criminal case on newly discovered evidence that is only cumulative and impeaching, but every case must stand on its own facts. State v. Garnett, 243 W 615, 11 NW (2d) 166.

The granting or denial of a motion for a new trial is largely within the discretion of the trial court. State v. Graff, 248 W 576, 22 NW (2d) 483.

Where, among other things, the defendant's affidavit in support of his motion for a new trial on the ground of newly discovered evidence failed to show that any diligence to find the evidence before the trial had been used, the denial of such motion was not an abuse of discretion. State v. Abdella, 261 W 393, 52 NW (2d) 924.

An unauthorized communication to the jury or a member thereof, not made in open court and a part of the record, is ground for the granting of a new trial, in a criminal or in a civil case. State v. Cotter, 262 W 168, 54 NW (2d) 43.

A question whether certain instructions to the jury were erroneous, not raised by the defendants' motion for a new trial, cannot be raised for the first time on appeal. State v. Biller, 262 W 472, 55 NW (2d) 414.

Where the trial court granted a new trial because of an alleged mistake made by the jury in its verdicts, and the court was in error in so doing, the ordering of the new trial will not be sustained as having been granted on the discretionary ground of being in the interest of justice, inasmuch as the trial court did not ascribe such latter ground as the basis for its order. State v. Biller, 262 W 472, 55 NW (2d) 414.

Whether a new trial in the interest of justice should be granted to the defendants in the instant case on the ground of alleged newly discovered evidence, claimed to tend to impeach the minor involved as a witness and to raise a serious question as to her mental competency, presented a question peculiarly for the discretion of the trial court, which is held not to have abused its discretion in denying the application for a new trial. State v. Driscoll, 263 W 230, 56 NW (2d) 788.

A contention that the evidence does not sustain a conviction for second-degree murder cannot be considered by the supreme court on review in the absence of a motion to set aside the verdict and grant a new trial made before sentence and judgment. Ferry v. State, 266 W 508, 63 NW (2d) 741.

To entitle an appellant in a criminal case to present to the appellate court such matters as alleged errors in the charge to the jury or in the verdict submitted to the jury, the allegations of error must first be presented for the consideration of the trial court. State v. Vinson, 269 W 305, 68 NW (2d) 712, 70 NW (2d) 1.

Claimed error in excluding evidence regarding the circumstances surrounding the defendant's confession cannot be considered by the supreme court on appeal in the absence of a motion in the trial court to set aside the verdict and grant a new trial on this ground. State v. Russell, 5 W (2d) 196, 92 NW (2d) 210.

A motion for a new trial can be made after judgment. State v. Nutley, 24 W (2d) 527, 129 NW (2d) 155.

While the words "new trial" may mean different things in different contexts, the words "new trial" as used in 958.06 (3) are construed as encompassing redetermination of guilt, irrespective of whether the original or subsequent determination was made on a plea of guilty. The provisions in 958.06 (3) (b) and (c), requiring the trial court where a new trial results in conviction to make allowances for and deduct from a sentence imposed whatever time a defendant has theretofore served and counting time served in prison under an earlier sentence for the same offense, in establishing eligibility for parole, were designed to revise the preexisting rule, so that a defendant upon redetermination of guilt should receive allowance for whatever time of imprisonment he had served by reason of the acts constituting the offense with which he was charged. State ex rel. Eastman v. Burke, 28 W (2d) 170, 136 NW (2d) 297.

The rules governing the granting of a new

trial on the ground of newly discovered evidence in a criminal case are the same rules which govern the granting of a new trial for newly discovered evidence in a civil case, and these are: (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the evidence must not be merely cumulative to the evidence which was introduced at the trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. Lock v. State, 31 W (2d) 110, 142 NW (2d) 183.

Criminal as well as civil cases cannot be retried at the instance of the loser because he is more hopeful of success on the second try. Unless the representation of counsel is so inadequate and of such low competency as to amount to no representation, a new trial cannot be granted on that ground. Pulaski v. State, 23 W (2d) 138, 126 NW (2d) 625. See also Le Barron v. State, 32 W (2d) 294, 145 NW (2d) 79.

A defendant who fails to move for a new trial or to set aside the verdict on the ground of insufficient evidence is not entitled to review of the evidence by the supreme court. State v. Van Beck, 31 W (2d) 51, 141 NW (2d) 873; State v. Thompson, 31 W (2d) 365, 142 NW (2d) 779; Okimosh v. State, 34 W (2d) 120, 148 NW (2d) 652.

Under 958.06 (1) a trial is over as soon as the jury verdict is rendered or finding of fact is made. Where defendant by absconding prevented sentencing for 2 years, he could not then ask for a new trial, since the trial court could not grant it. Strong v. State, 36 W (2d) 324, 152 NW (2d) 890.

There is no right to a new trial at common law; hence the authority of a trial court to grant such relief rests entirely on statutes, and its power is restricted thereby. Strong v. State, 36 W (2d) 324, 152 NW (2d) 890.

When a new trial is granted in the interest of justice, the reason that prompted the court to make the order must be set forth, although in all other cases it is sufficient for the order granting the new trial to state the statutory grounds therefor. State v. La Fernier, 37 W (2d) 365, 155 NW (2d) 93.

A statement or admission by a witness, uncorroborated by other newly discovered evidence, that he committed perjury on the trial of a cause, is not a ground for a new trial based on "newly discovered evidence". Zillmer v. State, 39 W (2d) 607, 159 NW (2d) 669.

Claimed "newly discovered evidence" which merely impeaches the credibility of a witness does not warrant a new trial on that ground alone. Greer v. State, 40 W (2d) 72, 161 NW (2d) 255.

Aside from the defendant's failure to timely appeal from the order denying his motion for a new trial (based on the ground of newly discovered evidence), no abuse of discretion was shown, it appearing from the record (as the trial court properly found) that defendant relied on alleged corroborative testimony and that such evidence was merely cumulative of that given at the trial, and not such as to offset the direct and positive evidence adduced by the state. State v. Christopher, 44 W (2d) 120, 170 NW (2d) 803.

974.03 History: 1969 c. 255; Stats. 1969 s. 974.03.

Comment of Judicial Council, 1969: This is basically present s. 958.13 except that the time for taking an appeal or procuring a writ of error is reduced from one year to 90 days. [Bill 603-A]

Editor's Note: The provisions of ch. 958, Laws 1967, governing writs of error were repealed by ch. 255, Laws 1969, and not replaced by provisions of ch. 974 except in sec. 974.03 and 974.05. Over the years, questions concerning writs of error were considered in the following cases (among others): Rolke v. State, 12 W 636; Knofle v. State, 13 W 411; Crilley v. State, 20 W 231; Babbitt v. State, 23 W (2d) 446, 127 NW (2d) 405; State v. Brownell, 80 W 563, 50 NW 413; Jackson v. State, 92 W 422, 66 NW 393; Lonergan v. State, 111 W 453, 87 NW 455; Gerke v. State, 151 W 495, 139 NW 404; Manna v. State, 179 W 384, 192 NW 160; Martin v. State, 236 W 571, 295 NW 681; and Ronzani v. State, 24 W (2d) 512, 129 NW (2d) 143. Appeals to the supreme court in civil actions are governed by provisions contained in ch. 274.

On writs of error see notes to sec. 21, art. I, and notes to 274.05; and on appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08.

An order adjudging defendant guilty of criminal contempt is reviewable by appeal as well as by writ of error under 358.13, Stats. 1927. State v. Meese, 200 W 454, 225 NW 746, 229 NW 31.

974.04 History: 1969 c. 255; Stats. 1969 s. 974.04.

Comment of Judicial Council, 1969: Present s. 958.115. [Bill 603-A]

974.05 History: 1969 c. 255; Stats. 1969 s. 974.05.

Comment of Judicial Council, 1969: With one exception, this is present s. 958.12. That exception which is a major change in existing law is sub. (1) (d) which permits the state to appeal from an order suppressing evidence, a confession or an arrest warrant. Since these matters normally determine the successful outcome of prosecutions, it is believed the state should be able to take an immediate appeal rather than wasting the time of the court with a hollow trial where the result is predordained by the ruling on the suppression question. For defendant's right in this area, see s. 971.31 (10). [Bill 603-A]

On prosecutions (double jeopardy) see notes to sec. 8, art. I; and on writs of error see notes to sec. 21, art. I, and notes to 274.05.

An order discharging an accused for want of evidence is final and not reviewable under sec. 4724a, Stats. 1919. State v. Meen, 171 W 36, 176 NW 70.

Under sec. 4724a the state may not only bring a writ of error before jeopardy has attached but may also bring such writ after jeopardy has attached if the accused has

waived such jeopardy as provided by sec. 4645a. State v. B——, 173 W 608, 179 NW 798.

Since a bastardy action is civil, not criminal, the state is entitled to a new trial upon proper showing. State ex rel. Mahnke v. Kablitz, 217 W 231, 258 NW 840.

Jeopardy does not attach on preliminary examination. Defendant is not in "jeopardy" until the jury has been duly impaneled and charged with his deliverance, but conviction or acquittal by any competent tribunal satisfies requirement of jeopardy. Pepin v. State ex rel. Chambers, 217 W 568, 259 NW 410.

Under 358.12 (3) and (6), Stats. 1937, the state cannot appeal nor can it prosecute a writ of error from a final judgment in a criminal case after jeopardy has attached, unless the defendant has first prosecuted a writ of error. State ex rel. Steffes v. Risjord, 228 W 535, 280 NW 680.

A writ of error may be taken by the state from a judgment granting the defendant's motion (made after a plea of not guilty but preliminary to trial) to suppress the evidence and discharging the defendant from custody. State v. Hunter, 235 W 188, 292 NW 609.

Where the state seeks to sue out a writ of error after the trial court has set aside a verdict of guilty, application for permission to sue out the writ should be made to the trial judge at the time the judgment of acquittal is rendered, so that the judge may then determine whether he will grant permission to have the case reviewed, and so that if such permission is granted, the defendant may be permitted to furnish bail or be retained in custody, and in this manner the jurisdiction of the court over the defendant be retained. State v. Witte, 243 W 423, 10 NW (2d) 117.

Under 358.12 (1) (d) there can be no appeal by the state from either a judgment of acquittal and discharge of a defendant, or from a subsequent order denying permission for the state to appeal from the judgment, unless such permission is first granted in each instance by the trial court. State v. McNitt, 244 W 1, 11 NW (2d) 671.

An order, made after trial in a prosecution tried to the court for violations of the game laws, and granting the defendants' motion to suppress certain evidence on grounds of illegal search and seizure, is not appealable by the state. State v. Flanagan, 248 W 406, 21 NW (2d) 638.

A ruling of the trial court, in a prosecution under 85.81 (3), Stats. 1943, setting aside a verdict of guilty and discharging the defendant on grounds of insufficiency of the evidence to establish that the defendant was in a drunken condition, which ruling necessarily involved the consideration of questions of fact as to the credibility, weight, and effect of conflicting testimony, was a ruling on questions of fact, not on "questions of law," hence is not reviewable by a writ of error taken by the state. State v. Nall, 248 W 584, 22 NW (2d) 520.

Where there is a reasonable doubt as to the correctness of a ruling on important evidence in a criminal case and the court permits the state to appeal, the proper procedure for the state is to enter the order of permission prior to or contemporaneous with the entry of a final judgment of acquittal, and to avoid discharge of the defendant pending the appeal, thereby avoiding constitutional objections to double jeopardy and at the same time furnishing the supreme court with subject matter that is appealable. State v. Flanagan, 249 W 521, 25 NW (2d) 111.

If what is sought to be reviewed on behalf of the state is not procedural error in the course of the trial but the ultimate determination of the tribunal to acquit, the review is not within the permission of 358.12 (8), Stats. 1947, and, if it were, the statute would violate the prohibition against double jeopardy in sec. 8, art. I. In respect to reviewability and jeopardy, it makes no difference that the acquittal is by the trial court and not by the jury. State v. Evjue, 254 W 581, 37 NW (2d) 50.

A judge of a circuit court, in issuing a warrant of arrest on a criminal complaint, and in sitting at the preliminary examination, was acting in the capacity of a magistrate, and not in the capacity of a court, and his order dismissing the complaint and discharging the accused persons from custody following the preliminary examination, although in form "By the court" and signed as "Judge," was an order of a magistrate and not of a court, and was not appealable to the supreme court by the state under 358.12, Stats. 1949. State v. Friedl, 259 W 110, 47 NW (2d) 306.

In a prosecution for murder, the jury's verdict of not guilty by reason of insanity at the time of the commission of the offense, and the trial court's commitment of the defendant to a state hospital for the criminal insane pursuant to such verdict, constituted an acquittal and discharge of the defendant, terminating jeopardy, so that where the district attorney, although present in the courtroom when such verdict was returned and the trial court made its pronouncement of commitment, did not then present an application to the trial judge for permission to appeal and was not shown to have been denied the opportunity to do so, and did not present such an application until a later date, the state could not take an appeal under 358.12 (1) (d), Stats. 1949. State v. King, 262 W 193, 54 NW (2d) 181.

Application for permission to take a writ of error or appeal from a judgment of acquittal, if opportunity therefor is given to him, must be made by the prosecutor promptly and before the defendant, having been put in jeopardy, has been discharged. State v. King, 262 W 193, 54 NW (2d) 181.

The provision of 358.12 (1) (b), Stats. 1951, giving the state the right to appeal from an order granting a new trial in a criminal case is not in conflict with any provision of the federal and state constitutions. State v. Biller, 262 W 472, 55 NW (2d) 414.

By statute (958.12 (1), Stats. 1957) the state has the right to appeal from or to obtain review by writ of error of a judgment and sentence not authorized by law. State v. Sutter, 5 W (2d) 192, 92 NW (2d) 229.

See notes to sec. 8, art. I, on double jeopardy, citing State v. Stang Tank Line, 264 W 570,

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.