CHAPTER 971

CRIMINAL PROCEDURE — PROCEEDINGS BEFORE AND AT TRIAL

Cross–reference: See definitions in s. 967.02.

971.01 Filing of the information. (1) The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03 (10), shall file an information according to the evidence on such examination subscribing his or her name thereto.

(2) The information shall be filed with the clerk within 30 days after the completion of the preliminary examination or waiver thereof except that the district attorney may move the court wherein the information is to be filed for an order extending the period for filing such information for cause. Notice of such motion shall be given the defendant. Failure to file the information within such time shall entitle the defendant to have the action dismissed without prejudice.

History: 1993 a. 486.

Action dismissed for failure to file information. State v. Woehrer, 83 W (2d) 696, 266 NW (2d) 366 (1978).

This section does not require that information be served on defendant within 30 days. State v. May, 100 W (2d) 9, 301 NW (2d) 458 (Ct. App. 1980).

Where challenge is not to bindover decision, but to specific charge in information, trial judge's review is limited to whether district attorney abused discretion in issuing charge. State v. Hooper, 101 W (2d) 517, 305 NW (2d) 110 (1981).

Prosecutor may include in information charges for which no direct evidence was presented at preliminary examination, as long as additional charges are not wholly unrelated to original charge. State v. Burke, 153 W (2d) 445, 451 NW (2d) 739 (1990). See also State v. Richer, 174 W (2d) 231, 496 NW (2d) 66 (1993).

971.02 Preliminary examination; when prerequisite to an information or indictment. (1) If the defendant is charged with a felony in any complaint, including a complaint issued under s. 968.26, or when the defendant has been returned to this state for prosecution through extradition proceedings under ch. 976, or any indictment, no information or indictment shall be filed until the defendant has had a preliminary examination, unless the defendant waives such examination in writing or in open court or unless the defendant is a corporation or limited liability company. The omission of the preliminary examination shall not invalidate any information unless the defendant moves to dismiss prior to the entry of a plea.

(2) Upon motion and for cause shown, the trial court may remand the case for a preliminary examination. "Cause" means:

(a) The preliminary examination was waived; and

(b) Defendant did not have advice of counsel prior to such waiver; and

(c) Defendant denies that probable cause exists to hold him or her for trial; and

(d) Defendant intends to plead not guilty.

History: 1973 c. 45; 1993 a. 112, 486.

An objection to the sufficiency of a preliminary examination is waived if not raised prior to pleading. Wold v. State, 57 W (2d) 344, 204 NW (2d) 482.

When defendant waived preliminary examination and wished to plead, but the information was not ready and was only orally read into the record, the defendant is not harmed by acceptance of his plea before the filing of the information. Larson v. State, 60 W (2d) 768.

Scope of cross examination by defense was properly limited at preliminary hearing. State v. Russo, 101 W (2d) 206, 303 NW (2d) 846 (Ct. App. 1981).

See note to Art. I, sec. 7, citing Gerstein v. Pugh, 420 US 103.

Preliminary examination potential. 58 MLR 159.

The grand jury in Wisconsin. Coffey, Richards, 58 MLR 518.

971.03 Form of information. The information may be in the following form:

STATE OF WISCONSIN,

..... County,

In ..... Court.

The State of Wisconsin

vs.

..... (Name of defendant).

I, ..., district attorney for said county, hereby inform the court that on the ..... day of ....., in the year 19.., at said county the defendant did (state the crime) ..... contrary to section ..... of the statutes.

Dated ....., 19..,

..... District Attorney

An information charging an attempt is sufficient if it alleges the attempt plus the elements of the attempted crime. Wilson v. State, 59 W (2d) 269, 208 NW (2d) 134.

Where the victim's name was correctly spelled in the complaint but wrong on the information, the variance was immaterial. State v. Bagnall, 61 W (2d) 297, 212 NW (2d) 122.

971.04 Defendant to be present. (1) Except as provided in subs. (2) and (3), the defendant shall be present:

(a) At the arraignment;

(b) At trial;

(c) At all proceedings when the jury is being selected;

(d) At any evidentiary hearing;

(e) At any view by the jury;

(f) When the jury returns its verdict;

(g) At the pronouncement of judgment and the imposition of sentence;

(h) At any other proceeding when ordered by the court.

(2) A defendant charged with a misdemeanor may authorize his or her attorney in writing to act on his or her behalf in any manner, with leave of the court, and be excused from attendance at any or all proceedings.

(3) If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times. A defendant need not be present at the pronouncement or entry of an order granting or denying relief under s. 974.02 or 974.06. If the defendant is not present, the time for appeal from any order under ss. 974.02 and 974.06 shall commence after a copy has been served upon the attorney representing the defendant, or upon the defendant if he or she appeared without counsel. Service of such an order shall be complete upon mailing. A defendant appearing without counsel shall supply the court with his or her current mailing address. If the defendant fails to supply the court with a current and accurate mailing address, failure to receive a copy of the order granting or denying relief shall not be a ground for tolling the time in which an appeal must be taken.

History: 1971 c. 298; Sup. Ct. Order, 130 W (2d) xix (1986); 1993 a. 486.

Court erred in resentencing defendant without notice after imposition of previously ordered invalid sentence. State v. Upchurch, 101 W (2d) 329, 305 NW (2d) 57 (1981).

If court is put on notice that accused has language difficulty, court must make factual determination whether interpreter is necessary; if so, accused must be made aware of right to interpreter, at public cost if accused is indigent. Waiver of right must be made voluntarily in open court on record. State v. Neave, 117 W (2d) 359, 344 NW (2d) 181 (1984).

Sub. (2) allows entry of plea to misdemeanor by attorney without defendant being present, but for guilty or no contest plea all requirements of 971.08 except attendance must be met. State v. Krause, 161 W (2d) 919, 469 NW (2d) 241 (Ct. App. 1991).

Sub. (1) does not encompass a postconviction evidentiary hearing. State v. Vennemann, 180 W (2d) 81, 508 NW (2d) 404 (1993).

A defendant present at the beginning of jury selection is not "present at the beginning of the trial" under sub. (3). State v. Dwyer, 181 W (2d) 826, 512 NW (2d) 533 (Ct. App. 1994).

971.05 Arraignment. If the defendant is charged with a felony, the arraignment may be in the trial court or the court which conducted the preliminary examination or accepted the defendant's waiver of the preliminary examination. If the defendant is charged with a misdemeanor, the arraignment may be in the trial court or the court which conducted the initial appearance. The arraignment shall be conducted in the following manner:

(1) The arraignment shall be in open court.

(2) If the defendant appears for arraignment without counsel, the court shall advise the defendant of the defendant's right to counsel as provided in s. 970.02.

(3) The district attorney shall deliver to the defendant a copy of the information in felony cases and in all cases shall read the information or complaint to the defendant unless the defendant waives such reading. Thereupon the court shall ask for the defendant's plea.

(4) The defendant then shall plead unless in accordance with s. 971.31 the defendant has filed a motion which requires determination before the entry of a plea. The court may extend the time for the filing of such motion.

History: 1979 c. 291; 1987 a. 74; 1993 a. 486.

Where through oversight, an arraignment was not held, it may be conducted after both parties had rested during the trial. Bies v. State, 53 W (2d) 322, 193 NW (2d) 46.

971.06 Pleas. (1) A defendant charged with a criminal offense may plead as follows:

(a) Guilty.

(b) Not guilty.

(c) No contest, subject to the approval of the court.

(d) Not guilty by reason of mental disease or defect. This plea may be joined with a plea of not guilty. If it is not so joined, this plea admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged in the indictment, information or complaint.

(2) If a defendant stands mute or refuses to plead, the court shall direct the entry of a plea of not guilty on the defendant's behalf.

(3) At the time a defendant enters a plea, the court may not require the defendant to disclose his or her citizenship status.

History: 1985 a. 252; 1993 a. 486.

Inaccurate legal advice renders a plea an uninformed one and can compromise the voluntariness of the plea. State v. Woods, 173 W (2d) 129, 496 NW (2d) 144 (Ct. App. 1992).

The decision to plead guilty is personal to the defendant. A defendant's attorney cannot renegotiate a plea agreement without the defendant's knowledge and consent. State v. Woods, 173 W (2d) 129, 496 NW (2d) 144 (Ct. App. 1992).

971.07 Multiple defendants. Defendants who are jointly charged may be arraigned separately or together, in the discretion of the court.

971.08 Pleas of guilty and no contest; withdrawal thereof. (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

(c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

(2) If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

(3) Any plea of guilty which is not accepted by the court or which is subsequently permitted to be withdrawn shall not be used against the defendant in a subsequent action.

History: 1983 a. 219; 1985 a. 252.

A court can consider defendant's record of juvenile offenses at a hearing on his guilty pleas prior to sentencing. McKnight v. State, 49 W (2d) 623, 182 NW (2d) 291.

When a plea agreement contemplates the nonprosecution of uncharged offenses the details of the plea agreement should be made a matter of record, whether it involves a recommendation of sentencing, a reduced charge, a nolle prosequi of charges, or "read ins" with an agreement of immunity, and a "read-in" agreement made after conviction or as part of a post-plea-of-guilty hearing to determine the voluntariness and accuracy of the plea should be a part of the sentencing hearing and made a matter of record. Austin v. State, 49 W (2d) 727, 183 NW (2d) 56.

A defendant may not withdraw a guilty plea simply because he did not specifically waive all of his constitutional rights, if the record shows he understood what rights he was waiving by the plea. After a plea of guilty the hearing as to the factual basis for the plea need not produce competent evidence which will satisfy the criminal burden of proof. Edwards v. State, 51 W (2d) 231, 186 NW (2d) 193.

It is sufficient for a court to inform a defendant charged with several offenses of the maximum penalty which could be imposed for each. The phrase "in connection with his appearance" as it appears in the guilty plea guidelines of the Burnett and Ernst cases should be deleted. Burkhalter v. State, 52 W (2d) 413, 190 NW (2d) 502.

A desire to avoid a possible life sentence by pleading guilty to a lesser charge does not alone render the plea involuntary. A claimed inability to remember does not require refusal of the plea where the evidence is clear that defendant committed the crime. State v. Herro, 53 W (2d) 211, 191 NW (2d) 889.

The proceedings following a plea of guilty were not designed to establish a prima facie case, but to establish the voluntariness of the plea and the factual basis therefor; hence if the defendant denies an element of the crime after pleading guilty, the court is required to reject the plea and set the case for trial, and not obliged to dismiss the

action because of refusal to accept the guilty plea. Johnson v State, 53 W (2d) 787, 193 NW (2d) 659

A hearing on a motion to withdraw a guilty plea is to be liberally granted if the motion is made prior to sentence; it is discretionary if made thereafter and need not be granted if the record refutes the allegations. Defendant must raise a substantial issue of fact. Nelson v State, 54 W (2d) 489, 195 NW (2d) 629

When there is strong evidence of guilt a conviction will be sustained even against a defendant who, having pleaded guilty, nonetheless denies the factual basis for guilt. State v Chabonian, 55 W (2d) 723, 201 NW (2d) 25.

A plea bargain which contemplates special concessions to another person requires careful scrutiny by the court. It must also be reviewed as to whether it is in the public interest. State ex rel. White v Gray, 57 W (2d) 17, 203 NW (2d) 638

A court has inherent power to refuse to accept a plea of guilty and may dismiss the charge on motion of the district attorney in order to allow prosecution on a 2nd complaint. State v. Waldman, 57 W (2d) 234, 203 NW (2d) 691

It is not error for the court to accept a guilty plea before hearing the factual basis for the plea if a sufficient basis is ultimately presented. Staver v. State, 58 W (2d) 726

The fact that defendant pled guilty with the understanding that his wife would be given probation on another charge does not necessarily render the plea involuntary. Seybold v. State, 61 W (2d) 227, 212 NW (2d) 146

The defendant's religious beliefs regarding the merits of confessing one's wrongdoing and his desire to mollify his family or give in to their desires are self–imposed coercive elements and do not vitiate the voluntary nature of the defendant's guilty plea. Craker v. State, 66 W (2d) 222, 223 NW (2d) 872

A defendant wishing to withdraw guilty plea must show by clear and convincing evidence that the plea was not knowingly and voluntarily entered and that withdrawal is necessary to prevent manifest injustice, as may be indicated in situations where (1) defendant was denied effective assistance of counsel; (2) the plea was not entered or ratified by defendant or a person authorized to so act in his behalf; (3) the plea was involuntary or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; and (4) defendant did not receive the concessions contemplated by the plea agreement and the prosecutor failed to seek them as promised therein. Birts v. State, 68 W (2d) 389, 228 NW (2d) 351

As required by Ernst v. State, 43 W (2d) 661 and (1) (b), prior to accepting a guilty plea, the trial court must establish that the conduct defendant admits constitutes the offense charged or an offense included therein to which defendant has pleaded guilty; but where the plea is made pursuant to a plea bargain, the court need not probe as deeply in determining whether the facts would sustain the charge as it would were the plea nonnegotiated. Broadie v. State, 68 W (2d) 420, 228 NW (2d) 687.

Trial court did not abuse discretion by failing to inquire into the effect tranquilizer had on defendant's competence to enter plea. Jones v. State, 71 W (2d) 750, 238 NW (2d) 741.

Withdrawal of guilty plea prior to sentencing is not an absolute right but should be freely allowed when a fair and just reason for doing so is presented. Dudrey v. State, 74 W (2d) 480, 247 NW (2d) 105

Guilty plea cannot be withdrawn on grounds that probation conditions were more onerous than expected. Garski v. State, 75 W (2d) 62, 248 NW (2d) 425

See note to 939.74, citing State v. Pohlhammer, 78 W (2d) 516, 254 NW (2d) 478.

While courts have no duty to secure informed waivers of possible statutory defenses, under unique facts of case, defendant was entitled to withdraw guilty plea to charge barred by statute of limitations. State v. Pohlhammer, 82 W (2d) 1, 260 NW (2d) 678.

Sub. (2) does not deprive court of jurisdiction to consider untimely motion. State v. Lee, 88 W (2d) 239, 276 NW (2d) 268 (1979).

See note to Art. I, sec. 8, citing State ex rel. Skinkis v. Treffert, 90 W (2d) 528, 280 NW (2d) 316 (Ct. App. 1979).

See note to Art. I, sec. 7, citing State v. Rock, 92 W (2d) 554, 285 NW (2d) 739 (1979).

Absent abuse of discretion in doing so, prosecutor may withdraw plea bargain offer at any time prior to action by defendant in detrimental reliance on the offer. State v Beckes, 100 W (2d) 1, 300 NW (2d) 871 (Ct. App. 1980).

Trial court did not err in refusing to allow defendant to withdraw guilty plea accompanied by protestations of innocence. State v Johnson, 105 W (2d) 657, 314 NW (2d) 897 (Ct. App. 1981).

Conditional guilty pleas are not to be accepted and will not be given effect, except as provided by statute. State v Riekkoff, 112 W (2d) 119, 332 NW (2d) 744 (1983).

See note to Art. I, sec. 7, citing State v. Ludwig, 124 W (2d) 600, 369 NW (2d) 722 (1985).

Where defendant offered plea of no contest but refused to waive constitutional rights or to answer judge's questions, judge should have set trial date and refused further discussion of no contest plea. State v Minniecheske, 127 W (2d) 234, 378 NW (2d) 283 (1985).

Due process does not require that record of plea hearing demonstrate defendant's understanding of nature of charge at time of plea. State v. Carter, 131 W (2d) 69, 389 NW (2d) 1 (1986).

Bangert procedures under this section apply to defendant pleading not guilty by reason of mental disease or defect. State v. Shegrud, 131 W (2d) 133, 389 NW (2d) 7 (1986).

Failure to comply with this section is not necessarily a constitutional violation. Procedures mandated for plea hearing. Remedy established. State v Bangert, 131 W (2d) 246, 389 NW (2d) 12 (1986).

Withholding of sentence and imposition of probation, as those terms are used by courts, are functionally equivalent to sentencing for determining appropriateness of plea withdrawal. State v. Booth, 142 W (2d) 232, 418 NW (2d) 20 (Ct. App. 1987).

See note to 971.04 citing State v. Krause, 161 W (2d) 919, 469 NW (2d) 241 (Ct. App. 1991).

Failure to comply with sub. (1) (c) is governed by sub. (2); holding in Bangert does not apply. Meaning of "likely" deportation under sub. (2) discussed. State v. Beaza, 174 W (2d) 118, 496 NW (2d) 156 (Ct. App. 1993).

Where alien defendant was aware of the likelihood of deportation when a plea was entered, the court's failure to comply with sub. (1) was not grounds for withdrawal of the plea. State v. Chavez, 175 W (2d) 366, 498 NW (2d) 887 (Ct. App. 1993).

A conclusory allegation of manifest injustice, unsupported by factual assertions is legally insufficient to entitle a defendant to even a hearing on a motion to withdraw a guilty plea following sentencing. State v. Washington, 176 W (2d) 205, NW (2d) (Ct. App. 1993).

In accepting a negotiated guilty plea for probation, the trial court should but is not required to advise the defendant of the potential maximum sentence which may be imposed if probation is revoked. State v. James, 176 W (2d) 230, NW (2d) (Ct. App. 1993).

In the context of a plea bargain, sub. (1) (a) is satisfied if the plea is voluntarily and understandingly made and a factual basis is shown for either the offense pleaded to or to a more serious offense reasonably related to the offense pleaded to. State v Harrell, 182 W (2d) 408, 513 NW (2d) 700 (Ct. App. 1994).

A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses including alleged violations of constitutional rights, prior to the appeal. State v. Aniton, 183 W (2d) 125, 515 NW (2d) 302 (Ct. App. 1994).

See note to 968.01, citing 63 Atty. Gen. 540.

Where accused rejected plea bargain on misdemeanor charge and instead requested jury trial, prosecutor did not act vindictively in raising charge to felony. United States v Goodwin, 457 US 368 (1982).

Defendant's acceptance of prosecutor's proposed plea bargain did not bar prosecutor from withdrawing offer. Mabry v. Johnson, 467 US 504 (1984).

Where a defendant knowingly entered a guilty plea and the state's evidence supported a conviction, the conviction is valid even though the defendant gave testimony inconsistent with the plea. Hansen v. Mathews, 424 F (2d) 1205

See note to Art. I, sec. 7, citing United States v. Gaertner, 583 F (2d) 308 (1978).

Guilty pleas in Wisconsin. Bishop, 58 MLR 631.

Pleas of guilty; plea bargaining. 1971 WLR 583

971.09 Plea of guilty to offenses committed in several counties. (1) Any person who admits that he or she has committed crimes in the county in which he or she is in custody and also in another county in this state may apply to the district attorney of the county in which he or she is in custody to be charged with those crimes so that the person may plead guilty and be sentenced for them in the county of custody. The application shall contain a description of all admitted crimes and the name of the county in which each was committed.

(2) Upon receipt of the application the district attorney shall prepare an information charging all the admitted crimes and naming in each count the county where each was committed. The district attorney shall send a copy of the information to the district attorney of each other county in which the defendant admits he or she committed crimes, together with a statement that the defendant has applied to plead guilty in the county of custody. Upon receipt of the information and statement, the district attorney of the other county may execute a consent in writing allowing the defendant to enter a plea of guilty in the county of custody, to the crime charged in the information and committed in the other county, and send it to the district attorney who prepared the information.

(3) The district attorney shall file the information in any court of the district attorney's county having jurisdiction to try or accept a plea of guilty to the most serious crime alleged therein as to which, if alleged to have been committed in another county, the district attorney of that county has executed a consent as provided in sub. (2). The defendant then may enter a plea of guilty to all offenses alleged to have been committed in the county where the court is located and to all offenses alleged to have been committed in other counties as to which the district attorney has executed a consent under sub. (2). Before entering a plea of guilty, the defendant shall waive in writing any right to be tried in the county where the crime was committed. The district attorney of the county where the crime was committed need not be present when the plea is made but the district attorney's written consent shall be filed with the court.

(4) Thereupon the court shall enter such judgment, the same as though all the crimes charged were alleged to have been committed in the county where the court is located, whether or not the court has jurisdiction to try all those crimes to which the defendant has pleaded guilty under this section.

(5) The county where the plea is made shall pay the costs of prosecution if the defendant does not pay them, and is entitled to

retain fees for receiving and paying to the state any fine which may be paid by the defendant. The clerk where the plea is made shall file a copy of the judgment of conviction with the clerk in each county where a crime covered by the plea was committed. The district attorney shall then move to dismiss any charges covered by the plea of guilty, which are pending against the defendant in the district attorney's county, and the same shall thereupon be dismissed.

History: 1979 c. 31; 1993 a. 486.

It is not error for the court to accept the plea before the amended complaint was filed, where defendant waived the late filing and was not prejudiced thereby. Failure to prepare an amended information prior to obtaining consents by the district attorneys involved does not invalidate the conviction where the consents were actually obtained and the defendant waived the defect. Failure to dismiss the charges in one of the counties does not deprive the court of jurisdiction. Failure of a district attorney to specifically consent as to one offense does not invalidate the procedure where the error is clerical. Peterson v. State, 54 W (2d) 370, 195 NW (2d) 837.

Effect of consolidation on repeater allegation discussed. State v. Rachwal, 159 W (2d) 494, 465 NW (2d) 490 (1991).

971.10 Speedy trial. (1) In misdemeanor actions trial shall commence within 60 days from the date of the defendant's initial appearance in court.

(2) (a) The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.

(b) If the court is unable to schedule a trial pursuant to par. (a), the court shall request assignment of another judge pursuant to s. 751.03.

(3) (a) A court may grant a continuance in a case, upon its own motion or the motion of any party, if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial. A continuance shall not be granted under this paragraph unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

(b) The factors, among others, which the court shall consider in determining whether to grant a continuance under par. (a) are:

1. Whether the failure to grant the continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice.

2. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(c) No continuance under par. (a) may be granted because of general congestion of the court's calendar or the lack of diligent preparation or the failure to obtain available witnesses on the part of the state.

(4) Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.

History: 1971 c. 40 s. 93; 1971 c. 46, 298; 1977 c. 187 s. 135; 1979 c. 34; 1993 a. 155.

The supreme court adopts the federal court applied balancing test, as appropriate to review the exercise of trial court's discretion on a request for the substitution of trial counsel, with the associated request for a continuance. Phifer v. State, 64 W (2d) 24, 218 NW (2d) 354.

Party requesting continuance on grounds of surprise must show: 1) actual surprise of unforeseeable development; 2) where surprise is caused by unexpected testimony, probability of producing contradictory or impeaching evidence; and 3) resulting prejudice if request is denied. See note to 971.23, citing Angus v. State, 76 W (2d) 191, 251 NW (2d) 28.

Delay of 84 days between defendant's first court appearance and trial on misdemeanor traffic charges was not so inordinate as to raise presumption of prejudice. State v. Mullis, 81 W (2d) 454, 260 NW (2d) 696.

Stay of proceedings caused by state's interlocutory appeal stopped the running of time period under (2). State ex rel. Rabe v. Ferris, 97 W (2d) 63, 293 NW (2d) 151 (1980).

971.105 Child victims and witnesses; duty to expedite proceedings. In all criminal cases, juvenile fact–finding hearings under s. 48.31 and juvenile dispositional hearings under s. 48.335 involving a child victim or witness, as defined in s. 950.02, the court and the district attorney shall take appropriate action to ensure a speedy trial in order to minimize the length of time the child must endure the stress of the child's involvement in the proceeding. In ruling on any motion or other request for a delay or continuance of proceedings, the court shall consider and give weight to any adverse impact the delay or continuance may have on the well–being of a child victim or witness.

History: 1983 a. 197; 1985 a. 262 s. 8; 1993 a. 98.

971.11 Prompt disposition of intrastate detainers. (1) Whenever the warden or superintendent receives notice of an untried criminal case pending in this state against an inmate of a state prison, the warden or superintendent shall, at the request of the inmate, send by certified mail a written request to the district attorney for prompt disposition of the case. The request shall state the sentence then being served, the date of parole eligibility, the approximate discharge or conditional release date, and prior decision relating to parole. If there has been no preliminary examination on the pending case, the request shall state whether the inmate waives such examination, and, if so, shall be accompanied by a written waiver signed by the inmate.

(2) If the crime charged is a felony, the district attorney shall either move to dismiss the pending case or arrange a date for preliminary examination as soon as convenient and notify the warden or superintendent of the prison thereof, unless such examination has already been held or has been waived. After the preliminary examination or upon waiver thereof, the district attorney shall file an information, unless it has already been filed, and mail a copy thereof to the warden or superintendent for service on the inmate. The district attorney shall bring the case on for trial within 120 days after receipt of the request subject to s. 971.10.

(3) If the crime charged is a misdemeanor, the district attorney shall either move to dismiss the charge or bring it on for trial within 90 days after receipt of the request.

(4) If the defendant desires to plead guilty or no contest to the complaint or to the information served upon him or her, the defendant shall notify the district attorney thereof. The district attorney shall thereupon arrange for the defendant's arraignment as soon as possible and the court may receive the plea and pronounce judgment.

(5) If the defendant wishes to plead guilty to cases pending in more than one county, the several district attorneys involved may agree with the defendant and among themselves for all such pleas to be received in the appropriate court of one of such counties, and s. 971.09 shall govern the procedure thereon so far as applicable.

(6) The prisoner shall be delivered into the custody of the sheriff of the county in which the charge is pending for transportation to the court, and the prisoner shall be retained in that custody during all proceedings under this section. The sheriff shall return the prisoner to the prison upon the completion of the proceedings and during any adjournments or continuances and between the preliminary examination and the trial, except that if the department certifies a jail as being suitable to detain the prisoner, he or she may be detained there until the court disposes of the case. The prisoner's existing sentence continues to run and he or she receives time credit under s. 302.11 while in custody.

(7) If the district attorney moves to dismiss any pending case or if it is not brought on for trial within the time specified in sub. (2) or (3) the case shall be dismissed unless the defendant has escaped or otherwise prevented the trial, in which case the request for disposition of the case shall be deemed withdrawn and of no further legal effect. Nothing in this section prevents a trial after the period specified in sub. (2) or (3) if a trial commenced within such period terminates in a mistrial or a new trial is granted.

History: 1983 a. 528; 1989 a. 31; 1993 a. 486.

971.12 Joinder of crimes and of defendants. (1) JOINDER OF CRIMES. Two or more crimes may be charged in

the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

(2) JOINDER OF DEFENDANTS Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(3) RELIEF FROM PREJUDICIAL JOINDER If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

(4) TRIAL TOGETHER OF SEPARATE CHARGES The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

History: 1993 a. 486.

Where 2 defendants were charged and the cases consolidated, and one then pleads guilty, there is no need for a severance, especially where the trial is to the court. Nicholas v. State, 49 W (2d) 678, 183 NW (2d) 8.

Severance is not required where the 2 charges involving a single act or transaction are so inextricably intertwined so as to make proof of one crime impossible without proof of the other. Holmes v. State, 63 W (2d) 389, 217 NW (2d) 657.

Due process of law was not violated, nor did the trial court abuse its discretion, by denial of defendant's motion to sever 3 counts of sex offenses from a count of first–degree murder. Bailey v. State, 65 W (2d) 331, 222 NW (2d) 871.

In a joint trial on charges of burglary and obstructing an officer, while evidence as to the fabrication of an alibi by defendant was probative as to the burglary, the substantial danger that the jury might employ such evidence as affirmative proof of the elements of that crime, for which the state was required to introduce separate and independent evidence showing guilt beyond a reasonable doubt, required the court to administer a clear and certain cautionary instruction that the jury should not consider evidence on the obstructing count as sufficient in itself to find defendant guilty of burglary. Peters v. State, 70 W (2d) 22, 233 NW (2d) 420.

Joinder was not prejudicial to defendant moving for severance where possibly prejudicial effect of inadmissible hearsay regarding other defendant was presumptively cured by instructions. State v. Jennaro, 76 W (2d) 499, 251 NW (2d) 800.

Where codefendant's antagonistic testimony merely corroborates overwhelming prosecution evidence, refusal to grant severance is not abuse of discretion. Haldane v. State, 85 W (2d) 182, 270 NW (2d) 75 (1978).

Joinder of charges against defendant was proper where separate acts exhibited some modus operandi. Francis v. State, 86 W (2d) 554, 273 NW (2d) 310 (1979).

Trial court properly deleted implicating references from codefendant's confession rather than granting defendant's motion for severance under (3). Pohl v. State, 96 W (2d) 290, 291 NW (2d) 554 (1980).

Trial court did not abuse discretion in denying severance motion and failing to caution jury against prejudice where 2 counts were joined. State v. Bettinger, 100 W (2d) 691, 303 NW (2d) 585 (1981).

Joinder is not prejudicial where same evidence would be admissible under 904.04 if there were separate trials. State v. Hall, 103 W (2d) 125, 307 NW (2d) 289 (1981).

Trial court abused discretion in denying motion for severance of codefendants' trials, where accused made initial showing that codefendant's testimony would have established accused's alibi defense and accused's entire defense was based on alibi. State v. Brown, 114 W (2d) 554, 338 NW (2d) 857 (Ct. App. 1983).

Joinder under (2) was proper where both robberies were instigated by one defendant's prostitution and other defendant systematically robbed customers who refused to pay. State v. King, 120 W (2d) 285, 354 NW (2d) 742 (Ct. App. 1984).

Misjoinder was harmless error. State v. Leach, 124 W (2d) 648, 370 NW (2d) 240 (1985).

To be of "same or similar character" under (1), crimes must be of same type, occur over relatively short time period, and evidence as to each must overlap. State v. Hamm, 146 W (2d) 130, 430 NW (2d) 584 (Ct. App. 1988).

Joinder and severance. 1971 WLR 604.

971.13 Competency. (1) No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

(2) A defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency.

(3) The fact that a defendant is not competent to proceed does not preclude any legal objection to the prosecution under s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

History: 1981 c. 367.

Judicial Council Committee's Note, 1981: Fundamental fairness precludes criminal prosecution of a defendant who is not mentally competent to exercise his or her constitutional and procedural rights. State ex rel. Matalik v. Schubert, 57 Wis. 2d 315, 322 (1973).

Sub. (1) states the competency standard in conformity with Dusky v. U.S., 362 U.S. 402 (1960) and State ex rel. Haskins v. Dodge County Court, 62 Wis. 2d 250, 265 (1974). Competency is a judicial rather than a medical determination. Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant's capacity to assist counsel and make decisions which counsel cannot make for him or her. See State v. Harper, 57 Wis. 2d 543 (1973); Norwood v. State, 74 Wis. 2d 343 (1976); State v. Albright, 96 Wis. 2d 122 (1980); Pickens v. State, 96 Wis. 2d 549 (1980).

Sub. (2) clarifies that a defendant who requires medication to remain competent is nevertheless competent; the court may order the defendant to be administered such medication for the duration of the criminal proceedings under s. 971.14 (5) (c).

Sub. (3) is identical to prior s. 971.14 (6). It has been renumbered for better statutory placement, adjacent to the rule which it clarifies. [Bill 765–A]

Competency to stand trial is not necessarily sufficient competency to represent oneself. Pickens v. State, 96 W (2d) 549, 292 NW (2d) 601 (1980).

Defense counsel having reason to doubt competency of client must raise issue with court, strategic considerations notwithstanding. State v. Johnson, 133 W (2d) 207, 395 NW (2d) 176 (1986).

971.14 Competency proceedings. (1) PROCEEDINGS. (a) The court shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed.

(b) If reason to doubt competency arises after the defendant has been bound over for trial after a preliminary examination, or after a finding of guilty has been rendered by the jury or made by the court, a probable cause determination shall not be required and the court shall proceed under sub. (2).

(c) Except as provided in par. (b), the court shall not proceed under sub. (2) until it has found that it is probable that the defendant committed the offense charged. The finding may be based upon the complaint or, if the defendant submits an affidavit alleging with particularity that the averments of the complaint are materially false, upon the complaint and the evidence presented at a hearing ordered by the court. The defendant may call and cross–examine witnesses at a hearing under this paragraph but the court shall limit the issues and witnesses to those required for determining probable cause. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of the hearing by telephone or live audio–visual means. If the court finds that any charge lacks probable cause, it shall dismiss the charge without prejudice and release the defendant except as provided in s. 971.31 (6).

(2) EXAMINATION. (a) The court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant. If an inpatient examination is determined by the court to be necessary, the defendant may be committed to a suitable mental health facility for the examination period specified in par. (c), which shall be deemed days spent in custody under s. 973.155. If the examination is to be conducted by the department of health and social services, the court shall order the individual to the facility designated by the department of health and social services.

(am) Notwithstanding par. (a), if the court orders the defendant to be examined by the department or a department facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case under this paragraph in which the department determines that an inpatient examination is neces-

sary, the 15–day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

(b) If the defendant has been released on bail, the court may not order an involuntary inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary for an adequate examination.

(c) Inpatient examinations shall be completed and the report of examination filed within 15 days after the examination is ordered or as specified in par. (am), whichever is applicable, unless, for good cause, the facility or examiner appointed by the court cannot complete the examination within this period and requests an extension. In that case, the court may allow one 15–day extension of the examination period. Outpatient examinations shall be completed and the report of examination filed within 30 days after the examination is ordered.

(d) If the court orders that the examination be conducted on an inpatient basis, it shall arrange for the transportation of any defendant not free on bail to the examining facility within a reasonable time after the examination is ordered and for the defendant to be returned to the jail within a reasonable time after receiving notice from the examining facility that the examination has been completed.

(e) The examiner shall personally observe and examine the defendant and shall have access to his or her past or present treatment records, as defined under s. 51.30 (1) (b).

(f) A defendant ordered to undergo examination under this section may receive voluntary treatment appropriate to his or her medical needs. The defendant may refuse medication and treatment except in a situation where the medication or treatment is necessary to prevent physical harm to the defendant or others.

(g) The defendant may be examined for competency purposes at any stage of the competency proceedings by physicians or other experts chosen by the defendant or by the district attorney, who shall be permitted reasonable access to the defendant for purposes of the examination.

(3) REPORT. The examiner shall submit to the court a written report which shall include all of the following:

(a) A description of the nature of the examination and an identification of the persons interviewed, the specific records reviewed and any tests administered to the defendant.

(b) The clinical findings of the examiner.

(c) The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense.

(d) If the examiner reports that the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5) (a).

(dm) If sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment for the defendant's mental condition. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, the defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment, and the alternatives to accepting the particular medication or treatment offered, after the advantages, disadvantages and alternatives have been explained to the defendant.

(e) The facts and reasoning, in reasonable detail, upon which the findings and opinions under pars. (b) to (dm) are based.

(4) HEARING. (a) The court shall cause copies of the report to be delivered forthwith to the district attorney and the defense counsel, or the defendant personally if not represented by counsel. The report shall not be otherwise disclosed prior to the hearing under this subsection.

(b) If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report filed under sub. (3) or (5). In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of the hearing by telephone or live audio–visual means. At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent. If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3) (dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

(c) If the court determines that the defendant is competent, the criminal proceeding shall be resumed.

(d) If the court determines that the defendant is not competent and not likely to become competent within the time period provided in sub. (5) (a), the proceedings shall be suspended and the defendant released, except as provided in sub. (6) (b).

(5) COMMITMENT. (a) If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department of health and social services for placement in an appropriate institution for a period of time not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less. Days spent in commitment under this paragraph are considered days spent in custody under s. 973.155.

(am) If the defendant is not subject to a court order determining the defendant to be not competent to refuse medication or treatment for the defendant's mental condition and if the treatment facility determines that the defendant should be subject to such a court order, the treatment facility may file with the court with notice to the counsel for the defendant, the defendant and the district attorney, a motion for a hearing, under the standard specified in sub. (3) (dm), on whether the defendant is not competent to refuse medication or treatment. A report on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the defendant needs medication or treatment and that the defendant is not competent to refuse medication or treatment, based on an examination of the defendant by a licensed physician. Within 10 days after a motion is filed under this paragraph, the court shall, under the procedures and standards specified in sub. (4) (b), determine the defendant's competency to refuse medication or treatment for the defendant's mental condition. At the request of the defendant, the defendant's counsel or the district attorney, the hearing may be postponed, but in no case may the postponed hear-

ing be held more than 20 days after a motion is filed under this paragraph.

(b) The defendant shall be periodically reexamined by the treatment facility. Written reports of examination shall be furnished to the court 3 months after commitment, 6 months after commitment, 9 months after commitment and within 30 days prior to the expiration of commitment. Each report shall indicate either that the defendant has become competent, that the defendant remains incompetent but that attainment of competency is likely within the remaining commitment period, or that the defendant has not made such progress that attainment of competency is likely within the remaining commitment period. Any report indicating such a lack of sufficient progress shall include the examiner's opinion regarding whether the defendant is mentally ill, alcoholic, drug dependent, developmentally disabled or infirm because of aging or other like incapacities.

(c) Upon receiving a report under par. (b), the court shall proceed under sub. (4). If the court determines that the defendant has become competent, the defendant shall be discharged from commitment and the criminal proceeding shall be resumed. If the court determines that the defendant is making sufficient progress toward becoming competent, the commitment shall continue.

(d) If the defendant is receiving medication the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings. If a defendant who has been restored to competency thereafter again becomes incompetent, the maximum commitment period under par. (a) shall be 18 months minus the days spent in previous commitments under this subsection, or 12 months, whichever is less.

(6) DISCHARGE; CIVIL PROCEEDINGS. (a) If the court determines that it is unlikely that the defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him or her, except as provided in par. (b). The court may order the defendant to appear in court at specified intervals for redetermination of his or her competency to proceed.

(b) When the court discharges a defendant from commitment under par. (a), it may order that the defendant be taken immediately into custody by a law enforcement official and promptly delivered to a facility specified in s. 51.15 (2), an approved public treatment facility under s. 51.45 (2) (c) or an appropriate medical or protective placement facility. Thereafter, detention of the defendant shall be governed by s. 51.15, 51.45 (11) or 55.06 (11), as appropriate. The district attorney or corporation counsel may prepare a statement meeting the requirements of s. 51.15 (4) or (5), 51.45 (13) (a) or 55.06 (11) based on the allegations of the criminal complaint and the evidence in the case. This statement shall be given to the director of the facility to which the defendant is delivered and filed with the branch of circuit court assigned to exercise criminal jurisdiction in the county in which the criminal charges are pending where it shall suffice, without corroboration by other petitioners, as a petition for commitment under s. 51.20, 51.45 (13) or 55.06 (2). This section does not restrict the power of the branch of circuit court in which the petition is filed to transfer the matter to the branch of circuit court assigned to exercise jurisdiction under ch. 51 in the county. Days spent in commitment or protective placement pursuant to a petition under this paragraph shall not be deemed days spent in custody under s. 973.155.

(c) If a person is committed under s. 51.20 pursuant to a petition under par. (b), the county department under s. 51.42 or 51.437 to whose care and custody the person is committed shall notify the court which discharged the person under par. (a), the district attorney for the county in which that court is located and the person's attorney of record in the prior criminal proceeding at least 14 days prior to transferring or discharging the defendant from an inpatient treatment facility and at least 14 days prior to the expiration of the order of commitment or any subsequent consecutive order, unless the county department or the department of health and social services has applied for an extension.

(d) Counsel who have received notice under par. (c) or who otherwise obtain information that a defendant discharged under par. (a) may have become competent may move the court to order that the defendant undergo a competency examination under sub. (2). If the court so orders, a report shall be filed under sub. (3) and a hearing held under sub. (4). If the court determines that the defendant is competent, the criminal proceeding shall be resumed. If the court determines that the defendant is not competent, it shall release him or her but may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent.

History: 1981 c. 367; 1985 a. 29, 176; Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 85, 403; 1989 a. 31, 107; Sup. Ct. Order, 158 W (2d) xvii (1990); 1991 a. 32.

Judicial Council Committee's Note, 1981: Sub. (1) (a) does not require the court to honor every request for an examination. The intent of sub. (1) (a) is to avoid unnecessary examinations by clarifying the threshold for a competency inquiry in accordance with State v. McKnight, 65 Wis. 2d 583 (1974). "Reason to doubt" may be raised by a motion setting forth the grounds for belief that a defendant lacks competency, by the evidence presented in the proceedings or by the defendant's colloquies with the judge or courtroom demeanor. In some cases an evidentiary hearing may be appropriate to assist the court in deciding whether to order an examination under sub. (2). Even when neither party moves the court to order a competency inquiry, the court may be required by due process to so inquire where the evidence raises a sufficient doubt. Pate v. Robinson, 383 U.S. 375, 387 (1966); Drope v. Missouri, 420 U.S. 162 (1975).

The Wisconsin supreme court has held that a defendant may not be ordered to undergo a competency inquiry unless the court has found probable cause to believe he or she is guilty of the offense charged. State v. McCredden, 33 Wis. 2d 661 (1967). Where this requirement has not been satisfied through a preliminary examination or verdict or finding of guilt prior to the time the competency issue is raised, a special probable cause determination is required. Subsection (1) (b) allows that determination to be made from the allegations in the criminal complaint without an evidentiary hearing unless the defendant submits a particularized affidavit alleging that averments in the criminal complaint are materially false. Where a hearing is held, the issue is limited to probable cause and hearsay evidence may be admitted. See s. 911.01 (4) (c).

Sub. (2) (a) requires the court to appoint one or more qualified examiners to examine the defendant when there is reason to doubt his or her competency. Although the prior statute required the appointment of a physician, this section allows the court to appoint examiners without medical degrees, if their particular qualifications enable them to form expert opinions regarding the defendant's competency.

Sub. (2) (b), (c) and (d) is intended to limit the defendant's stay at the examining facility to that period necessary for examination purposes. In many cases, it is possible for an adequate examination to be made without institutional commitment, expediting the commencement of treatment of the incompetent defendant. Fosdal, The Contributions and Limitations of Psychiatric Testimony, 50 Wis. Bar Bulletin, No. 4, pp. 31–33 (April 1977).

Sub. (2) (e) clarifies the examiner's right of access to the defendant's past or present treatment records, otherwise confidential under s. 51.30.

Sub. (2) (f) clarifies that a defendant on examination status may receive voluntary treatment but, until committed under sub. (5), may not be involuntarily treated or medicated unless necessary for the safety of the defendant or others. See s. 51.61 (1) (f), (g), (h) and (i).

Sub. (2) (g), like prior s. 971.14 (7), permits examination of the defendant by an expert of his or her choosing. It also allows access to the defendant by examiners selected by the prosecution at any stage of the competency proceedings.

Sub. (3) requires the examiner to render an opinion regarding the probability of timely restoration to competency, to assist the court in determining whether an incompetent defendant should be committed for treatment. Incompetency commitments may not exceed the reasonable time necessary to determine whether there is a substantial probability that the defendant will attain competency in the foreseeable future: Jackson v. Indiana, 406 U.S. 715, 738 (1972). The new statute also requires the report to include the facts and reasoning which underlie the examiner's clinical findings and opinion on competency.

Sub. (4) is based upon prior s. 971.14 (4). The revision emphasizes that the determination of competency is a judicial matter. State ex rel. Haskins v. Dodge County Court, 62 Wis. 2d 250 (1974). The standard of proof specified in State ex rel. Matalik v. Schubert, 57 Wis. 2d 315 (1973) has been changed to conform to the "clear and convincing evidence" standard of s. 51.20 (13) (e) and Addington v. Texas, 441 U.S. 418 (1979). [but see 1987 Wis. Act 85]

Sub. (5) requires, in accordance with Jackson v. Indiana, 406 U.S. 715 (1972), that competency commitments be justified by the defendant's continued progress toward becoming competent within a reasonable time. The maximum commitment period is established at 18 months, in accordance with State ex rel. Haskins v. Dodge County Court, 62 Wis. 2d 250 (1974) and other data. If a defendant becomes competent while committed for treatment and later becomes incompetent, further commitment is permitted but in no event may the cumulated commitment periods exceed 24 months or the maximum sentence for the offense with which the defendant is charged, whichever is less. State ex rel. Deisinger v. Treffert, 85 Wis. 2d 257 (1978).

Sub. (6) clarifies the procedures for transition to civil commitment, alcoholism treatment or protective placement when the competency commitment has not been, or is not likely to be, successful in restoring the defendant to competency. The new statute requires the defense counsel, district attorney and criminal court to be notified when the defendant is discharged from civil commitment, in order that a redetermina-

tion of competency may be ordered at that stage. State ex rel. Porter v. Wolke, 80 Wis. 2d 197, 297 N.W. 2d 881 (1977). The procedures specified in sub. (6) are not intended to be the exclusive means of initiating civil commitment proceedings against such persons. See, e.g., In Matter of Haskins, 101 Wis. 2d 176 (Ct. App. 1980). [Bill 765–A]

Judicial Council Note, 1990: [Re amendment of (1) (c)] The McCredden hearing is substantially similar in purpose to the preliminary examination. The standard for admission of telephone testimony should be the same in either proceeding.

[Re amendment of (4) (b)] The standard for admission of telephone testimony at a competency hearing is the same as that for a preliminary examination. See s. 970.03 (13) and NOTE thereto. [Re Order eff. 1–1–91]

Legislature intended by reference to 973.155 in (5) (a) that good time credit be accorded persons committed as incompetent to stand trial. State v. Moore, 167 W. (2d) 491, 481 NW (2d) 633 (1992).

Competency hearing may be waived by defense counsel without affirmative assent of defendant. State v. Guck, 176 W. (2d) 845, 500 NW (2d) 910 (1993).

Due process requires prosecution to shoulder burden of proving defendant is fit to stand trial once the issue of unfitness has been properly raised. United States ex rel. SEC v. Billingsley, 766 F. (2d) 1015 (7th Cir. 1985).

Wisconsin's new competency to stand trial statute. Fosdal and Fullin. WBB Oct. 1982.

The insanity defense: Ready for reform? Fullin. WBB Dec. 1982.

971.15 Mental responsibility of defendant. (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

(2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

History: 1993 a. 486.

It is not a violation of due process to put the burden of the affirmative defense of mental disease or defect on the defendant. State v. Hebard, 50 W. (2d) 408, 184 NW (2d) 156.

Psychomotor epilepsy may be legally classified as a mental disease or defect. Sprague v. State, 52 W. (2d) 89, 187 NW (2d) 784.

The state does not have to produce evidence contradicting an insanity defense. The burden is on the defendant. Gibson v. State, 55 W. (2d) 110, 197 NW (2d) 813.

A voluntarily drugged condition is not a form of insanity which can constitute a mental defect or a disease. Medical testimony can hardly be used both on the issue of guilt to prove lack of intent and also to prove insanity. Gibson v. State, 55 W. (2d) 110, 197 NW (2d) 813.

The legislature, in enacting this section, the ALI Institute definition of insanity, deliberately and positively excluded "antisocial conduct" from the statutory definition of "mental disease or defect." Simpson v. State, 62 W. (2d) 605, 215 NW (2d) 435.

The jury was not obliged to accept the testimony of the 2 medical witnesses, although the state did not present medical testimony, because it was their responsibility to determine the weight and credibility of the medical testimony. Pautz v. State, 64 W. (2d) 469, 219 NW (2d) 327.

See note to 939.42, citing State v. Kolisnitschenko, 84 W. (2d) 492, 267 NW (2d) 321 (1978).

Court properly directed verdict against defendant on issue of mental disease or defect. State v. Leach, 124 W. (2d) 648, 370 NW (2d) 240 (1985).

The power of the psychiatric excuse. Halleck, 53 MLR 229.

The insanity defense: Conceptual confusion and the erosion of fairness. MacBain, 67 MLR 1 (1983).

Evidence of diminished capacity inadmissible to show lack of intent. 1976 WLR 623.

971.16 Examination of defendant. (1) In this section:

(a) "Physician" has the meaning given in s. 448.01 (5).

(b) "Psychologist" means a person holding a valid license under s. 455.04.

(2) If the defendant has entered a plea of not guilty by reason of mental disease or defect or there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, the court may appoint at least one physician or at least one psychologist, but not more than 3 physicians or psychologists or combination thereof, to examine the defendant and to testify at the trial. The compensation of the physicians or psychologists shall be fixed by the court and paid by the county upon the order of the court as part of the costs of the action. The receipt by any physician or psychologist summoned under this section of any other compensation than that so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation, is unlawful and punishable as contempt of court. The fact that the physician or psychologist has been appointed by the court shall be made known to the jury and the physician or psychologist shall be subject to cross–examination by both parties.

(3) Not less than 10 days before trial, or at any other time that the court directs, any physician or psychologist appointed under sub. (2) shall file a report of his or her examination of the defendant with the judge, who shall cause copies to be transmitted to the district attorney and to counsel for the defendant. The contents of the report shall be confidential until the physician or psychologist has testified or at the completion of the trial. The report shall contain an opinion regarding the ability of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct with the requirements of law at the time of the commission of the criminal offense charged and, if sufficient information is available to the physician or psychologist to reach an opinion, his or her opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment for the defendant's mental condition. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, the defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment, and the alternatives to accepting the particular medication or treatment offered, after the advantages, disadvantages and alternatives have been explained to the defendant.

(4) If the defendant wishes to be examined by a physician, psychologist or other expert of his or her own choice, the examiner shall be permitted to have reasonable access to the defendant for the purposes of examination. No testimony regarding the mental condition of the defendant shall be received from a physician, psychologist or expert witness summoned by the defendant unless not less than 3 days before trial a report of the examination has been transmitted to the district attorney and unless the prosecution has been afforded an opportunity to examine and observe the defendant if the opportunity has been seasonably demanded. The state may summon a physician, psychologist or other expert to testify, but that witness shall not give testimony unless not less than 3 days before trial a written report of his or her examination of the defendant has been transmitted to counsel for the defendant.

(5) If a physician, psychologist or other expert who has examined the defendant testifies concerning the defendant's mental condition, he or she shall be permitted to make a statement as to the nature of his or her examination, his or her diagnosis of the mental condition of the defendant at the time of the commission of the offense charged, his or her opinion as to the ability of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law and, if sufficient information is available to the physician, psychologist or expert to reach an opinion, his or her opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment for the defendant's mental condition. Testimony concerning the defendant's need for medication or treatment and competence to refuse medication or treatment may not be presented before the jury that is determining the ability of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct with the requirements of law at the time of the commission of the criminal offense charged. The physician, psychologist or other expert shall be permitted to make an explanation reasonably serving to clarify his or her diagnosis and opinion and may be cross–examined as to any matter bearing on his or her competency or credibility or the validity of his or her diagnosis or opinion.

(6) Nothing in this section shall require the attendance at the trial of any physician, psychologist or other expert witness for any purpose other than the giving of his or her testimony.

History: 1989 a. 31, 359; 1991 a. 39.

Denial of defendant's motion for a directed verdict after defendant's sanity witnesses had testified and the state had rested, and then allowing 3 witnesses appointed by the court to testify, was not an abuse of discretion. State v. Bergenthal, 47 W. (2d) 668, 178 NW (2d) 16.

The rules stated in the Bergenthal case apply where the trial is to the court. Lewis v. State, 57 W (2d) 469, 204 NW (2d) 527.

It is not error to allow a psychiatrist to express an opinion that no psychiatrist could form an opinion as to defendant's legal sanity because of unknown variables. Kemp v. State, 61 W (2d) 125, 211 NW (2d) 793.

"Mental condition" within meaning of (3) refers to the defense of mental disease or defect, not to an intoxication defense. Loveday v. State, 74 W (2d) 503, 247 NW (2d) 116.

An indigent defendant is constitutionally entitled to an examining physician at state expense when mental status is an issue, but this statute is not the vehicle to satisfy this constitutional obligation. State v. Burdick, 166 W (2d) 785, 480 NW (2d) 528 (Ct. App. 1992).

971.165 Trial of actions upon plea of not guilty by reason of mental disease or defect. (1) If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect:

(a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

(b) If the plea of not guilty is tried to a jury, the jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. No verdict on the first plea may be valid or received unless agreed to by all jurors.

(c) If both pleas are tried to a jury, that jury shall be the same, except that:

1. If one or more jurors who participated in determining the first plea become unable to serve, the remaining jurors shall determine the 2nd plea.

2. If the jury is discharged prior to reaching a verdict on the 2nd plea, the defendant shall not solely on that account be entitled to a redetermination of the first plea and a different jury may be drawn to determine the 2nd plea only.

3. If an appellate court reverses a judgment as to the 2nd plea but not as to the first plea and remands for further proceedings, or if the trial court vacates the judgment as to the 2nd plea but not as to the first plea, the 2nd plea may be determined by a different jury drawn for this purpose.

(d) If the defendant is found not guilty, the court shall enter a judgment of acquittal and discharge the defendant. If the defendant is found guilty, the court shall withhold entry of judgment pending determination of the 2nd plea.

(2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health and social services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court. No verdict on the plea of not guilty by reason of mental disease or defect may be valid or received unless agreed to by at least five–sixths of the jurors.

(3) (a) If a defendant is not found not guilty by reason of mental disease or defect, the court shall enter a judgment of conviction and shall either impose or withhold sentence under s. 972.13 (2).

(b) If a defendant is found not guilty by reason of mental disease or defect, the court shall enter a judgment of not guilty by reason of mental disease or defect. The court shall thereupon proceed under s. 971.17. A judgment entered under this paragraph is interlocutory to the commitment order entered under s. 971.17 and reviewable upon appeal therefrom.

History: 1987 a. 86; 1989 a. 31, 334.

Judicial Council Note, 1987: Wisconsin presently requires each element of the crime (including any mental element) to be proven before evidence is taken on the plea of not guilty by reason of mental disease or defect. This statute provides for the procedural bifurcation of the pleas of not guilty and not guilty by reason of mental disease or defect, in order that evidence presented on the latter issue not prejudice determination of the former. State ex rel. LaFollette v. Raskin, 34 Wis. 2d 607 (1976).

The legal effect of a finding of not guilty by reason of mental disease or defect is that the court must commit the defendant to the custody of the department of health and social services under s. 971.17.

Sub. (1) (c) provides several necessary exceptions to the prior statute's requirement that the same jury try both pleas in order to avoid unnecessary redeterminations of guilt. Kemp v. State, 61 Wis. 2d 125 (1973).

Sub. (2) allows a five–sixths verdict on the plea of not guilty by reason of mental disease or defect. [87 Act 86]

Constitutionality of directed verdict against criminal defendant on issue of insanity upheld. Leach v. Kolb, 911 F (2d) 1249 (1990).

Restricting the admission of psychiatric testimony on a defendant's mental state: Wisconsin's Steele curtain. 1981 WLR 733.

971.17 Commitment of persons found not guilty by reason of mental disease or mental defect. (1) COMMITMENT PERIOD. When a defendant is found not guilty by reason of mental disease or mental defect, the court shall commit the person to the department of health and social services for a specified period not exceeding two–thirds of the maximum term of imprisonment that could be imposed under s. 973.15 (2) (a) against an offender convicted of the same crime or crimes, including imprisonment authorized by ss. 161.48, 939.62, 939.621, 939.63, 939.635, 939.64, 939.641 and 939.645 and other penalty enhancement statutes, as applicable, subject to the credit provisions of s. 973.155. If the maximum term of imprisonment is life, the commitment period specified by the court may be life, subject to termination under sub. (5).

(1g) If the defendant under sub. (1) is found not guilty of a felony by reason of mental disease or defect, the court shall inform the defendant of the requirements and penalties under s. 941.29.

(1m) SEXUAL ASSAULT; REGISTRATION AND TESTING. If the defendant under sub. (1) is found not guilty by reason of mental disease or defect for a violation of s. 940.225 (1) or (2), 948.02 (1) or (2) or 948.025, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis and to comply with the reporting requirements of s. 175.45.

(2) (a) The court shall enter an initial commitment order under this section pursuant to a hearing held as soon as practicable after the judgment of not guilty by reason of mental disease or mental defect is entered. If the court lacks sufficient information to make the determination required by sub. (3) immediately after trial, it may adjourn the hearing and order the department of health and social services to conduct a predisposition investigation using the procedure in s. 972.15 or a supplementary mental examination or both, to assist the court in framing the commitment order.

(b) If a supplementary mental examination is ordered under par. (a), the court may appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the person. In lieu thereof, the court may commit the person to an appropriate mental health facility for the period specified in par. (c), which shall count as days spent in custody under s. 973.155.

(c) An examiner shall complete an inpatient examination under par. (b) and file the report within 15 days after the examination is ordered unless, for good cause, the examiner cannot complete the examination and requests an extension. In that case, the court may allow one 15–day extension of the examination period. An examiner shall complete an outpatient examination and file the report of examination within 15 days after the examination is ordered.

(d) If the court orders an inpatient examination under par. (b), it shall arrange for the transportation of the person to the examining facility within a reasonable time after the examination is ordered and for the person to be returned to the jail or court within a reasonable time after the examination has been completed.

(e) The examiner appointed under par. (b) shall personally observe and examine the person. The examiner or facility shall have access to the person's past or present treatment records, as defined in s. 51.30 (1) (b), and patient health care records, as provided under s. 146.82 (2) (c). If the examiner believes that the per-

son is appropriate for conditional release, the examiner shall report on the type of treatment and services that the person may need while in the community on conditional release.

(f) The costs of an examination ordered under par. (a) shall be paid by the county upon the order of the court as part of the costs of the action.

(g) Within 10 days after the examiner's report is filed under par. (c), the court shall hold a hearing to determine whether commitment shall take the form of institutional care or conditional release.

(3) COMMITMENT ORDER. (a) An order for commitment under this section shall specify either institutional care or conditional release. The court shall order institutional care if it finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage. If the court does not make this finding, it shall order conditional release. In determining whether commitment shall be for institutional care or conditional release, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

(b) If the state proves by clear and convincing evidence that the person is not competent to refuse medication or treatment for the person's mental condition, under the standard specified in s. 971.16 (3), the court shall issue, as part of the commitment order, an order that the person is not competent to refuse medication or treatment for the person's mental condition and that whoever administers the medication or treatment to the person shall observe appropriate medical standards.

(c) If the court order specifies institutional care, the department of health and social services shall place the person in an institution under s. 51.37 (3) that the department considers appropriate in light of the rehabilitative services required by the person and the protection of public safety. If the person is not subject to a court order determining the person to be not competent to refuse medication or treatment for the person's mental condition and if the institution in which the person is placed determines that the person should be subject to such a court order, the institution may file with the court, with notice to the person and his or her counsel and the district attorney, a motion for a hearing, under the standard specified in s. 971.16 (3), on whether the person is not competent to refuse medication or treatment. A report on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the person needs medication or treatment and that the person is not competent to refuse medication or treatment, based on an examination of the person by a licensed physician. Within 10 days after a motion is filed under this paragraph, the court shall determine the person's competency to refuse medication or treatment for the person's mental condition. At the request of the person, his or her counsel or the district attorney, the hearing may be postponed, but in no case may the postponed hearing be held more than 20 days after a motion is filed under this paragraph. If the district attorney, the person and his or her counsel waive their respective opportunities to present other evidence on the issue, the court shall determine the person's competency to refuse medication or treatment on the basis of the report accompanying the motion. In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. If the state proves by evidence that is clear and convincing that the person is not competent to refuse medication or treatment, under the standard specified in s. 971.16 (3), the court shall order that the person is not competent to refuse medication or treatment for the person's mental condition and that whoever administers the medication or treatment to the person shall observe appropriate medical standards.

(d) If the court finds that the person is appropriate for conditional release, the court shall notify the department of health and social services. The department of health and social services and the county department under s. 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan shall address the person's need, if any, for supervision, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The department of health and social services may contract with a county department, under s. 51.42 (3) (aw) 1. d., with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 21 days after the court finding that the person is appropriate for conditional release, unless the county department, department of health and social services and person to be released request additional time to develop the plan. If the county department of the person's county of residence declines to prepare a plan, the department of health and social services may arrange for another county to prepare the plan if that county agrees to prepare the plan and if the individual will be living in that county.

(e) An order for conditional release places the person in the custody and control of the department of health and social services. A conditionally released person is subject to the conditions set by the court and to the rules of the department of health and social services. Before a person is conditionally released by the court under this subsection, the court shall so notify the municipal police department and county sheriff for the area where the person will be residing. The notification requirement under this paragraph does not apply if a municipal department or county sheriff submits to the court a written statement waiving the right to be notified. If the department of health and social services alleges that a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked, he or she may be taken into custody under the rules of the department. The department of health and social services shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court and the regional office of the state public defender responsible for handling cases in the county where the committing court is located within 48 hours after the detention. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the department of health and social services may detain the person in a jail or in a hospital, center or facility specified by s. 51.15 (2). The state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked. If the court determines after hearing that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution under s. 51.37 (3) until the expiration of the commitment or until again conditionally released under this section.

(4) PETITION FOR CONDITIONAL RELEASE. (a) Any person who is committed for institutional care may petition the committing court to modify its order by authorizing conditional release if at least 6 months have elapsed since the initial commitment order was entered, the most recent release petition was denied or the most recent order for conditional release was revoked. The director of the facility at which the person is placed may file a petition under this paragraph on the person's behalf at any time.

(b) If the person files a timely petition without counsel, the court shall serve a copy of the petition on the district attorney and, subject to sub. (7) (b), refer the matter to the state public defender for determination of indigency and appointment of counsel under

s. 977.05 (4) (j). If the person petitions through counsel, his or her attorney shall serve the district attorney.

(c) Within 20 days after receipt of the petition, the court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate, who shall examine the person and furnish a written report of the examination to the court within 30 days after appointment. The examiners shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records, as provided under s. 146.82 (2) (c). If any such examiner believes that the person is appropriate for conditional release, the examiner shall report on the type of treatment and services that the person may need while in the community on conditional release.

(d) The court, without a jury, shall hear the petition within 30 days after the report of the court–appointed examiner is filed with the court, unless the petitioner waives this time limit. Expenses of proceedings under this subsection shall be paid as provided under s. 51.20 (18). The court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released. In making this determination, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

(e) If the court finds that the person is appropriate for conditional release, the court shall notify the department of health and social services. The department of health and social services and the county department under s. 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan shall address the person's need, if any, for supervision, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The department of health and social services may contract with a county department, under s. 51.42 (3) (aw) 1. d., with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 60 days after the court finding that the person is appropriate for conditional release, unless the county department, department of health and social services and person to be released request additional time to develop the plan. If the county department of the person's county of residence declines to prepare a plan, the department of health and social services may arrange for another county to prepare the plan if that county agrees to prepare the plan and if the individual will be living in that county.

(4m) NOTICE TO VICTIMS ABOUT CONDITIONAL RELEASE. (a) In this subsection:

1. "Crime" has the meaning designated in s. 949.01 (1).

2. "Member of the family" means spouse, child, sibling, parent or legal guardian.

3. "Victim" means a person against whom a crime has been committed.

(b) If the court conditionally releases a defendant under this section, the district attorney shall notify the following person, if he or she can be found, in accordance with par. (c): the victim of the crime committed by the defendant or, if the victim died as a result of the crime, an adult member of the victim's family or, if the victim is younger than 18 years old, the victim's parent or legal guardian.

(c) The notice under par. (b) shall inform the person under par. (b) of the defendant's name and conditional release date. The district attorney shall send the notice, postmarked no later than 7 days after the court orders the conditional release under this section, to the last–known address of the person under par. (b).

(d) Upon request, the department of health and social services shall assist district attorneys in obtaining information regarding persons specified in par. (b).

(5) PETITION FOR TERMINATION. A person on conditional release, or the department of health and social services on his or her behalf, may petition the committing court to terminate the order of commitment. If the person files a timely petition without counsel, the court shall serve a copy of the petition on the district attorney and, subject to sub. (7) (b), refer the matter to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j). If the person petitions through counsel, his or her attorney shall serve the district attorney. The petition shall be determined as promptly as practicable by the court without a jury. The court shall terminate the order of commitment unless it finds by clear and convincing evidence that further supervision is necessary to prevent a significant risk of bodily harm to the person or to others or of serious property damage. In making this determination, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and current mental condition, the person's behavior while on conditional release, and plans for the person's living arrangements, support, treatment and other required services after termination of the commitment order. A petition under this subsection may not be filed unless at least 6 months have elapsed since the person was last placed on conditional release or since the most recent petition under this subsection was denied.

(6) EXPIRATION OF COMMITMENT ORDER. (a) At least 60 days prior to the expiration of a commitment order under sub. (1), the department of health and social services shall notify all of the following:

1. The court that committed the person.

2. The district attorney of the county in which the commitment order was entered.

3. The appropriate county department under s. 51.42 or 51.437.

(b) Upon the expiration of a commitment order under sub. (1), the court shall discharge the person, subject to the right of the department of health and social services or the appropriate county department under s. 51.42 or 51.437 to proceed against the person under ch. 51 or 55. If none of those departments proceeds against the person under ch. 51 or 55, the court may order the proceeding.

(6m) NOTICE TO VICTIMS ABOUT TERMINATION OR DISCHARGE. (a) In this subsection:

1. "Crime" has the meaning designated in s. 949.01 (1).

2. "Member of the family" means spouse, child, sibling, parent or legal guardian.

3. "Victim" means a person against whom a crime has been committed.

(b) If the court orders that the defendant's commitment is terminated under sub. (5) or that the defendant be discharged under sub. (6), the department of health and social services shall notify the victim of the crime committed by the defendant, or, if the victim died as a result of the crime, an adult member of the victim's family or, if the victim is younger than 18 years old, the victim's parent or legal guardian, after the submission of a card under par. (d) requesting notification.

(c) The notice under par. (b) shall inform the person under par. (b) of the defendant's name and termination or discharge date. The department of health and social services shall send the notice, postmarked at least 7 days before the defendant's termination or discharge date, to the last–known address of the person under par. (b).

(d) The department of health and social services shall design and prepare cards for persons specified in par. (b) to send to the department. The cards shall have space for these persons to pro-

vide their names and addresses, the name of the applicable defendant and any other information the department determines is necessary. The department shall provide the cards, without charge, to district attorneys. District attorneys shall provide the cards, without charge, to persons specified in par. (b). These persons may send completed cards to the department. All departmental records or portions of records that relate to mailing addresses of these persons are not subject to inspection or copying under s. 19.35 (1), except as needed to comply with a request under sub. (4m) (d).

(7) HEARINGS AND RIGHTS (a) The committing court shall conduct all hearings under this section. The person shall be given reasonable notice of the time and place of each such hearing. The court may designate additional persons to receive these notices.

(b) Without limitation by enumeration, at any hearing under this section, the person has the right to:

1. Counsel. If the person claims or appears to be indigent, the court shall refer the person to the authority for indigency determinations under s. 977.07 (1).

2. Remain silent.

3. Present and cross–examine witnesses.

4. Have the hearing recorded by a court reporter.

(c) If the person wishes to be examined by a physician, as defined in s. 971.16 (1) (a), or a psychologist, as defined in s. 971.16 (1) (b), or other expert of his or her choice, the procedure under s. 971.16 (4) shall apply. Upon motion of an indigent person, the court shall appoint a qualified and available examiner for the person at public expense. Examiners for the person or the district attorney shall have reasonable access to the person for purposes of examination, and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records as provided under s. 146.82 (2) (c).

(d) Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of a hearing under this section by telephone or live audio–visual means.

(8) APPLICABILITY. This section governs the commitment, release and discharge of persons adjudicated not guilty by reason of mental disease or mental defect for offenses committed on or after January 1, 1991. The commitment, release and discharge of persons adjudicated not guilty by reason of mental disease or mental defect for offenses committed prior to January 1, 1991, shall be governed by s. 971.17, 1987 stats., as affected by 1989 Wisconsin Act 31.

History: 1975 c. 430; 1977 c. 353; 1977 c. 428 s. 115; 1983 a. 359; Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 394; 1989 a. 31, 142, 334, 359; Sup. Ct. Order, 158 W (2d) xvii (1990); 1991 a. 39, 189, 269; 1993 a. 16, 98, 227.

Judicial Council Note, 1990: Sub. (7) (d) [created] conforms the standard for admission of testimony by telephone or live audio–visual means at hearings under this section to that governing other evidentiary criminal proceedings. [Re Order eff. 1–1–91]

There is no right to jury trial in recommitment proceedings under sub. (3), due process clause or equal protection clause. State v. M.S., 159 W (2d) 206, 464 NW (2d) 41 (Ct. App. 1990).

DHSS not the county is responsible for funding the conditions for a person conditionally released under this section. Rolo v. Goers, 174 W (2d) 709, 497 NW (2d) 724 (Ct. App. 1993).

971.18 Inadmissibility of statements for purposes of examination. A statement made by a person subjected to psychiatric examination or treatment pursuant to this chapter for the purposes of such examination or treatment shall not be admissible in evidence against the person in any criminal proceeding on any issue other than that of the person's mental condition.

History: 1993 a. 486.

971.19 Place of trial. (1) Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided.

(2) Where 2 or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occurred.

(3) Where an offense is committed on or within one–fourth of a mile of the boundary of 2 or more counties, the defendant may be tried in any of such counties.

(4) If a crime is committed in, on or against any vehicle passing through or within this state, and it cannot readily be determined in which county the crime was committed, the defendant may be tried in any county through which such vehicle has passed or in the county where the defendant's travel commenced or terminated.

(5) If the act causing death is in one county and the death ensues in another, the defendant may be tried in either county. If neither location can be determined, the defendant may be tried in the county where the body is found.

(6) If an offense is commenced outside the state and is consummated within the state, the defendant may be tried in the county where the offense was consummated.

(7) If a crime is committed on boundary waters at a place where 2 or more counties have common jurisdiction under s. 2.03 or 2.04 or under any other law, the prosecution may be in either county. The county whose process against the offender is first served shall be conclusively presumed to be the county in which the crime was committed.

(8) In an action for a violation of s. 948.31, the defendant may be tried in the county where the crime was committed or the county of lawful residence of the child.

(9) In an action under s. 175.45 (6), the defendant may be tried in the defendant's county of residence at the time that the complaint is filed or, if the defendant does not have a county of residence in this state at the time that the complaint is filed, any county in which he or she has resided while subject to s. 175.45.

History: 1987 a. 332; 1993 a. 98, 486.

Where failure to file registration form and act of soliciting contributions were elements of the offense, venue was proper in either of the 2 counties under (2). Blenski v. State, 73 W (2d) 685, 245 NW (2d) 906.

971.20 Substitution of judge. (1) DEFINITION. In this section, "action" means all proceedings before a court from the filing of a complaint to final disposition at the trial level.

(2) ONE SUBSTITUTION. In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section.

(3) SUBSTITUTION OF JUDGE ASSIGNED TO PRELIMINARY EXAMINATION. (a) In this subsection, "judge" includes a court commissioner who is assigned to conduct the preliminary examination.

(b) A written request for the substitution of a different judge for the judge assigned to preside at the preliminary examination may be filed with the clerk, or with the court at the initial appearance. If filed with the clerk, the request must be filed at least 5 days before the preliminary examination unless the court otherwise permits. Substitution of a judge assigned to a preliminary examination under this subsection exhausts the right to substitution for the duration of the action, except under sub. (7).

(4) SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

(5) SUBSTITUTION OF TRIAL JUDGE SUBSEQUENTLY ASSIGNED. If a new judge is assigned to the trial of an action and the defendant has not exercised the right to substitute an assigned judge, a written request for the substitution of the new judge may be filed with the clerk within 15 days of the clerk's giving actual notice or sending notice of the assignment to the defendant or the defendant's attorney. If the notification occurs within 20 days of the date set for trial, the request shall be filed within 48 hours of the clerk's giving actual notice or sending notice of the assignment. If the notification occurs within 48 hours of the trial or if there has been

no notification, the defendant may make an oral or written request for substitution prior to the commencement of the proceedings.

(6) SUBSTITUTION OF JUDGE IN MULTIPLE DEFENDANT ACTIONS. In actions involving more than one defendant, the request for substitution shall be made jointly by all defendants. If severance has been granted and the right to substitute has not been exercised prior to the granting of severance, the defendant or defendants in each action may request a substitution under this section.

(7) SUBSTITUTION OF JUDGE FOLLOWING APPEAL. If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

(8) PROCEDURES FOR CLERK. Upon receiving a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge for the determination and reassignment of the action as necessary. If the request is determined to be proper, the clerk shall request the assignment of another judge under s. 751.03.

(9) JUDGE'S AUTHORITY TO ACT. Upon the filing of a request for substitution in proper form and within the proper time, the judge whose substitution has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail.

(10) FORM OF REQUEST. A request for substitution of a judge may be made in the following form:

STATE OF WISCONSIN
CIRCUIT COURT
..... County
State of Wisconsin
vs.
.....(Defendant)

Pursuant to s. 971.20 the defendant (or defendants) request (s) a substitution for the Hon. ..... as judge in the above entitled action.

Dated ....., 19....

.....(Signature of defendant or defendant's attorney)

(11) RETURN OF ACTION TO SUBSTITUTED JUDGE. Upon the filing of an agreement signed by the defendant or defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge, the criminal action and all pertinent records shall be transferred back to the substituted judge.

History: 1981 c. 137; 1987 a. 27.

NOTE: See the 1979–80 Statutes for notes and annotations relating to 971.20 prior to its repeal and recreation by ch. 137, laws of 1981.

Judicial Council Note, 1981: Section 971.20 has been revised to clarify its objective of allowing defendants in criminal trials one substitution of the assigned judge upon making a timely request. The statute is not to be used for delay nor for "judge shopping," but is to ensure a fair and impartial trial for the defendants. The statute does not govern removal for cause of the assigned judge through an affidavit of prejudice.

Sub. (2) clarifies that the defendant has a right to only one substitution of judge in a criminal action, unless an appellate court orders a new trial. Prior sub. (2) so provided, but the effect of this provision was unclear in light of the introductory phrase of prior sub. (3).

Sub. (3) allows the defendant's right of substitution to be used against the judge assigned to the preliminary examination and specifies the timing of these requests.

Sub. (4) allows the defendant's right of substitution to be used against the judge originally assigned to preside at trial, specifying the timing of these requests.

Sub. (5) allows the defendant's right of substitution to be used against a judge assigned to preside at trial in place of the judge originally assigned, specifying the timing of these requests.

Sub. (6) clarifies that all defendants in a single action must join in a substitution request.

Sub. (7) allows a substitution request to be made upon appellate remand for a new trial, irrespective of whether a substitution of judge was requested prior to the appeal. It is the only exception to the rule of one substitution per action. The time limit for the request is tied to filing of the remittitur, in accordance with Rohl v. State, 97 Wis. 2d 514 (1980). [LRB NOTE: Senate Amendment 1 revised this subsection to also allow the substitution request to be made upon appellate remand for new sentencing proceedings.]

Sub. (8) provides for the determination of the timeliness and propriety of the substitution request to be made by the chief judge if the trial judge fails to do so within 7 days.

Sub. (9) is prior sub. (2), amended to allow the judge whose substitution has been requested to accept any plea. The prior statute allowed the judge to accept only pleas of not guilty. This revision promotes judicial economy by allowing the judge whose substitution has been requested to accept a guilty or no contest plea tendered by the defendant before the action is reassigned. Defendants preferring to have guilty or no contest pleas accepted by the substituting judge may obtain that result by standing mute or pleading not guilty until after the action has been reassigned.

Sub. (10) is prior sub. (5).

Sub. (11) is prior sub. (6). [Bill 163–S]

Peremptory substitution of judge under s. 971.20, 1979 stats., was not unconstitutional. State v. Holmes, 106 W (2d) 31, 315 NW (2d) 703 (1982).

Where appellate court remands for exercise of discretion in ordering restitution, it has not remanded for a sentencing proceeding, and defendant is not entitled to substitution under (7). State v. Foley, 153 W (2d) 748, 451 NW (2d) 796 (Ct. App. 1989).

Where initial appearance is conducted before judge assigned to hear matter, strict application of filing deadline is appropriate; where intake system does not provide adequate notice of assigned judge prior to arraignment, deadlines are relaxed to allow defendant to intelligently exercise right. Tinti v. Waukesha County Circuit Ct. 159 W (2d) 783, 464 NW (2d) 853 (Ct. App. 1990).

Once a judge is substituted for, the judge may only act in the case as specified in sub. (9); understandable inadvertent appearance before the substituted judge is not a waiver of the substitution. State v. Austin, 171 W (2d) 251, 490 NW (2d) 780 (Ct. App. 1992).

Where a case is assigned to a newly appointed judge prior to the appointee's taking the judicial oath, the time limit to request a substitution commences on the date the appointee becomes a judge. Strong v. Dane County Circuit Court, 184 W (2d) 223, 416 NW (2d) 451 (Ct. App. 1994).

971.22 Change of place of trial. (1) The defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county. The motion shall be made at arraignment, but it may be made thereafter for cause.

(2) The motion shall be in writing and supported by affidavit which shall state evidentiary facts showing the nature of the prejudice alleged. The district attorney may file counter affidavits.

(3) If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had. Only one change may be granted under this subsection. The judge who orders the change in the place of trial shall preside at the trial. Preliminary matters prior to trial may be conducted in either county at the discretion of the court. The judge shall determine where the defendant, if he or she is in custody, shall be held and where the record shall be kept. If the criteria under s. 971.225 (1) (a) to (c) exist, the court may proceed under s. 971.225 (2).

History: 1981 c. 115.

Relevant factors as to necessity of a change of venue discussed. State v. Hebard, 50 W (2d) 408, 184 NW (2d) 156; Tucker v. State, 56 W (2d) 728, 202 NW (2d) 897.

Rules for determining whether community prejudice exists discussed. Thomas v. State, 53 W (2d) 483, 192 NW (2d) 864.

While actual prejudice need not be shown, there must be a showing of a reasonable probability of prejudice inherent in the situation. Gibson v. State, 55 W (2d) 110, 197 NW (2d) 813.

The timing, specificity, inflammatory nature and degree of permeation of publicity is extremely important in determining the likelihood of prejudice in the community. State ex rel. Hussong v. Froelich, 62 W (2d) 577, 215 NW (2d) 390.

Where news stories concerning the crime were accurate, informational articles of a nature which would not cause prejudice and where 4 months elapsed between publication of the news stories and trial, it tended to indicate little or no prejudice against defendant. Jones v. State, 66 W (2d) 105, 223 NW (2d) 889.

There was no abuse of discretion in this prosecution for 1st–degree murder in not changing the venue where the transcript of the hearing on the issuance of arrest warrant, the preliminary examination, and other hearings were closed to public and press; the police and prosecutor refused to divulge any facts to public and press; and press reports were generally free from the details of incriminating evidence, straightforward and not incendiary. State v. Dean, 67 W (2d) 513, 227 NW (2d) 712.

Only defendant may waive right to venue where the crime was committed. State v. Mendoza, 80 W (2d) 122, 258 NW (2d) 260.

971.225 Jury from another county. (1) In lieu of changing the place of trial under s. 971.22 (3), the court may require the selection of a jury under sub. (2) if:

(a) The court has decided to sequester the jurors after the commencement of the trial, as provided in s. 972.12;

(b) There are grounds for changing the place of trial under s. 971.22 (1); and

(c) The estimated costs to the county appear to be less using the procedure under this section than using the procedure for holding the trial in another county.

(2) If the court decides to proceed under this section it shall follow the procedure under s. 971.22 until the jury is chosen in the

2nd county. At that time, the proceedings shall return to the original county using the jurors selected in the 2nd county. The original county shall reimburse the 2nd county for all applicable costs under s. 814.22.

History: 1981 c. 115; 1991 a. 39.

971.23 Discovery and inspection. (1) DEFENDANT'S STATEMENTS. Upon demand, the district attorney shall permit the defendant within a reasonable time before trial to inspect and copy or photograph 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 secret proceeding or before a grand jury. Upon demand, the district attorney shall furnish the defendant with a written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial. The names of witnesses to the written and oral statements which the state plans to use in the course of the trial shall also be furnished.

(2) PRIOR CRIMINAL RECORD. Upon demand prior to trial, the district attorney shall furnish the defendant a copy of the defendant's criminal record which is within the possession, custody or control of the state.

(3) LIST OF WITNESSES. (a) 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 not apply to rebuttal witnesses or those called for impeachment only.

(b) No comment or instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such comment or instruction is the fact the name of the witness appears upon a list furnished pursuant to this section.

(4) INSPECTION OF PHYSICAL EVIDENCE. On motion of a party subject to s. 971.31 (5), all parties shall produce at a reasonable time and place designated by the court all physical evidence which each party intends to introduce in evidence. Thereupon, any party shall be permitted to inspect or copy such physical evidence in the presence of a person designated by the court. The order shall specify the time, place and manner of making the inspection, copies or photographs and may prescribe such terms and conditions as are just.

(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.

(6) PROTECTIVE ORDER. Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses 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.

(7) 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, the party shall promptly notify the other party of the existence of the additional material or names. 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.

(8) NOTICE OF ALIBI. (a) If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 15 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known. If at the close of the state's case the defendant withdraws the alibi or if at the close of the defendant's case the defendant does not call some or any of the alibi witnesses, the state shall not comment on the defendant's withdrawal or on the failure to call some or any of the alibi witnesses. The state shall not call any alibi witnesses not called by the defendant for the purpose of impeaching the defendant's credibility with regard to the alibi notice. Nothing in this section may prohibit the state from calling said alibi witnesses for any other purpose.

(b) In default of such notice, no evidence of the alibi shall be received unless the court, for cause, orders otherwise.

(c) The court may enlarge the time for filing a notice of alibi as provided in par. (a) for cause.

(d) Within 10 days after receipt of the notice of alibi, or such other time as the court orders, the district attorney shall furnish the defendant notice in writing of the names and addresses, if known, of any witnesses whom the state proposes to offer in rebuttal to discredit the defendant's alibi. In default of such notice, no rebuttal evidence on the alibi issue shall be received unless the court, for cause, orders otherwise.

(9) ONE-PARTY CONSENT RECORDINGS. Notwithstanding sub. (1), if the district attorney intends to use evidence obtained in the manner described under s. 968.31 (2) (b), 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.

History: 1973 c. 196; 1975 c. 378, 421; 1989 a. 121; 1991 a. 223; 1993 a. 16, 486.

Inadequate preparation for trial which resulted in a district attorney's failure to disclose all scientific reports does not constitute good cause for the failure if the defense is misled, but this is subject to the harmless error rule. Wold v. State, 57 W (2d) 344, 204 NW (2d) 482.

When a prosecutor submitted a list of 97 witnesses he intended to call the court should have required him to be more specific as to those he really intended to call. Irby v. State, 60 W (2d) 311, 210 NW (2d) 755.

The last sentence of (3) (a) providing "This section shall not apply to rebuttal witnesses or those called for impeachment only." is stricken as unconstitutional. Sub. (8), stats. 1973, is constitutional because after notice of alibi is given the state would have a duty to submit a list of rebuttal witnesses under (3) (a). This satisfies the due process requirement of reciprocity. Allison v. State, 62 W (2d) 14, 214 NW (2d) 437. [But see Tucker v. State, 84 W (2d) 630 (1978), for discussion of reciprocity provision in (8) (d) added to this section by ch. 196, laws of 1973.]

Retroactive effect of ruling in Allison as to (3) (a) denied where defendant not prejudiced by operation of alibi statute. Rohl v. State, 65 W (2d) 683, 223 NW (2d) 567.

Under both the statutory discovery provisions of this section and the constitutional duty of the state to disclose to a criminal defendant evidence exculpatory in nature, there is no requirement to provide exculpatory evidence which is not within the exclusive possession of the state and does not surprise or prejudice the defendant. State v. Calhoun, 67 W (2d) 204, 226 NW (2d) 504.

The calling of a rebuttal witness not included in the state's witness list, as allowed by (3) (a), was not unconstitutional. Although substantial evidence indicates that the state had subpoenaed its "rebuttal" witness at least 2 weeks before he was called to testify and deliberately held him back for "dramatic" effect, no objection or motion to suppress was made on the proper ground that the witness was not a bona fide rebuttal witness hence objection to the witness' testimony was waived. Caccitolo v. State, 69 W (2d) 102, 230 NW (2d) 139.

Where the state calls a witness not included in its list of witnesses exchanged under (3), the preferable procedure is not to strike the witness but to allow a defendant, who makes a timely showing of surprise and prejudice, a continuance sufficient to interview the witness. Kutchera v. State, 69 W (2d) 534, 230 NW (2d) 750.

The written summary of all oral statements made by defendant which the state intends to introduce at trial and which must be provided to defendant under (1), upon request is not limited to statements to police; hence, incriminating statements made by defendant to 2 witnesses were within the scope of the disclosure statute. Kutchera v. State, 69 W (2d) 534, 230 NW (2d) 750.

Where defendant relies solely on defense of alibi and on day of trial complaining witness changes mind as to date of occurrence, request for continuance based on surprise was properly denied because defendant failed to show prejudicial effect of unexpected testimony. See note to 971.10, citing Angus v. State, 76 W (2d) 191, 251 NW (2d) 28.

Generalized inspection of prosecution files by defense counsel prior to preliminary hearing is so inherently harmful to orderly administration of justice that trial court may not confer such right. Matter of State ex rel. Lynch v. County Ct. 82 W (2d) 454, 262 NW (2d) 773.

Under (8) (d), state must provide names of all people who will testify at any time during trial that defendant was at scene of crime. Tucker v. State, 84 W (2d) 630, 267 NW (2d) 630 (1978).

Under facts of case, victim's medical records were not reports required to be disclosed under (5). State v. Moriarty, 107 W (2d) 622, 321 NW (2d) 324 (Ct. App. 1982).

Where defendant was not relying on alibi defense and did not file notice of alibi, judge did not abuse discretion in barring alibi testimony. State v. Burroughs, 117 W (2d) 293, 344 NW (2d) 149 (1984).

Disclosure of exculpatory evidence discussed. State v. Ruiz, 118 W (2d) 177, 347 NW (2d) 352 (1984).

Where defendant was charged under "party to a crime" statute for conspiratorial planning of robbery, alibi notice was required only regarding defendant's whereabouts during the robbery, not during the planning sessions. State v. Horenberger, 119 W (2d) 237, 349 NW (2d) 692 (1984).

See note to 345.421, citing State v. Ehlen, 119 W (2d) 451, 351 NW (2d) 503 (1984).

Sub. (7) requires determination by trial court whether noncompliance was for good cause; if it was not, exclusion is mandatory. If it was, sanction is discretionary. State v. Wild, 146 W (2d) 18, 429 NW (2d) 105 (Ct. App. 1988).

Criminal defendant is not required to comply with rules of criminal procedure to obtain a record available under the open records law. State ex rel. Young v. Shaw, 165 W (2d) 276, 477 NW (2d) 340 (Ct. App. 1991).

State unconstitutionally excluded defendant's alibi testimony for failure to comply with this section, but error was harmless. Alicea v. Gagnon, 675 F (2d) 913 (1982).

Comparison of federal discovery and the ABA standards with the Wisconsin statute. 1971 WLR 614.

971.24 Statement of witnesses. (1) At the trial before a witness other than the defendant testifies, written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury. For cause, the court may order the production of such statements prior to trial.

(2) Either party may move for an in camera inspection by the court of the documents referred to in sub. (1) 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.

(3) 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 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.

History: 1985 a. 262; 1989 a. 31.

When a party successfully moves under (2) to have material masked or deleted from a discovery document, the proper procedure to be pursued is to place it in a sealed envelope or container, if necessary, so that it may be preserved for the aid of the supreme court upon appellate review. State v. Van Ark, 62 W (2d) 155, 215 NW (2d) 41.

Under (1), statements do not include notes made by an enforcement officer at the time of his interrogation of a witness. Coleman v. State, 64 W (2d) 124, 218 NW (2d) 744.

Police officers' "memo books" and reports were within the rule requiring production of witness statements, since the books and reports were written by the officers, the reports signed by them, and both officers testified as to the incident preceding defendant's arrest. State v. Groh, 69 W (2d) 481, 230 NW (2d) 745.

All statements, whether possessed by direct–examining counsel or cross–examining counsel, must be produced; mere notes need not be produced. State v. Lenarchick, 74 W (2d) 425, 247 NW (2d) 80.

See note to 971.23, citing Matter of State ex rel. Lynch v. County Ct. 82 W (2d) 454, 262 NW (2d) 769.

Trial court erred in ordering defense to turn over "transcripts" of interviews between defense counsel, defendant and alibi witnesses, where oral statements were not recorded verbatim. Pohl v. State, 96 W (2d) 290, 291 NW (2d) 554 (1980).

See note to art. I, sec. 8, citing State v. Copening, 100 W (2d) 700, 303 NW (2d) 821 (1981).

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

(2) 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.

The prosecutor's duty under (1) does not ordinarily extend to discovery of criminal records from other jurisdictions. The prosecutor must make good–faith efforts to obtain such records from other jurisdictions specifically requested by the defense. Jones v. State, 69 W (2d) 337, 230 NW (2d) 677.

See note to 971.23, citing Matter of State ex rel. Lynch v. County Ct. 82 W (2d) 454, 262 NW (2d) 773.

971.26 Formal defects. No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.

The fact that the information alleged the wrong date for the offense is not prejudicial where the complaint stated the correct date and there was no evidence defendant was misled. A charge of violation of 946.42 (2) (a) (c) is a technical defect of language in a case where both paragraphs applied. Burkhalter v. State, 52 W (2d) 413, 190 NW (2d) 502.

The failure to cite the correct statutory subsections violated in the information and certificate of conviction is immaterial where defendant cannot show he was misled. Craig v. State, 55 W (2d) 489, 198 NW (2d) 609.

Lack of prejudice to defendant, notwithstanding technical defects in the information, is made patent by his counsel's concession that his client knew precisely what crime he was charged with having committed, and the absence in the record of any such claim asserted during the case, which was vigorously tried. Clark v. State, 62 W (2d) 194, 214 NW (2d) 450.

Failure to allege lack of consent was not fatal jurisdictional defect of information charging burglary. Schleiss v. State, 71 W (2d) 733, 239 NW (2d) 68.

971.27 Lost information, complaint or indictment. In the case of the loss or destruction of an information or complaint, the district attorney may file a copy, and the prosecution shall proceed without delay from that cause. In the case of the loss or destruction of an indictment, an information may be filed.

971.28 Pleading judgment. In pleading a judgment or other determination of or proceeding before any court or officer, it shall be sufficient to state that the judgment or determination was duly rendered or made or the proceeding duly had.

971.29 Amending the charge. (1) A complaint or information may be amended at any time prior to arraignment without leave of the court.

(2) At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

(3) Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

Where there was evidence which a jury could believe proved guilt, the trial court cannot sua sponte set aside the verdict, amend the information, and find defendant guilty on a lesser charge. State v. Helnik, 47 W (2d) 720, 177 NW (2d) 881.

The variance is not material where the court amended the charge against the defendant to charge a lesser included crime. Moore v. State, 55 W (2d) 1, 197 NW (2d) 820.

Sub. (2), in regard to amendments after verdict, applies only to technical variances in the complaint, not material to the merits of the action. It may not be used to substitute a new charge. State v. Duda, 60 W (2d) 431, 210 NW (2d) 763.

The refusal of a proposed amendment of an information has no effect on the original information. An amendment to charge a violation of a substantive section as well as a separate penalty section is not prejudicial to a defendant. Wagner v. State, 60 W (2d) 722, 211 NW (2d) 449.

Sub. (1) does not prohibit amendment of the information with leave of court after arraignment but before trial provided defendant's rights are not prejudiced. Whitaker v. State, 83 W (2d) 368, 265 NW (2d) 575 (1978).

The trial court cannot after trial amend a charge of sexual intercourse with a child to one of contributing to the delinquency of a minor since the offenses require proof of different facts and defendant is entitled to notice of the charge against him. LaFond v. Quatsoe, 325 F Supp. 1010.

971.30 Motion defined. (1) "Motion" means an application for an order.

(2) Unless otherwise provided or ordered by the court, all motions shall meet the following criteria:

(a) Be in writing.

(b) Contain a caption setting forth the name of the court, the venue, the title of the action, the file number, a denomination of the party seeking the order or relief and a brief description of the type of order or relief sought.

(c) State with particularity the grounds for the motion and the order or relief sought.

History: Sup. Ct. Order, 171 W (2d) xix (1992).

971.31 Motions before trial. (1) Any motion which is capable of determination without the trial of the general issue may be made before trial.

(2) Except as provided in sub. (5), defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

(3) The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial.

(4) Except as provided in sub. (3), a motion shall be determined before trial of the general issue unless the court orders that it be deferred for determination at the trial. All issues of fact arising out of such motion shall be tried by the court without a jury.

(5) (a) Motions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action or 10 days after arraignment in a felony action unless the court otherwise permits.

(b) In felony actions, motions to suppress evidence or motions under ss. 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.

(c) In felony actions, objections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived.

(6) If the court grants a motion to dismiss based upon a defect in the indictment, information or complaint, or in the institution of the proceedings, it may order that the defendant be held in custody or that the defendant's bail be continued for not more than 72 hours pending issuance of a new summons or warrant or the filing of a new indictment, information or complaint.

(7) If the motion to dismiss is based upon a misnomer, the court shall forthwith amend the indictment, information or complaint in that respect, and require the defendant to plead thereto.

(8) No complaint, indictment, information, process, return or other proceeding shall be dismissed or reversed for any error or mistake where the case and the identity of the defendant may be readily understood by the court; and the court may order an amendment curing such defects.

(9) A motion required to be served on a defendant may be served upon the defendant's attorney of record.

(10) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty.

(11) In actions under s. 940.225, 948.02 or 948.025, evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(12) In actions under s. 940.22, the court may determine the admissibility of evidence under s. 972.11 only upon a pretrial motion.

History: 1975 c. 184; 1985 a. 275; 1987 a. 332 s. 64; 1993 a. 227, 486.

Where defendant made a pro se motion before trial to suppress evidence of identification at a lineup, but trial counsel refused to pursue the motion for strategic reasons, this amounts to a waiver of the motion. State v. McDonald, 50 W (2d) 534, 184 NW (2d) 886.

A claim of illegal arrest for lack of probable cause must be raised by motion before trial. Lampkins v. State, 51 W (2d) 564, 187 NW (2d) 164.

The waiver provision in sub. (2) is constitutional. Day v. State, 52 W (2d) 122, 187 NW (2d) 790.

A defendant is not required to make a motion to withdraw his plea to preserve his right to a review of an alleged error of refusal to suppress evidence. State v. Meier, 60 W (2d) 452, 210 NW (2d) 685.

Motion to suppress statements on the ground they were products of an allegedly improper arrest, was timely, notwithstanding failure to assert that challenge prior to appearance in court at arraignment, since it was made after information was filed and prior to trial. Rinehart v. State, 63 W (2d) 760, 218 NW (2d) 323.

Request for Goodchild hearing after direct testimony is concluded is not timely under (2). Coleman v. State, 64 W (2d) 124, 218 NW (2d) 744.

The rule in (2) does not apply to confessions, because (2) is qualified by (3) and (4). Upchurch v. State, 64 W (2d) 553, 219 NW (2d) 363.

Challenge to the search of his person cannot be raised for the first time on appeal. Madison v. State, 64 W (2d) 564, 219 NW (2d) 259.

Defendant's right to testify at Goodchild hearing may be curtailed only for the most compelling reasons. Franklin v. State, 74 W (2d) 717, 247 NW (2d) 721.

See note to 345.11, citing State v. Mudgett, 99 W (2d) 525, 299 NW (2d) 621 (Ct. App. 1980).

Sub. (6) authorizes court to hold defendant in custody or on bail for 72 hours pending new proceedings. State ex rel. Brockway v. Milwaukee Cty. Cir. Ct. 105 W (2d) 341, 313 NW (2d) 845 (Ct. App. 1981).

See note to art. I, sec. 8, citing State v. Anastas, 107 W (2d) 270, 320 NW (2d) 15 (Ct. App. 1982).

By pleading guilty, defendant waived right to appeal trial court's ruling on admissibility of other crimes evidence. State v. Nelson, 108 W (2d) 698, 324 NW (2d) 292 (Ct. App. 1982).

Finding of not guilty by reason of mental disease or defect is judgment of conviction under 972.13 (1) and thus 971.31 (10) is applicable. State v. Smith, 113 W (2d) 497, 335 NW (2d) 376 (1983).

Sub. (10) does not apply to civil forfeiture cases. County of Racine v. Smith, 122 W (2d) 431, 362 NW (2d) 439 (Ct. App. 1984).

See note to 972.11, citing State v. DeSantis, 155 W (2d) 774, 456 NW (2d) 600 (1990).

When defendant pleads guilty then appeals the denial of a suppression motion under sub. (10) the harmless error rule may not be applied where a motion to suppress was erroneously denied. State v. Pounds, 176 W (2d) 315, NW (2d) (Ct. App. 1993).

Press and public have no constitutional right to attend pretrial suppression hearing where defendant demands closed hearing to avoid prejudicial publicity. Gannett Co. v. DePasquale, 443 US 368 (1979).

971.32 Ownership, how alleged. In an indictment, information or complaint for a crime committed in relation to property, it shall be sufficient to state the name of any one of several coowners, or of any officer or manager of any corporation, limited liability company or association owning the same.

History: 1993 a. 112, 491.

971.33 Possession of property, what sufficient. In the prosecution of a crime committed upon or in relation to or in any way affecting real property or any crime committed by stealing, damaging or fraudulently receiving or concealing personal property, it is sufficient if it is proved that at the time the crime was committed either the actual or constructive possession or the general or special property in any part of such property was in the person alleged to be the owner thereof.

971.34 Intent to defraud. Where the intent to defraud is necessary to constitute the crime it is sufficient to allege the intent generally; and on the trial it shall be sufficient if there appears to be an intent to defraud the United States or any state or any person.

971.36 Theft; pleading and evidence; subsequent prosecutions. (1) In any criminal pleading for theft, it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming the owner) of the value of (stating the value in money).

(2) Any criminal pleading for theft may contain a count for receiving the same property and the jury may find all or any of the persons charged guilty of either of the crimes.

(3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:

(a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;

(b) The property belonged to the same owner and was stolen by a person in possession of it; or

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period. But an acquittal or conviction in any such case does not bar a subsequent prosecution for any acts of theft on which no evidence was received at the trial of the original charge. In case of a conviction on the original charge on a plea of guilty or no contest, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of theft are included in the charge and in that event conviction does not bar a subsequent prosecution for any other acts of theft.

History: 1993 a. 486.

971.365 Crimes involving certain controlled substances. (1) (a) In any case under s. 161.41 (1) (cm), (d), (e), (f), (g) or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.

(b) In any case under s. 161.41 (1m) (cm), (d), (e), (f), (g) or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.

(c) In any case under s. 161.41 (2r) (b), (3m), (3n), (3p) or (3r) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.

(2) An acquittal or conviction under sub. (1) does not bar a subsequent prosecution for any acts in violation of s. 161.41 (1) (cm), (d), (e), (f), (g) or (h), (1m) (cm), (d), (e), (f), (g) or (h), (2r) (b), (3m), (3n), (3p) or (3r) on which no evidence was received at the trial on the original charge.

History: 1985 a. 328; 1987 a. 339; 1989 a. 121; 1993 a. 98, 118, 490.

971.37 Deferred prosecution programs; domestic abuse. (1) In this section, "child sexual abuse" means an alleged violation of s. 940.225, 948.02, 948.025, 948.05 or 948.06 if the alleged victim is a minor and the person accused of, or charged with, the violation:

(a) Lives with or has lived with the minor;

(b) Is nearer of kin to the alleged victim than a 2nd cousin;

(c) Is a guardian or legal custodian of the minor; or

(d) Is or appears to be in a position of power or control over the minor.

(1m) (a) The district attorney may enter into a deferred prosecution agreement under this section with any of the following:

1. A person accused of or charged with child sexual abuse.

2. An adult accused of or charged with a criminal violation of s. 940.19, 940.20 (3), 940.225, 940.23, 940.285, 940.30, 940.42, 940.43, 940.44, 940.45, 940.48, 941.20, 941.30, 943.01, 943.14, 943.15, 946.49, 947.01 or 947.012 and the conduct constituting the violation involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child.

3. A person accused of or charged with a violation of s. 813.12 (8) (a).

(b) The agreement shall provide that the prosecution will be suspended for a specified period if the person complies with conditions specified in the agreement. The agreement shall be in writing, signed by the district attorney or his or her designee and the person, and shall provide that the person waives his or her right to a speedy trial and that the agreement will toll any applicable civil or criminal statute of limitations during the period of the agreement, and, furthermore, that the person shall file with the district attorney a monthly written report certifying his or her compliance with the conditions specified in the agreement. The district attorney shall provide the spouse of the accused person and the alleged victim or the parent or guardian of the alleged victim with a copy of the agreement.

(c) 1. The agreement may provide as one of its conditions that a person covered under sub. (1) (b) or (c) pay the domestic abuse assessment under s. 973.055. Payments and collections under this subdivision are subject to s. 973.055 (2) to (4), except as follows:

a. The district attorney shall determine the amount due. The district attorney may authorize less than a full assessment if he or she believes that full payment would have a negative impact on the offender's family. The district attorney shall provide the clerk of circuit court with the information necessary to comply with subd. 1. b.

b. The clerk of circuit court shall collect the amount due from the person and transmit it to the county treasurer.

2. If the prosecution is resumed under sub. (2) and the person is subsequently convicted, a court shall give the person credit under s. 973.055 for any amount paid under subd. 1.

(2) The written agreement shall be terminated and the prosecution may resume upon written notice by either the person or the district attorney to the other prior to completion of the period of the agreement.

(3) Upon completion of the period of the agreement, if the agreement has not been terminated under sub. (2), the court shall dismiss, with prejudice, any charge or charges against the person in connection with the crime specified in sub. (1m), or if no such charges have been filed, none may be filed.

(4) Consent to a deferred prosecution under this section is not an admission of guilt and the consent may not be admitted in evidence in a trial for the crime specified in sub. (1m), except if relevant to questions concerning the statute of limitations or lack of speedy trial. No statement relating to the crime, made by the person in connection with any discussions concerning deferred prosecution or to any person involved in a program in which the person must participate as a condition of the agreement, is admissible in a trial for the crime specified in sub. (1m).

(5) This section does not preclude use of deferred prosecution agreements for any alleged violations not subject to this section.

History: 1979 c. 111; 1981 c. 88, 366; 1983 a. 204; 1987 a. 27; 1987 a. 332 s. 64; 1991 a. 39; 1993 a. 227, 262, 319.

971.38 Deferred prosecution program; community service work. (1) Except as provided in s. 967.055 (3), the district attorney may require as a condition of any deferred prosecution program for any crime that the defendant perform community service work for a public agency or a nonprofit charitable organization. The number of hours of work required may not exceed what would be reasonable considering the seriousness of the alleged offense. An order may only apply if agreed to by the defendant and the organization or agency. The district attorney shall ensure that the defendant is provided a written statement of the terms of the community service order and that the community service order is monitored.

(2) Any organization or agency acting in good faith to which a defendant is assigned pursuant to an order under this section has immunity from any civil liability in excess of $25,000 for acts or omissions by or impacting on the defendant.

History: 1981 c. 88; 1987 a. 101.

971.39 Deferred prosecution program; agreements with department. (1) Except as provided in s. 967.055 (3), in counties having a population of less than 100,000, if a defendant is charged with a crime, the district attorney, the department and a defendant may all enter into a deferred prosecution agreement which includes, but is not limited to, the following conditions:

(a) The agreement shall be in writing, signed by the district attorney or his or her designee, a representative of the department and the defendant.

(b) The defendant admits, in writing, all of the elements of the crime charged.

(c) The defendant agrees to participate in therapy or in community programs and to abide by any conditions imposed under the therapy or programs.

(d) The department monitors compliance with the deferred prosecution agreement.

(e) The district attorney may resume prosecution upon the defendant's failure to meet or comply with any condition of a deferred prosecution agreement.

(f) The circuit court shall dismiss, with prejudice, any charge which is subject to the agreement upon the completion of the period of the agreement, unless prosecution has been resumed under par. (e).

(2) Any written admission under sub. (1) (b) and any statement relating to the crime under sub. (1) (intro.), made by the person in connection with any discussions concerning deferred prosecution or to any person involved in a program in which the person must participate as a condition of the agreement, are not admissible in a trial for the crime.

History: 1985 a. 29; 1987 a. 101.

971.40 Deferred prosecution agreement; placement with volunteers in probation program. The court, district attorney and defendant may enter into a deferred prosecution agreement for the defendant to be placed with a volunteers in probation program under s. 973.11. The agreement must include the requirement that the defendant comply with the court's order under s. 973.11 (1).

History: 1991 a. 253.