



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-0532/3  
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## 2017 SENATE BILL 492

October 27, 2017 - Introduced by Senators PETROWSKI, WANGGAARD, COWLES, HARSDFORF and OLSEN, cosponsored by Representatives SPIROS, JACQUE, BERCEAU, E. BROOKS, MURSAU, PETRYK and TAUCHEN. Referred to Committee on Judiciary and Public Safety.

- 1     **AN ACT to create** 950.04 (1v) (df), 971.313 and 974.05 (1) (e) of the statutes;  
2           **relating to:** obtaining crime victim mental health treatment records.

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### *Analysis by the Legislative Reference Bureau*

This bill creates a procedure by which a defendant in a criminal case may seek access to the mental health treatment records of a crime victim that are not in the possession of or under the control of a government entity when he or she believes that those records contain information that is crucial to the defendant's defense.

Under the bill, if a defendant wishes to gain access to the mental health treatment records of a crime victim, he or she must file a motion describing the information sought and show that there are mental health treatment records that are reasonably likely to contain the information sought, that the information is necessary to formulate an articulated defense, and that the information is not available from any other source. If the court finds that the defendant has made this showing by a preponderance of the evidence and that the potential benefit to the defendant is greater than the harm to the crime victim from disclosure, and if the crime victim consents, the court may conduct an in camera review of the mental health treatment records. Upon reviewing the records, if the court determines by clear and convincing evidence both that the information in the mental health treatment records is necessary to any articulated defense and that the benefit to the defendant from disclosure is greater than the harm to the crime victim from disclosure, or determines that the evidence is otherwise exculpatory, the court may order disclosure of the records. Following this order, the crime victim may review the records that the court has determined should be disclosed and may consent to

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disclose the records, may appeal the court's decision, or may decline to disclose the records and be barred from testifying at the trial.

If the crime victim declines to disclose his or her mental health treatment records for an in camera review, the court must abide by his or her declination and must permit the victim to testify at trial. The defendant, however, may then comment on the declination and question the victim about those records.

All filings and records pertinent to this process and the mental health treatment records of the victim are to be sealed by the court. Additionally, all decisions of the court during this process may be appealed at any time by the state or the crime victim as a matter of right.

This bill also adds enumerated rights to the basic bill of rights for victims describing the right of a victim to privacy in his or her mental health treatment records, in accordance with the new procedure that the bill creates.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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

1           **SECTION 1.** 950.04 (1v) (df) of the statutes is created to read:

2           950.04 (1v) (df) To privacy in his or her confidential mental health treatment  
3 records, in accordance with the procedure under s. 971.313.

4           **SECTION 2.** 971.313 of the statutes is created to read:

5           **971.313 Obtaining victim mental health treatment records. (1)**

6           DEFINITIONS. In this section:

7           (a) "Crime victim" has the meaning given for "victim" in s. 950.02 (4) or a  
8 guardian ad litem appointed under sub. (3) (c) 2. if a person identified under s. 950.02  
9 (4) (a) 2. has interests that are adverse to a child victim.

10           (b) "Mental health treatment records" means all records that are not in the  
11 possession of a government agency that are created in the course of providing  
12 services to individuals for mental illness, developmental disabilities, alcoholism,  
13 drug dependence, or other mental health issues and that are maintained by  
14 treatment facilities as defined in s. 51.01 (19), by psychologists licensed under s.

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1 455.04 (1), or by licensed mental health professionals as defined in s. 51.01 (11m).  
2 “Mental health treatment records” does not include psychotherapy notes, as defined  
3 in 45 CFR 164.501, that are maintained for personal use and kept separate from  
4 other mental health treatment records.

5 (c) “Necessary to any articulated defense” means that the evidence supports  
6 any articulated defense by tending to create reasonable doubt that would not  
7 otherwise exist.

8 **(2) MOTION FOR DISCOVERY OF MENTAL HEALTH TREATMENT RECORDS.** (a)  
9 Notwithstanding ss. 51.30 (4) (b) 4. and 146.82 (2) (a) 4., a defendant seeking  
10 discovery of a person’s mental health treatment records shall file a confidential  
11 motion, sealed under s. 801.20, at least 45 days before trial, unless the court extends  
12 the time for filing upon a specific finding of good cause, including when there has  
13 been new discovery.

14 (b) In a motion under par. (a), the defendant shall submit a good faith offer of  
15 proof and a supporting affidavit from someone with personal knowledge that  
16 indicates all of the following:

17 1. The specific information that is sought from the mental health treatment  
18 records.

19 2. That there are mental health treatment records that are reasonably likely  
20 to contain the information sought under subd. 1.

21 3. That the specific information sought under subd. 1. is necessary to any  
22 articulated defense.

23 4. That the mental health treatment records are the only source for the  
24 information sought under subd. 1.

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1           5. That the information sought under subd. 1. is not cumulative to evidence  
2 already available.

3           (c) The following offers of proof alone are not sufficient to determine whether  
4 the defendant has met his or her burden of proof to obtain a person's mental health  
5 treatment records under par. (b):

6           1. That the crime victim reported or failed to report a victimization.

7           2. That the crime victim sought or received counseling or mental health  
8 treatment for a prior or current victimization.

9           3. That the crime victim received counseling or mental health treatment to  
10 address personal or family issues.

11           **(3) NOTIFICATION REQUIRED; CRIME VICTIM RIGHTS.** (a) The prosecuting attorney  
12 shall notify the crime victim whose mental health treatment records are being  
13 sought of all of the following:

14           1. That a motion has been filed under sub. (2) (a) requesting his or her mental  
15 health treatment records.

16           2. That he or she has the right to the assistance of counsel regarding the issue  
17 of access to his or her mental health treatment records.

18           3. That he or she may consent or decline to consent to an in camera review of  
19 his or her mental health treatment records.

20           4. That by consenting to an in camera review, he or she has not waived any  
21 privilege under s. 905.11 or 905.12 to object to redisclosure of the privileged  
22 information or the use of any privileged information in a subsequent court  
23 proceeding after the court's review and determination under sub. (4).

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1 (b) The prosecuting attorney may respond to the motion made under sub. (2)

2 (a) with affidavits or written arguments, which shall be filed confidentially and  
3 sealed under s. 801.20.

4 (c) 1. The crime victim whose mental health treatment records are being sought  
5 has the right to counsel. The crime victim may retain counsel who may intervene in  
6 this proceeding on his or her behalf. The court shall provide the crime victim  
7 reasonable time to secure counsel and may appoint counsel upon the victim's request.  
8 The counsel may file a response to the filing made under sub. (2) (a) with affidavits  
9 or written arguments, which shall be filed confidentially and sealed under s. 801.20.

10 2. If the victim of the crime is a child, and the court determines that a person  
11 identified under s. 950.02 (4) (a) 2. has interests that are adverse to the child, the  
12 court shall appoint a guardian ad litem. The guardian ad litem shall be an advocate  
13 for the best interests of the child. The guardian ad litem shall function  
14 independently in the same manner as the counsel identified under subd. 1.

15 **(4) IN CAMERA REVIEW; DETERMINATION OF WHETHER DISCLOSURE IS WARRANTED.** (a)  
16 If the court concludes by a preponderance of the evidence both that the defendant has  
17 made the showing required by sub. (2) (b) and that the potential benefit to the  
18 defendant from disclosure outweighs the harm to the crime victim from disclosure,  
19 the court shall inquire as to whether the crime victim consents to an in camera review  
20 of the mental health treatment records by the court.

21 (b) 1. If the crime victim does not consent to an in camera review of his or her  
22 mental health treatment records by the court, the court shall follow the procedures  
23 in sub. (6) (a).

24 2. If the crime victim consents to an in camera review of his or her mental health  
25 treatment records by the court, the court shall examine the mental health treatment

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1 records in camera for the presence of any evidence that is necessary to any  
2 articulated defense.

3 (c) Following an in camera review of the mental health treatment records under  
4 par. (b) 2., the court may order the disclosure of the relevant records only if the court  
5 determines by clear and convincing evidence one of the following:

6 1. That the information in the mental health treatment records is necessary to  
7 any articulated defense and that the benefit to the defendant from disclosure  
8 outweighs the harm to the crime victim from disclosure.

9 2. That the information in the mental health treatment records is exculpatory  
10 by tending to create reasonable doubt that would not otherwise exist.

11 (d) If the court determines under par. (c) that some or all of the mental health  
12 treatment records are eligible for disclosure, the crime victim shall have the  
13 opportunity to review the records identified for disclosure. Within 45 days from the  
14 date of the order under par. (c), the crime victim and the state shall notify the court  
15 whether the crime victim or the state intends to appeal the order pursuant to s.  
16 974.05, and if neither the crime victim nor the state intends to appeal the order, the  
17 crime victim shall indicate whether he or she consents or declines to consent to the  
18 disclosure of the relevant records. If the crime victim or the state appeals the order  
19 under par. (c) within 45 days, the crime victim's mental health treatment records  
20 may not be disclosed until the appeal has concluded.

21 (e) 1. After the appeal under par. (d) has concluded, the crime victim shall  
22 indicate whether he or she consents to the disclosure of his or her mental health  
23 treatment records.

24 2. If the crime victim does not consent to the disclosure of the mental health  
25 treatment records under par. (d) after the appeal has concluded or after the state and

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1 the crime victim each indicate that he or she or it does not intend to appeal the order,  
2 the court shall follow the procedures in sub. (6) (b).

3 3. If the crime victim consents to the disclosure of the mental health treatment  
4 records after the appeal has concluded or after the state and the crime victim each  
5 indicate that he or she or it does not intend to appeal the order, the court shall order  
6 disclosure of those records to the prosecuting attorney and to the defendant's  
7 attorney in accordance with the procedures in sub. (5).

8 **(5) DISCLOSURE OF INFORMATION; DISSEMINATION PROHIBITED.** (a) If the court  
9 orders disclosure of mental health treatment records, the order may include only  
10 those mental health treatment records or portions of mental health treatment  
11 records that are necessary to any articulated defense or are otherwise exculpatory.

12 (b) If the court orders disclosure of mental health treatment records, the court  
13 shall enter a protective order under s. 971.23 (6) that provides that any record or  
14 information provided to the prosecuting attorney and to the defendant's attorney  
15 shall be confidential and may not be redisclosed or disseminated by the prosecuting  
16 attorney or the defendant's attorney unless specifically authorized by the court. Any  
17 provided record or information in paper form shall be returned to the court at the  
18 conclusion of representation. Any provided or stored electronic record or information  
19 shall be deleted at the conclusion of the representation by the prosecuting attorney  
20 and the defendant's attorney, both of whom shall provide the court with an affidavit  
21 affirming that the records or information have been deleted.

22 (c) The court shall determine the admissibility of any disclosed mental health  
23 treatment records under the applicable rules of evidence.

24 (d) The court shall retain any mental health treatment records under seal for  
25 the applicable period of time as specified in SCR 72.01.

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1           **(6)** CRIME VICTIM NONCONSENT; APPEALS OF COURT DECISIONS REGARDING MENTAL  
2 HEALTH TREATMENT RECORDS. (a) If the crime victim does not consent to in camera  
3 review of his or her mental health treatment records, the court shall do all of the  
4 following:

5           1. Abide by the declination of the crime victim.

6           2. Permit the crime victim to testify at the trial.

7           3. If the case is tried by a jury, inform the jury of all of the following:

8           a. That the crime victim declined to disclose mental health treatment records  
9 for inspection by the court.

10           b. That the crime victim has the right to decline an in camera review of the  
11 mental health treatment records.

12           4. Notwithstanding any prohibition under s. 905.11 or 905.12, permit comment  
13 on the declination by the crime victim and allow the defendant to draw any  
14 reasonable inference therefrom.

15           (b) If the crime victim does not consent to disclosure of his or her mental health  
16 treatment records following an in camera review, the court shall prohibit the crime  
17 victim from testifying at the trial and the court may not order disclosure of the crime  
18 victim's mental health treatment records.

19           (c) Any of the following orders of the court may be appealed to the court of  
20 appeals as a matter of right by the state under s. 974.05 or by the crime victim in the  
21 manner under s. 974.05:

22           1. The order of the court determining that the defendant has met his or her  
23 burden of proof under sub. (2) (b), triggering an in camera review of mental health  
24 treatment records.



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1           2. The order of the court determining that the mental health treatment records  
2 should be disclosed under sub. (4) (c).

3           **(7) PRIVILEGE.** The consent of a crime victim to review of mental health  
4 treatment records under sub. (4) (a) or disclosure of mental health treatment records  
5 under sub. (4) (d) does not waive any privilege under s. 905.11 or 905.12. A crime  
6 victim may still claim any applicable privilege for confidential communications or for  
7 information reviewed or disclosed under this section.

8           **(8) PSYCHOTHERAPY NOTES.** Except for uses or disclosures described in 45 CFR  
9 164.508 (a) (2) (i) and (ii), a defendant may not obtain and a court may not order  
10 disclosure of psychotherapy notes, as defined in 45 CFR 164.501, that are  
11 maintained for personal use and kept separate from other mental health treatment  
12 records unless the crime victim voluntarily provides an authorization in accordance  
13 with 45 CFR 164.508 to disclose psychotherapy notes.

14           **SECTION 3.** 974.05 (1) (e) of the statutes is created to read:

15           974.05 **(1)** (e) Order granting relief under s. 971.313 (6) (c) 1. or 2.

16           **SECTION 4. Effective date.**

17           (1) This act takes effect on October 1, 2017.

18

(END)