

# State of Wisconsin



1995 Assembly Bill 721

Date of enactment: **May 31, 1996**  
Date of publication\*: **June 14, 1996**

## 1995 WISCONSIN ACT 387

AN ACT *to repeal* 971.23 (2) (title), 971.23 (4), 971.23 (9) (title), 971.24 (title) and (1) and 971.25 (title); *to renumber* 971.23 (3) (b); *to renumber and amend* 971.23 (1), 971.23 (2), 971.23 (3) (a), 971.23 (9), 971.24 (2), 971.24 (3), 971.25 (1) and 971.25 (2); *to amend* 165.79 (1), 908.08 (6), 938.293 (2), 967.08 (3) (c), 971.23 (5), 971.23 (6), 971.23 (7), 971.31 (5) (b) and 972.10 (5); *to repeal and recreate* 971.23 (1) (title) and 971.23 (3) (title); and *to create* 304.06 (3d), 971.23 (1) (g) and (h), 971.23 (2m), 971.23 (6m) (title), 971.23 (7m) (title), 971.23 (7m) (b), 971.23 (8) (e) and 973.10 (2g) of the statutes; **relating to:** discovery in criminal cases.

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

**SECTION 1.** 165.79 (1) of the statutes is amended to read:

165.79 (1) Evidence, information and analyses of evidence obtained from law enforcement officers by the laboratories is privileged and not available to persons other than law enforcement officers nor is the defendant entitled to an inspection of information and evidence submitted to the laboratories by the state or of a laboratory's findings, or to examine laboratory personnel as witnesses concerning the same, prior to trial, except to the extent that the same is used by the state at a preliminary hearing and except as provided in s. 971.23. Upon request of a defendant in a felony action, approved by the presiding judge, the laboratories shall conduct analyses of evidence on behalf of the defendant. No prosecuting officer is entitled to an inspection of information and evidence submitted to the laboratories by the defendant, or of a laboratory's findings, or to examine laboratory personnel as witnesses concerning the same, prior to trial, except to the extent that the same is used by the accused at a preliminary hearing and except as provided in s. 971.23. Em-

ployes who made examinations or analyses of evidence shall attend the criminal trial as witnesses, without subpoena, upon reasonable written notice from either party requesting the attendance. ~~Nothing in this section limits the right of a court to order the production of evidence or reports under s. 971.23 prior to trial.~~

**SECTION 2.** 304.06 (3d) of the statutes is created to read:

304.06 (3d) Upon demand prior to a revocation hearing under sub. (3), the district attorney shall disclose to a defendant the existence of any videotaped oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the videotaped statement. If, subsequent to compliance with this subsection, the state obtains possession, custody or control of such a videotaped statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the videotaped statement.

**SECTION 3.** 908.08 (6) of the statutes is amended to read:

\* Section 991.11, WISCONSIN STATUTES 1993-94: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

908.08 (6) Videotaped oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3) ~~and 971.24 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).~~

**SECTION 4.** 938.293 (2) of the statutes, as created by 1995 Wisconsin Act 77, is amended to read:

938.293 (2) All records relating to a juvenile which are relevant to the subject matter of a proceeding under this subchapter shall be open to inspection by a guardian ad litem or counsel for any party, upon demand and upon presentation of releases where necessary, at least 48 hours before the proceeding. Persons entitled to inspect the records may obtain copies of the records with the permission of the custodian of the records or with the permission of the court. The court may instruct counsel not to disclose specified items in the materials to the juvenile or the parent if the court reasonably believes that the disclosure would be harmful to the interests of the juvenile. Sections 971.23 to ~~971.25~~ and 972.11 (5) shall be applicable in all delinquency proceedings under this subchapter, except that the court shall establish the timetable for the disclosures required under ss. 971.23 (3), (1), (2m) and (8) and (9) and 972.11 (5).

**SECTION 5.** 967.08 (3) (c) of the statutes is amended to read:

967.08 (3) (c) Motions for ~~inspection or testing of physical evidence under s. 971.23 (4) or (5) or for protective orders under s. 971.23 (6).~~

**SECTION 6.** 971.23 (1) (title) of the statutes is repealed and recreated to read:

971.23 (1) (title) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT.

**SECTION 7.** 971.23 (1) of the statutes is renumbered 971.23 (1) (intro.) and amended to read:

971.23 (1) (intro.) Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant within a reasonable time before trial or his or her attorney to inspect and copy or photograph any all of the following materials and information, if it is within the possession, custody or control of the state:

(a) Any written or recorded statement concerning the alleged crime made by the defendant which is within the possession, custody or control of the state, including the testimony of the defendant in an s. 968.26 a secret proceeding under s. 968.26 or before a grand jury. Upon demand, the district attorney shall furnish the defendant with a, and the names of witnesses to the defendant's written statements.

(b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial. The and the names of witnesses to the written and defendant's oral statements which the state plans to use in the course of the trial shall also be furnished.

**SECTION 8.** 971.23 (1) (g) and (h) of the statutes are created to read:

971.23 (1) (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

(h) Any exculpatory evidence.

**SECTION 9.** 971.23 (2) (title) of the statutes is repealed.

**SECTION 10.** 971.23 (2) of the statutes is renumbered 971.23 (1) (c) and amended to read:

971.23 (1) (c) ~~Upon demand prior to trial, the district attorney shall furnish the defendant a Δ copy of the defendant's criminal record which is within the possession, custody or control of the state.~~

**SECTION 11.** 971.23 (2m) of the statutes is created to read:

971.23 (2m) WHAT A DEFENDANT MUST DISCLOSE TO THE DISTRICT ATTORNEY. Upon demand, the defendant or his or her attorney shall, within a reasonable time before trial, disclose to the district attorney and permit the district attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the defendant:

(a) A list of all witnesses, other than the defendant, whom the defendant intends to call at trial, together with their addresses. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

(am) Any relevant written or recorded statements of a witness named on a list under par. (a), including 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 results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial. This paragraph does not apply to reports subject to disclosure under s. 972.11 (5).

(c) Any physical evidence that the defendant intends to offer in evidence at the trial.

**SECTION 12.** 971.23 (3) (title) of the statutes is repealed and recreated to read:

971.23 (3) (title) COMMENT OR INSTRUCTION ON FAILURE TO CALL WITNESS.

**SECTION 13.** 971.23 (3) (a) of the statutes is renumbered 971.23 (1) (d) and amended to read:

971.23 (1) (d) ~~A defendant may, not less than 15 days nor more than 30 days before trial, serve upon the district attorney an offer in writing to furnish the state a list of all witnesses the defendant intends to call at the trial, whereupon within 5 days after the receipt of such offer, the district attorney shall furnish the defendant a list of all witnesses and their addresses whom the district attorney intends to call at the trial. Within 5 days after the district attorney furnishes such list, the defendant shall furnish the district attorney a list of all witnesses and their addresses whom the defendant intends to call at the trial.~~

This section shall ~~paragraph does~~ not apply to rebuttal witnesses or those called for impeachment only.

**SECTION 14.** 971.23 (3) (b) of the statutes is renumbered 971.23 (3).

**SECTION 15.** 971.23 (4) of the statutes is repealed.

**SECTION 16.** 971.23 (5) of the statutes is amended to read:

971.23 (5) **SCIENTIFIC TESTING.** On motion of a party subject to s. 971.31 (5), the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes. ~~Except as provided in s. 972.11 (5), the court may also order the production of reports or results of any scientific tests or experiments made by any party relating to evidence intended to be introduced at the trial.~~

**SECTION 17.** 971.23 (6) of the statutes is amended to read:

971.23 (6) **PROTECTIVE ORDER.** Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses required under this section be denied, restricted or deferred, or make other appropriate orders. If the district attorney or defense counsel certifies that to list a witness may subject the witness or others to physical or economic harm or coercion, the court may order that the deposition of the witness be taken pursuant to s. 967.04 (2) to (6). The name of the witness need not be divulged prior to the taking of such deposition. If the witness becomes unavailable or changes his or her testimony, the deposition shall be admissible at trial as substantive evidence.

**SECTION 18.** 971.23 (6m) (title) of the statutes is created to read:

971.23 (6m) (title) **IN CAMERA PROCEEDINGS.**

**SECTION 19.** 971.23 (7) of the statutes is amended to read:

971.23 (7) (title) **CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY.** If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production ~~hereunder~~ under this section, the party shall promptly notify the other party of the existence of the additional material or names.

**(7m) (a)** The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

**SECTION 20.** 971.23 (7m) (title) of the statutes is created to read:

971.23 (7m) (title) **SANCTIONS FOR FAILURE TO COMPLY.**

**SECTION 21.** 971.23 (7m) (b) of the statutes is created to read:

971.23 (7m) (b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

**SECTION 24.** 971.23 (8) (e) of the statutes is created to read:

971.23 (8) (e) A witness list required under par. (a) or (d) shall be provided in addition to a witness list required under sub. (1) (d) or (2m) (a), and a witness disclosed on a list under sub. (1) (d) or (2m) (a) shall be included on a list under par. (a) or (d) if the witness is required to be disclosed under par. (a) or (d).

**SECTION 25.** 971.23 (9) (title) of the statutes is repealed.

**SECTION 26.** 971.23 (9) of the statutes is renumbered 971.23 (1) (bm) and amended to read:

971.23 (1) (bm) ~~Notwithstanding sub. (1), if the district attorney intends to use evidence~~ Evidence obtained in the manner described under s. 968.31 (2) (b), ~~if the district attorney shall notify the defendant of that intention not less than 30 days before trial. The district attorney shall permit the defendant to inspect, listen to or copy the evidence upon demand~~ intends to use the evidence at trial.

**SECTION 27.** 971.24 (title) and (1) of the statutes are repealed.

**SECTION 28.** 971.24 (2) of the statutes is renumbered 971.23 (6m) and amended to read:

971.23 (6m) Either party may move for an in camera inspection by the court of the ~~documents referred to in sub. (1)~~ any document required to be disclosed under sub. (1) or (2m) for the purpose of masking or deleting any material which is not relevant to the case being tried. The court shall mask or delete any irrelevant material.

**SECTION 29.** 971.24 (3) of the statutes is renumbered 971.23 (1) (e) and amended to read:

971.23 (1) (e) ~~Upon demand prior to trial or revocation hearing under s. 304.06 (3) or 973.10 (2), the district attorney shall disclose to a defendant the existence of~~ Any relevant written or recorded statements of a witness named on a list under par. (d), including any videotaped oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the videotaped statement. If, subsequent to compliance with this subsection, the state obtains possession, custody or control of such a videotaped statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the videotaped statement, 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 district attorney intends to offer in evidence at trial. This paragraph does not apply to reports subject to disclosure under s. 972.11 (5).

**SECTION 30.** 971.25 (title) of the statutes is repealed.

**SECTION 31.** 971.25 (1) of the statutes is renumbered 971.23 (1) (f) and amended to read:

971.23 (1) (f) ~~The district attorney shall disclose to the defendant, upon demand, the criminal record of a prosecution witness which is known to the district attorney.~~

**SECTION 32.** 971.25 (2) of the statutes is renumbered 971.23 (2m) (b) and amended to read:

971.23 (2m) (b) ~~The defense attorney shall disclose to the district attorney, upon demand, the criminal record of a defense witness, other than the defendant, which is known to the defense attorney.~~

**SECTION 33.** 971.31 (5) (b) of the statutes is amended to read:

971.31 (5) (b) In felony actions, motions to suppress evidence or motions under ss. s. 971.23 ~~to 971.25~~ or objections to the admissibility of statements of a defendant shall not be made at a preliminary examination and not until an information has been filed.

**SECTION 34.** 972.10 (5) of the statutes is amended to read:

972.10 (5) When the evidence is concluded and the testimony closed, if either party desires special instructions to be given to the jury, the instructions shall be reduced to writing, signed by the party or his or her attorney and filed with the clerk, unless the court otherwise directs. Counsel for the parties, or the defendant if he or she is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and to present and argue to the court objections to the adoption or rejection of any instructions requested by counsel. The court

shall advise the parties of the instructions to be given. No instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such instruction is the fact the name of the witness appears upon a list furnished pursuant to s. 971.23. Counsel, or the defendant if he or she is not represented by counsel, shall specify and state the particular ground on which the instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection shall specify with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection. All objections shall be on the record. The court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.

**SECTION 35.** 973.10 (2g) of the statutes is created to read:

973.10 (2g) Upon demand prior to a revocation hearing under sub. (2), the district attorney shall disclose to a defendant the existence of any videotaped oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the videotaped statement. If, subsequent to compliance with this subsection, the state obtains possession, custody or control of such a videotaped statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the videotaped statement.

**SECTION 36. Initial applicability.**

(1) This act first applies to criminal actions commenced on the effective date of this subsection.

**SECTION 37. Effective date.**

(1) This act takes effect on January 1, 1997.