

DD:WF:jal;

12/11/2006

1 **AN ACT** *to repeal* 961.47; and *to create* 973.015 (3) and 973.016 of the statutes;
2 **relating to:** ...

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

JOINT LEGISLATIVE COUNCIL PREFATORY COMMENT: This draft was prepared for review by the Joint Legislative Council's Special Committee on Expunction of Criminal Records. The draft is based on committee discussion, at its November 21, 2006 meeting, of a letter, dated November 14, 2006, from special committee member Judge Gary Carlson.

The draft creates s. 973.016, stats., which provides a "conditional discharge" procedure under which an individual who pleads guilty to or is found guilty of a misdemeanor may, by complying with probation or other conditions specified by the judge, avoid a criminal conviction. The conditional discharge procedure does not apply to all types of misdemeanors, may be used for a particular defendant only once, and does not apply if the defendant has previously been convicted of a crime. Section 973.016 is based on current s. 961.47, stats., which provides a conditional discharge procedure applicable to first offense misdemeanor drug possession cases. Section 961.47, stats., is repealed by the draft.

The draft amends s. 973.015, stats., which is the current expunction statute, so that it is no longer applicable to convictions that occur on or after the effective date of the draft. Section 973.015, stats., allows, under certain limited circumstances, case history information and files related to misdemeanor convictions to be removed from the Wisconsin circuit court access (WCCA) public website and from circuit court records.

Additional information and comment on provisions of the draft are provided in the comments below to individual provisions of the draft. Note that if the special committee decides to recommend legislation, formal Joint Legislative Council notes will be added to the draft.

Because the insertion in the draft of comments between the subunits of new s. 973.016 (conditional discharge procedure) may interfere with comprehending the new provision as a whole, the new section is replicated following the comments at the end of the draft, on pp. 11 and 12.

1 **SECTION 1.** 961.47 of the statutes is repealed.

COMMENT: Repeals current s. 961.47, relating to conditional discharge of first offense misdemeanor drug possession violations. The repealed section is replaced by an expanded conditional discharge procedure, created by SECTION 3 of the draft.

2 **SECTION 2.** 973.015 (3) of the statutes is created to read:

3 973.015 (3) LIMITED APPLICABILITY. This section does not apply to offenses committed
4 on or after the effective date of this subsection [revisor inserts date].

COMMENT: Limits the application of the current expunction statute, s. 973.015, stats., to offenses committed before the effective date of the proposed legislation. This approach is proposed, rather than an outright repeal of the statute, because it appears there is utility in retaining the statute for at least 2 reasons. First, there will be a transition period during which offenses committed before the effective date of the draft will still be eligible for expunction under the statute even though the new conditional discharge procedure will be in effect (the latter will only apply to offenses committed on or after the effective date; see SECTION 4 of the draft). Second, it may be useful for defendants whose records have been expunged under this section and other interested persons to have the language of the section available in the statutes even after the transition period.

5 **SECTION 3.** 973.016 of the statutes is created to read:

6 **973.016 Conditional discharge for first offense misdemeanors. (1) DEFINITIONS.**

7 In this section:

8 (a) “Crime” means a crime under the laws of this state or any other state or under federal
9 law.

COMMENT: Provides a definition of “crime” for use in proposed s. 973.016. The term appears in subs. (3) and (4) of the proposed section.

10 (b) “Misdemeanor” does not include:

COMMENT: Excludes from the definition of “misdemeanor”, for purposes of proposed s. 973.016, various specific misdemeanor violations, listed below. In general, a “misdemeanor” is a crime which is not punishable by imprisonment in the Wisconsin state prisons (in contrast to a jail). Section 939.60, stats.; see, also, s. 973.02, stats. By

excluding various violations from the definition of “misdemeanor”, those violations are not eligible under the proposed conditional discharge procedure.

- 1 1. A violation of s. 346.63 (1) described under s. 346.65 (2) (am) 2. to 4. (bm) and (cm);
- 2 a violation of s. 346.63 (2) (a); a violation of s. 346.63 (5) described in s. 346.65 (2j) (am) 2.
- 3 to 3., (bm) and (cm); and a violation of s. 346.63 (6) (a).

COMMENT: Excludes from the definition of “misdemeanor” 2nd, 3rd, and 4th offense operating-while-intoxicated (OWI) violations, causing injury to another by OWI, and corresponding OWI violations while operating a commercial motor vehicle.

Should misdemeanor OWI violations relating to all-terrain vehicles, boats, or snowmobiles also be excluded from the definition of “misdemeanor”? See, e.g., ss. 23.33 (4c) and (4p) (e), 30.681, 30.684 (5), 350.101, 350.104 (5), and 350.17, stats.

- 4 2. [A misdemeanor to which s. 939.63 (1) (a) applies.]

COMMENT: Excludes from the definition of “misdemeanor” a misdemeanor committed while possessing, using, or threatening to use a dangerous weapon. “Dangerous weapon” is defined as “any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm”. Section 939.22 (10), stats.

Under s. 939.63 (1) (a), stats., if a misdemeanor is committed while possessing, using, or threatening to use a dangerous weapon, the maximum term of imprisonment for the misdemeanor may be increased by not more than 6 months. (However, the penalty enhancer does not change the status of the misdemeanor to a felony. *State v. Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984).)

These misdemeanors do not include misdemeanors for which possessing, using, or threatening to use a dangerous weapon is an essential element of the underlying crime itself. Section 939.63 (2), stats. See subd. 3., below, for misdemeanors in the latter category involving firearms.

At the November 21 meeting, the special committee discussed excluding firearms and weapons violations from the definition of misdemeanor but did not determine which specific violations should be excluded. *Does*

the committee wish to exclude misdemeanors to which s. 939.63 (1) (a) applies?

3. [A misdemeanor that includes as an essential element the possession, use, or threatened use of a firearm or the possession, use, or threatened use of a dangerous weapon, when the dangerous weapon used in the violation is a firearm.]

COMMENT: As noted above, the committee previously discussed excluding misdemeanor firearms violations from the definition of “misdemeanor”. For further discussion and identification of misdemeanor firearms violations, see Comment A at the end of this draft.

4. A violation of s. 944.20.

COMMENT: Excludes a violation of the prohibition against “lewd and lascivious behavior”, s. 944.20, stats., from the definition of “misdemeanor”. Section 944.20 provides as follows:

944.20 Lewd and lascivious behavior. (1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(b) Publicly and indecently exposes genitals or pubic area.

(2) Subsection (1) does not apply to a mother's breast-feeding of her child.

5. A misdemeanor under ch. 948.

COMMENT: Excludes a misdemeanor included under ch. 948, stats., crimes against children, from the definition of “misdemeanor”. See Comment B at the end of this draft for additional information on misdemeanors included in ch. 948.

6. [A misdemeanor that was an act of domestic abuse, as defined in s. 968.075 (1) (a).]

OR

[A misdemeanor described in s. 973.055 (1) (a).]

COMMENT: Provides 2 alternatives for excluding domestic abuse–related misdemeanors from the definition of “misdemeanor”. See Comment C at the end of this draft for additional information.

1 (2) AUTHORITY OF COURT. Subject to sub. (4), if a person pleads guilty to or is found
2 guilty of a misdemeanor, the court, without entering a judgment of guilt and with the consent
3 of the accused, may defer further proceedings upon terms and conditions ordered by the court
4 or may defer further proceedings and place the person on probation upon terms and conditions.
5 If the person violates a term or condition, the court may enter an adjudication of guilt and
6 proceed accordingly. If the person fulfills the terms and conditions, the court shall discharge
7 the person and dismiss the proceedings against the person.

COMMENT: Provides authority for the court to use the conditional discharge procedure, based on language in current s. 961.47 (1), stats. There was discussion at the committee's November 21 meeting concerning whether the procedure should apply only if the defendant pleads guilty or if it may also apply if the defendant is found guilty. While there was an apparent consensus to include both situations, staff wants to be certain this was the committee's decision.

Note that, as in current s. 961.47, stats., there is no stated standard for the court to apply when deciding to use the procedure, other than successful fulfillment of terms and conditions, nor is there an explicit requirement that the court set forth in writing its rationale for using the procedure.

The committee discussed providing a note acknowledging that when conditional discharge procedure is used without probation, it is assumed the judge will impose self-monitoring, subject to review by the judge.
What should the content of the note include?

8 (3) DISCHARGE AND DISMISSAL; EFFECT. Discharge and dismissal under this section is
9 without adjudication of guilt and is not a conviction for purposes of disqualifications or
10 disabilities imposed by law upon conviction of a crime.

COMMENT: States the effect of a discharge and dismissal under the conditional discharge procedure, based on language in current s. 961.47 (1), stats.

11 (4) LIMITATIONS. This section does not apply to a person who has been previously
12 convicted of a crime. This section does not apply to a person who was previously the subject
13 of a discharge and dismissal under this section.

COMMENT: Limits the applicability of the conditional discharge procedure to one time only and only to first offenses. While both limitations are found in current s. 961.47 (1), stats., the limitations are stated somewhat differently in this draft.

1 **(5) NOTICE TO DEPARTMENT OF JUSTICE.** Within 20 days after probation or conditions are
2 ordered under this section, the clerk of court shall notify the department of justice of the name
3 of the individual subject to the order and any other information required by the department.
4 This report shall be upon forms provided by the department.

COMMENT: Based on current s. 961.47 (2), stats., but expanded to reflect the expanded conditional discharge procedure created by this draft. According to the Department of Justice (DOJ), the notification requirement in the current statute is intended to permit the DOJ criminal history database to reflect the probationary status of an individual under s. 961.47 before a final disposition under that statute occurs. It is possible that the department and the courts will be able to work out notice to the department via circuit court automation programs (CCAP), making an express statutory requirement unnecessary. Additional information on this issue will be discussed at the special committee's December 19 meeting.

5 **SECTION 4. Initial applicability.**

6 (1) The treatment of section 973.016 of the statutes first applies to misdemeanors
7 committed on the effective date of this act.

COMMENT: Provides that the new conditional discharge procedure will first apply to misdemeanors committed on the effective date of the legislation (and, of course, will apply to offenses committed thereafter as well).

ADDITIONAL COMMENTS CONCERNING EXCLUDED MISDEMEANORS

COMMENT A: FIREARMS OFFENSES

As noted in the comment above to proposed s. 973.016 (1) (b) 3., the committee has discussed excluding misdemeanor firearms violations from the definition of "misdemeanor" but has not identified which offenses should be excluded. Identifying those misdemeanors as misdemeanors that include "as an essential element the possession, use, or threatened use of a firearm or a dangerous weapon, when the latter constitutes a firearm" seemingly includes all such misdemeanors. It has

the advantages of being inclusive and briefly stated but the disadvantage of not identifying the specific misdemeanors included. Misdemeanors included in this category are found both within the criminal code and outside the criminal code and are relatively numerous. Examples within the criminal code include:

1. Various aspects of endangering safety by use of a dangerous weapon. Section 941.20 (1), stats.
2. Carrying a concealed weapon. Section 941.23, stats.
3. Carrying a firearm in a public building. Section 941.235, stats.
4. Carrying a handgun where alcohol beverages may be sold and consumed. Section 941.237 (2), stats.

Examples of misdemeanor firearms violations outside the criminal code include:

1. Use of firearms near public parks and similar facilities. Section 167.30, stats.
2. Transportation and use of firearms in aircraft. Section 167.31 (3), stats.

Does the committee wish to specifically identify the misdemeanor firearms violations to be excluded from the definition of "misdemeanor"; does it wish to simply exclude any misdemeanor which has as an essential element the possession, use, or threatened use of a firearm or a dangerous weapon when the latter constitutes a firearm; or, does the committee wish to take the latter approach but in turn exclude certain violations so that the latter are eligible under the conditional discharge procedure?

COMMENT B: CRIMES AGAINST CHILDREN

The committee expressed a desire to exclude misdemeanor offenses against children from the definition of "misdemeanor" for purposes of the conditional discharge procedure. For purposes of the criminal code, crimes against children are generally set forth in ch. 948, stats. Misdemeanors under that chapter include:

1. Sexual intercourse with a child age 16 or older. Section 948.09, stats.
2. Causing child to expose genitals or pubic area or exposing genitals or pubic area to a child. Section 948.10, stats.
3. Possessing material harmful to a child with intent to transfer or exhibit the material to a child. Section 948.11 (2) (b), stats.

4. Child neglect through failure to take action. Section 948.21, stats.
5. Intentional failure for less than 120 consecutive days to provide family support. Section 948.22 (3), stats.
6. Contributing to the delinquency of a child. Section 948.40, stats.
7. Contributing to truancy. Section 948.45, stats.
8. Strip searches of pupils by school or school district officials or employees. Section 948.50, stats.
9. Hazing of a student that results in or is likely to result in bodily harm. Section 948.51 (3) (a), stats.
10. Leaving child unattended in child care vehicle. Section 948.53, stats.
11. Leaving or storing a loaded firearm within reach or easy access of a child under 14 years of age. Section 948.55, stats.
12. Possessing or going armed with a dangerous weapon by a person under 18 years of age. Section 948.60 (2) (a), stats.
13. Possessing or going armed with a dangerous weapon other than a firearm on school premises. Section 948.61 (2) (a), stats.
14. Receiving stolen property from a child when the value does not exceed \$500. Section 948.62 (1) (a), stats.
15. Receiving property from a child by secondhand articles dealer or pawnbroker without consent of parent or guardian. Section 948.63, stats.

Examples of misdemeanor outside of the criminal code that might be characterized as offenses against children include:

1. Various offenses relating to employment of minors under ch. 103, stats.
2. Repeat violations of furnishing alcohol beverages to underage persons. Section 125.07, stats.
3. Knowing violations of regulations on the use of lead paint and transfer of objects containing lead paint and as those relate to minors. Sections 254.12 and 254.30 (2) (b), stats.

How does the committee wish to proceed concerning excluding offenses against children from the definition of "misdemeanor" for purposes of the draft under consideration?

COMMENT C: DOMESTIC ABUSE-RELATED OFFENSES

There was apparent consensus at the November 21 meeting to exclude domestic abuse–related misdemeanors from the definition of “misdemeanor”. Two alternatives are provided for committee consideration.

The first alternative refers to “a misdemeanor that was an act of domestic violence, as defined in s. 968.075 (1) (a), [stats.]”. The latter section provides as follows:

“968.075 (1) (a) “Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.”.

Thus, under this approach, any misdemeanor that constitutes an act of domestic abuse, as defined in s. 968.075 (1) (a), stats., would be excluded from the definition of “misdemeanor” for purposes of the conditional discharge procedure. This approach has the advantages of being inclusive and briefly stated but has the disadvantage of not identifying specific misdemeanors covered. Note that identical language referencing a misdemeanor that was an act of domestic violence as defined in s. 968.075 (1) (a) appears in current s. 973.09 (2) (a) 1. b., stats., relating to minimum terms of probation for certain misdemeanors.

The alternative approach suggested in the draft is to refer to “a misdemeanor described in s. 973.055 (1) (a) [stats.]”. Section 973.055 (1) (a) identifies certain offenses for which a domestic abuse assessment is imposed. The statute lists specific violations to which the assessment applies if the court finds that the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formally resided or against an adult with whom the adult person has created a child. Section 973.055 (1) (a), stats. Misdemeanors included under current s. 973.055, stats., are:

1. Battery (bodily harm). Section 940.19 (1), stats.
2. Fourth–degree sexual assault. Section 940.225 (3m), stats.

3. Abuse of individuals at risk (bodily harm or no bodily harm). Section 940.285 (2) (b) 4. and 5., stats.
4. Misdemeanor intimidation of witness. Section 940.42, stats.
5. Misdemeanor intimidation of victim. Section 940.44, stats.
6. Violation of court orders relating to witnesses and victims that constitute a violation of ss. 940.42 and 940.44. Section 940.48 (1), stats.
7. Endangering safety by use of dangerous weapon. Section 941.20 (1), stats.
8. Misdemeanor damage to property. Section 943.01 (1), stats.
9. Criminal trespass to dwellings. Section 943.14, stats.
10. Entering onto construction site or into locked building, dwelling, or room. Section 943.15, stats.
11. Bail jumping when underlying offense is a misdemeanor. Section 946.49 (1) (a), stats.
12. Disorderly conduct. Section 947.01, stats.
13. Unlawful use of telephone. Section 947.012 (1), stats.
14. Unlawful use of computerized communication system. Section 947.0125 (2), stats.
15. Violation of domestic abuse restraining order or injunction. Section 813.12 (8), stats.

How does the committee wish to proceed concerning excluding misdemeanor domestic abuse violations from the definition of "misdemeanor" under the draft?

SECTION 973.016, AS PROPOSED IN THE DRAFT**973.016 Conditional discharge for first offense misdemeanors. (1) DEFINITIONS.**

In this section:

(a) "Crime" means a crime under the laws of this state or any other state or under federal law.

(b) "Misdemeanor" does not include:

1. A violation of s. 346.63 (1) described under s. 346.65 (2) (am) 2. to 4. (bm) and (cm); a violation of s. 346.63 (2) (a); a violation of s. 346.63 (5) described in s. 346.65 (2j) (am) 2. to 3., (bm) and (cm); and a violation of s. 346.63 (6) (a).

2. [A misdemeanor to which s. 939.63 (1) (a) applies.]

3. [A misdemeanor that includes as an essential element the possession, use, or threatened use of a firearm or the possession, use, or threatened use of a dangerous weapon, when the dangerous weapon used in the violation is a firearm.]

4. A violation of s. 944.20.

5. A misdemeanor under ch. 948.

6. [A misdemeanor that was an act of domestic abuse, as defined in s. 968.075 (1) (a).]

OR

[A misdemeanor described in s. 973.055 (1) (a).]

(2) AUTHORITY OF COURT. Subject to sub. (4), if a person pleads guilty to or is found guilty of a misdemeanor, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings upon terms and conditions ordered by the court or may defer further proceedings and place the person on probation upon terms and conditions. If the person violates a term or condition, the court may enter an adjudication of guilt and

1 proceed accordingly. If the person fulfills the terms and conditions, the court shall discharge
2 the person and dismiss the proceedings against the person.

3 (3) DISCHARGE AND DISMISSAL; EFFECT. Discharge and dismissal under this section is
4 without adjudication of guilt and is not a conviction for purposes of disqualifications or
5 disabilities imposed by law upon conviction of a crime.

6 (4) LIMITATIONS. This section does not apply to a person who has been previously
7 convicted of a crime. This section does not apply to a person who was previously the subject
8 of a discharge and dismissal under this section.

9 (5) NOTICE TO DEPARTMENT OF JUSTICE. Within 20 days after probation or conditions are
10 imposed under this section, the clerk of court shall notify the department of justice of the name
11 of the individual grant of probation and any other information required by the department.
12 This report shall be upon forms provided by the department.

13 (END)