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.

The failure to file the information is not a mere matter of form, but is grounds for dismissal under sub. (2). State v. Woehrer, 83 Wis. 2d 696, 266 N.W.2d 366 (1978).

The 30–day limit under sub. (2) does not apply to service on the defendant; only filing with the clerk. State v. May, 100 Wis. 2d 9, 301 N.W.2d 458 (Ct. App. 1980).

If a challenge is not to the bindover decision, but to a specific charge in the information, the trial court's review is limited to whether the district attorney abused his or her discretion in issuing the charge. State v. Hooper, 101 Wis. 2d 517, 305 N.W.2d 110 (1981).

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

A preliminary examination is completed for purposes of sub. (2) when the court finishes scrutinizing the evidence and renders a bindover decision. State v. Phillips, 2000 WI App 184, 238 Wis. 2d 279, 617 N.W.2d 522, 99–3197.

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 it is not raised prior to pleading. Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

When the defendant waived a preliminary examination and wished to plead, but the information was not ready and was only orally read into the record, the defendant was not harmed by the acceptance of the plea before the filing of the information. Larson v. State, 60 Wis. 2d 768, 211 N.W.2d 513 (1973).

The scope of cross–examination by the defense was properly limited at the preliminary hearing. State v. Russo, 101 Wis. 2d 206, 303 N.W.2d 846 (Ct. App. 1981).

The denial of a preliminary examination to a corporation is constitutional. State v. C&S Management, Inc., 198 Wis. 2d 844, 544 N.W.2d 237 (Ct. App. 1995), 94–3188.

A preliminary hearing to determine probable cause for detention pending further proceedings is not a "critical stage" in a prosecution requiring appointed counsel. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

Preliminary Examination Potential. Dean. 58 MLR 159 (1975).

The Grand Jury in Wisconsin. Coffey & Richards. 58 MLR 517 (1975).

971.025 Forms. (1) In all criminal actions and proceedings and actions and proceedings under chapters 48 and 938 in circuit court, the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18 (1), commencing the date on which the forms are adopted. If an applicable court form has been adopted under s. 758.18 (2), that form may be used in lieu of the standard court form.

(2) A party or court official may supplement a court form with additional material.

(3) A court may not dismiss a case, refuse a filing or strike a pleading for failure of a party to use a standard court form under sub. (1) or to follow format rules but shall require the party to submit, within 10 days, a corrected form and may impose statutory fees or costs or both.

(4) If the judicial conference does not create a standard court form for an action or pleading undertaken by a party or court official, the party or court official may use a format consistent with any statutory or court requirement for the action or pleading.

History: Sup. Ct. Order No. 98–01, 228 Wis. 2d xiii (2000); Sup. Ct. Order No. 05–02, 2005 WI 41, 278 Wis. 2d xxxv.

971.027 Protected information. The provisions of ss. 801.19 to 801.21 are applicable in criminal cases.

History: Sup. Ct. Order No. 14–04, 2015 WI 89, 364 Wis. 2d xv.

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 .... (year), at said county the defendant did (state the crime) .... contrary to section .... of the statutes.

Dated ...., ... (year),

.... District Attorney

History: 1997 a. 250.

An information charging attempt is sufficient if it alleges the attempt plus the elements of the attempted crime. Wilson v. State, 59 Wis. 2d 269, 208 N.W.2d 134 (1973).

When a victim's name was correctly spelled in the complaint but wrong on the information, the variance was immaterial. State v. Bagnall, 61 Wis. 2d 297, 212 N.W.2d 122 (1973).

The law does not require that the information specify with particularity upon which dates the course of conduct occurred. In drafting an information, the state should not have to spell out every act that would comprise an element of the crime. Instead, allegations of the elements of the crime charged will suffice. State v. Conner, 2009 WI App 143, 321 Wis. 2d 449, 775 N.W.2d 105, 08–1296.

While citation to a specific statute may be the preferred practice, failure to specifically cite to a statute in the information and complaint is harmless error when there is no prejudice to the defendant. State v. Elverman, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528, 14–0354.

971.04 Defendant to be present. (1) Except as provided in subs. (2) and (3), the defendant shall be present personally or as provided under s. 967.08:

(a) At the arraignment;

(b) At trial;

(c) During voir dire of the trial jury;

(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, 974.06, or 974.07. If the defendant is not present, the time for appeal from any order under ss. 974.02, 974.06, and 974.07 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 Wis. 2d xix (1986); 1993 a. 486; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); 2001 a. 16; 2021 a. 141.

Judicial Council Note, 1996: This statute [sub. (1) (c)] defines the proceedings at which a criminal defendant has the right to be present. The prior statute's [sub. (1) (c)] reference to "all proceedings when the jury is being selected" was probably intended to include only those at which the jurors themselves were present, not the selection of names from lists which occurs at several stages before the defendant is charged or the trial jury picked. [Re Order effective 1–1–97]

The court erred in resentencing the defendant without notice after imposition of a previously ordered invalid sentence. State v. Upchurch, 101 Wis. 2d 329, 305 N.W.2d 57 (1981).

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

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

Sub. (1) does not encompass a postconviction evidentiary hearing. State v. Vennemann, 180 Wis. 2d 81, 508 N.W.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 Wis. 2d 826, 512 N.W.2d 233 (Ct. App. 1994).

A defendant's presence is required during all proceedings when the jury is being selected, including in camera voir dire. However, failure to allow the defendant's presence may be harmless error. State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994).

A trial begins under sub. (3) when jeopardy attaches, which is when the jury is sworn. State v. Miller, 197 Wis. 2d 518, 541 N.W.2d 153 (Ct. App. 1995), 95–0129.

An accused has the right to be present at trial, but the right may be waived by misconduct or consent. A formal on–the–record waiver is favored but not required. State v. Divanovic, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996), 95–0881.

A defendant may not be sentenced in absentia. The right to be present for sentencing may not be waived. State v. Koopmans, 210 Wis. 2d 670, 563 N.W.2d 528 (1997), 94–2424.

Koopmans, 210 Wis. 2d 670 (1997), does not require rejecting the harmless error test for all violations of this section. State v. Peterson, 220 Wis. 2d 474, 584 N.W.2d 144 (Ct. App. 1998), 97–3294.

Deprivation of the right to be present and to have counsel present at jury selection is subject to a harmless error analysis; there is a thin line between when reversal is warranted and when it is not. That a juror's subjective bias is generally ascertained by that person's responses at voir dire and that the interplay between potential jurors and a defendant is both immediate and continuous are factors that weigh against finding harmless error. State v. Harris, 229 Wis. 2d 832, 601 N.W.2d 682 (Ct. App. 1999), 98–1091.

A violation of sub. (1) does not automatically translate into a constitutional violation. The entry of a plea from jail by closed circuit television, while a violation of the statute, does not violate due process absent a showing of coercion, threat, or other unfairness. State v. Peters, 2000 WI App 154, 237 Wis. 2d 741, 615 N.W.2d 655, 99–1940.

Reversed on other grounds. 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797, 99–1940.

The correction of a clerical error in the sentence portion of a written judgment to reflect accurately an oral pronouncement of sentence is not the pronouncement or imposition of a sentence under sub. (1) (g) and does not mandate the offender's presence when the error is corrected. State v. Prihoda, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857, 98–2263.

Excusing and deferring prospective jurors under s. 756.03 is one component of a circuit judge's obligation to administer the jury system. The judge may delegate the authority to the clerk of circuit court under s. 756.03 (3), may be handled administratively, need not be handled by a judge, in court, or with the prospective juror present in person, and may take place well in advance of a particular trial. The defendant's presence cannot be required when the judge or clerk is acting in an administrative capacity. State v. Gribble, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488, 00–1821.

Although it was error for the court to interview potential jurors outside of the presence of the prosecution, defendant, and defense counsel, the error was harmless when there was no showing that it contributed to the defendant's conviction. State v. Tulley, 2001 WI App 236, 248 Wis. 2d 505, 635 N.W.2d 807, 00–3084.

A court's order that the defendant not look at his victim during the victim's statement to the court because, the trial court said, "I just don't want him intimidating her," did not deprive the defendant of his statutory right under this section or a due process right to be present at his sentencing. State v. Payette, 2008 WI App 106, 313 Wis. 2d 39, 756 N.W.2d 423, 07–1192.

Sub. (1) (g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held and the court accepts the plea and pronounces judgment. A defendant may waive, but not forfeit, the right to be in the same courtroom as the presiding judge. State v. Soto, 2012 WI 93, 343 Wis. 2d 43, 817 N.W.2d 848, 10–2273

The defendant waived his statutory right to be in the same courtroom as the presiding judge because he appeared in a courtroom with both his attorney and the prosecuting attorney; through videoconferencing, the judge was able to see, speak to, and hear the defendant, and the defendant was able to see, speak to, and hear the judge; the judge explained that videoconferencing would be used for the plea hearing if the defendant chose to enter a plea that day; and the defendant expressly consented to the

use of videoconferencing for the plea hearing. State v. Soto, 2012 WI 93, 343 Wis. 2d 43, 817 N.W.2d 848, 10–2273.

The circuit court's decision to exclude the defendant from in–chambers meetings with jurors during the trial regarding possible bias did not violate the statutory right under sub. (1) (c) to be present during voir dire. Voir dire is a preliminary examination of whether an individual can serve on a jury. In this case, the trial had already commenced and the jurors had already been selected when the bias issue arose. State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126, 11–0394.

While *Soto*, 2012 WI 93, describes what a circuit court should do to establish a valid waiver of the defendant's right to be present at the defendant's plea hearing when the defendant appears by videoconferencing or similar technology, is in a courtroom, and is in the same room as the defendant's attorney, more is required when the defendant appears by telephone, from prison, and is physically separated from counsel. Under these circumstances, a valid waiver of the defendant's right to be present must be predicated upon a colloquy that unambiguously informs the defendant he or she has a right to be physically present for the plea hearing in the same courtroom as the presiding judge. The court must specifically inquire, as often and in whatever manner is necessary under the circumstances, whether the defendant is able to hear and understand the court and the other participants. State v. Anderson, 2017 WI App 17, 374 Wis. 2d 372, 896 N.W.2d 364, 15–2611.

In a case in which a defendant asserts the defendant did not validly waive his or her right to be present at a plea hearing, once the defendant has shown that the circuit court's waiver colloquy was deficient and has asserted that the defendant did not understand his or her right to appear in person at the plea hearing, the burden should shift to the state to prove by clear and convincing evidence that the defendant did, in fact, knowingly, voluntarily, and intelligently waive the defendant's right to be present. State v. Anderson, 2017 WI App 17, 374 Wis. 2d 372, 896 N.W.2d 364, 15–2611.

Sub. (3) sets forth a way that a defendant can forfeit the right to be present at trial: by leaving after the jury has been sworn. The statute does not limit a defendant's ability to waive the right to be present and does not purport to set forth the exclusive manner in which a defendant can relinquish the right to be present. Sub. (3) was created to attend to the situation in which a defendant absconds, not when an obstreperous defendant seeks to delay and disrupt proceedings through the defendant's own actions. State v. Washington, 2018 WI 3, 379 Wis. 2d 58, 905 N.W.2d 380, 16–0238.

Similar to the constitutional right to be present, a defendant may waive the defendant's statutory right to be present at certain proceedings enumerated in sub. (1). Waiver can be either express or by conduct. Determining whether there is waiver by conduct presents a fact intensive inquiry. State v. Washington, 2018 WI 3, 379 Wis. 2d 58, 905 N.W.2d 380, 16–0238.

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.

When, through oversight, an arraignment is not held, it may be conducted after both parties had rested during the trial. Bies v. State, 53 Wis. 2d 322, 193 N.W.2d 46 (1972).

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 Wis. 2d 129, 496 N.W.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 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992).

Whether to grant a defendant's motion to change a plea is within the court's discretion. State v. Kazee, 192 Wis. 2d 213, 531 N.W.2d 332 (Ct. App. 1995).

The decision to withdraw a not guilty by reason of mental defect plea belongs to the defendant and not counsel. State v. Byrge, 225 Wis. 2d 702, 594 N.W.2d 388 (Ct. App. 1999), 97–3217.

If a defendant enters a plea of not guilty by reason of mental disease or defect under sub. (1) (d) without an accompanying not–guilty plea, the defendant waives the constitutional right to a trial as to the guilt phase and admits that he or she committed the criminal act. State v. Fugere, 2018 WI App 24, 381 Wis. 2d 142, 911 N.W.2d 127, 16–2258.

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."

(d) Inquire of the district attorney whether he or she has complied with s. 971.095 (2).

(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; 1997 a. 181.

A court can consider a defendant's record of juvenile offenses at a hearing on the defendant's guilty pleas prior to sentencing. McKnight v. State, 49 Wis. 2d 623, 182 N.W.2d 291 (1971).

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. 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 Wis. 2d 727, 183 N.W.2d 56 (1971).

A defendant may not withdraw a guilty plea simply because the defendant did not specifically waive all of the defendant's constitutional rights if the record shows that the defendant understood what rights were waived by the plea. After a guilty plea, the hearing on the factual basis for the plea need not produce competent evidence that satisfies the criminal burden of proof. Edwards v. State, 51 Wis. 2d 231, 186 N.W.2d 193 (1971).

It is sufficient for a court to inform a defendant charged with several offenses of the maximum penalty that could be imposed for each. Burkhalter v. State, 52 Wis. 2d 413, 190 N.W.2d 502 (1971).

A desire to avoid a possible life sentence by pleading guilty to a lesser charge does not alone render a plea involuntary. A claimed inability to remember does not require refusal of the plea if the evidence is clear that the defendant committed the crime. State v. Herro, 53 Wis. 2d 211, 191 N.W.2d 889 (1971).

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. 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 is not obliged to dismiss the

action because of refusal to accept the guilty plea. Johnson v. State, 53 Wis. 2d 787, 193 N.W.2d 659 (1972).

A hearing on a motion to withdraw a guilty plea is to be liberally granted if the motion is made prior to sentencing; it is discretionary if made thereafter and need not be granted if the record refutes the allegations. The defendant must raise a substantial issue of fact. Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

If 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 Wis. 2d 723, 201 N.W.2d 25 (1972).

A plea bargain that contemplates special concessions to another person requires careful scrutiny by the court. If the prosecuting attorney has agreed to seek charge or sentence concessions that must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The bargain must also be reviewed to determine whether it is in the public interest. State ex rel. White v. Gray, 57 Wis. 2d 17, 203 N.W.2d 638 (1973).

A court has inherent power to refuse to accept a plea of guilty and may dismiss the charge on the motion of the district attorney in order to allow prosecution on a second complaint. State v. Waldman, 57 Wis. 2d 234, 203 N.W.2d 691 (1973).

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 Wis. 2d 726, 206 N.W.2d 623 (1973).

The fact that a defendant pled guilty with the understanding that his wife would be given probation on another charge did not necessarily render the plea involuntary. Seybold v. State, 61 Wis. 2d 227, 212 N.W.2d 146 (1973).

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 were self–imposed coercive elements and did not vitiate the voluntary nature of the defendant's guilty plea. Craker v. State, 66 Wis. 2d 222, 223 N.W.2d 872 (1974).

A defendant wishing to withdraw a 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 indicated when: 1) the defendant was denied effective assistance of counsel; 2) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant's 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) the defendant did not receive the concessions contemplated by the plea agreement and the prosecutor failed to seek them as promised in the agreement. Birts v. State, 68 Wis. 2d 389, 228 N.W.2d 351 (1975).

As required by *Ernst*, 43 Wis. 2d 661 (1969), and sub. (1) (b), prior to accepting a guilty plea, the trial court must establish that the conduct that the defendant admits constitutes the offense charged or an included offense to which the defendant has pleaded guilty. If the plea is made under 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 not negotiated. Broadie v. State, 68 Wis. 2d 420, 228 N.W.2d 687 (1975).

The trial court did not abuse its discretion by failing to inquire into the effect a tranquilizer had on the defendant's competence to enter a plea. Jones v. State, 71 Wis. 2d 750, 238 N.W.2d 741 (1976).

A plea bargain agreement by law enforcement officials not to reveal relevant and pertinent information to the sentencing judge was unenforceable as being against public policy. Grant v. State, 73 Wis. 2d 441, 243 N.W.2d 186 (1976).

Withdrawal of a 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 Wis. 2d 480, 247 N.W.2d 105 (1976).

A guilty plea cannot be withdrawn on grounds that probation conditions were more onerous than expected. Garski v. State, 75 Wis. 2d 62, 248 N.W.2d 425 (1977).

A plea of guilty admits the facts charged but does not raise the issue of the statute of limitations because the time of the commencement of the action does not appear on the information. State v. Pohlhammer, 78 Wis. 2d 516, 254 N.W.2d 478 (1977).

While courts have no duty to secure informed waivers of possible statutory defenses, under the unique facts of this case, the defendant was entitled to withdraw a guilty plea to a charge barred by the statute of limitations. State v. Pohlhammer, 82 Wis. 2d 1, 260 N.W.2d 678 (1978).

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

Trial courts do not have subject matter jurisdiction to convict defendants under unconstitutionally vague statutes. The right to raise the issue on appeal cannot be waived, regardless of a guilty plea. State ex rel. Skinkis v. Treffert, 90 Wis. 2d 528, 280 N.W.2d 316 (Ct. App. 1979).

Discussing withdrawal of a guilty plea on the grounds of ineffective representation by trial counsel. State v. Rock, 92 Wis. 2d 554, 285 N.W.2d 739 (1979).

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

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

A prosecutor is relieved from terms of a plea agreement if it is judicially determined that the defendant has materially breached its conditions. State v. Rivest, 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

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

Effective assistance of counsel was denied when the defense attorney did not properly inform the client of the personal right to accept a plea offer. State v. Ludwig, 124 Wis. 2d 600, 369 N.W.2d 722 (1985).

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

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

Bangert, 131 Wis. 2d 246 (1986), procedures under this section apply to a defendant pleading not guilty by reason of mental disease or defect. State v. Shegrud, 131 Wis. 2d 133, 389 N.W.2d 7 (1986). But see State v. Fugere, 2018 WI App 24, 381 Wis. 2d 142, 911 N.W.2d 127, 16–2258.

Failure to comply with this section is not necessarily a constitutional violation. Discussing procedures mandated for plea hearings and establishing a remedy. State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

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

Section 971.04 (2) allows entry of plea to a misdemeanor by an attorney without the defendant being present, but for guilty or no contest pleas all requirements of this section except attendance must be met. State v. Krause, 161 Wis. 2d 919, 469 N.W.2d 241 (Ct. App. 1991).

A plea agreement to amend a judgment of conviction upon successful completion of probation is not authorized by statute. State v. Hayes, 167 Wis. 2d 423, 481 N.W.2d 699 (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 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992).

Failure to comply with sub. (1) (c) is governed by sub. (2); the holding in *Bangert*, 131 Wis. 2d 246 (1986), does not apply. Discussing the meaning of "likely" deportation under sub. (2). State v. Baeza, 174 Wis. 2d 118, 496 N.W.2d 233 (Ct. App. 1993).

When it was undisputed that the defendant was aware of the potential for deportation when he entered his plea, the failure to advise him pursuant to this section was harmless error for which he was not entitled to relief. Legislative history indicates that the legislature sought to alleviate the hardship and unfairness involved when an alien unwittingly pleads guilty or no contest to a charge without being informed of the consequences of such a plea. The legislature did not intend a windfall to a defendant who was aware of the deportation consequences of the plea. State v. Chavez, 175 Wis. 2d 366, 498 N.W.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 Wis. 2d 205, 500 N.W.2d 331 (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 that may be imposed if probation is revoked. State v. James, 176 Wis. 2d 230, 500 N.W.2d 345 (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 Wis. 2d 408, 513 N.W.2d 676 (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 Wis. 2d 125, 515 N.W.2d 302 (Ct. App. 1994).

Sub. (1) (c) requires the trial court to personally advise a defendant regarding deportation, and mere reference to a guilty plea questionnaire does not satisfy that requirement. However, under *Chavez*, 175 Wis. 2d 366 (1993), before the trial court is required to grant a motion to withdraw a guilty plea, it must determine whether, despite the trial court's failure to personally advise the defendant, the defendant understood the potential deportation consequences of his guilty pleas. State v. Issa, 186 Wis. 2d 199, 519 N.W.2d 741 (Ct. App. 1994).

A plea agreement is analogous to a contract, and contract law principals are drawn upon to interpret an agreement. The state's enforcement of a penalty provision in the agreement for failure of the defendant to fulfill his obligations under the agreement did not require an evidentiary hearing to determine a breach when the breach was obvious and material and did not give the defendant a basis for withdrawing his plea. State v. Toliver, 187 Wis. 2d 346, 523 N.W.2d 113 (Ct. App. 1994).

An executory plea bargain is without constitutional significance, and a defendant has no right to require the performance of the agreement. Upon entry of a plea, due process requires the defendant's expectations to be fulfilled. State v. Wills, 187 Wis. 2d 529, 523 N.W.2d 569 (Ct. App. 1994).

An *Alford*, 400 U.S. 25 (1970), plea, under which the defendant pleads guilty while either maintaining innocence or not admitting having committed the crime, is acceptable when strong proof of guilt has been shown. State v. Garcia, 192 Wis. 2d 845, 532 N.W.2d 111 (1995).

A trial court need not advise a defendant of the potential that restitution will be ordered in accepting a plea under this section. Restitution is primarily rehabilitative, not punitive, and not "potential punishment" under sub. (1) (a). State v. Dugan, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995).

A postconviction motion to withdraw a guilty plea requires showing that a "manifest injustice" would occur if the motion is denied. A postconviction recantation by a witness may constitute new evidence showing a "manifest injustice" and requiring a new trial if there is a reasonable probability that a jury would reach a different result. It is error for the judge to determine whether the recantation or the original allegation is true. State v. McCallum, 198 Wis. 2d 149, 542 N.W.2d 184 (Ct. App. 1995), 95–1518.

A defendant seeking a postconviction plea withdrawal due to a violation of sub. (1) (a) must make a prima facie showing that a violation occurred and must also allege that the defendant did not know or understand the information that should have been provided. State v. Giebel, 198 Wis. 2d 207, 541 N.W.2d 815 (Ct. App. 1995), 94–2225.

The concept of notice pleading has no application to a postconviction motion challenging a guilty plea. An allegation that a guilty plea was entered because of misinformation provided by counsel is merely conclusory. Facts must be alleged that show a reasonable probability that but for counsel's errors the defendant would have proceeded to trial and that allow the court to meaningfully assess the claim of prejudice. State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), 94–3310.

It is error for a trial court not to inquire whether the defendant has knowledge of the presumptive minimum sentence, but the error may be harmless if the defendant

is otherwise aware of the minimum. State v. Mohr, 201 Wis. 2d 693, 549 N.W.2d 497 (Ct. App. 1996), 95–2186.

An *Alford*, 400 U.S. 25 (1970), plea is acceptable only if strong proof of guilt has been shown. A plea under an agreement to plead to a related offense to that charged that would have been legally impossible for the defendant to have committed could not satisfy the strong proof requirement. State v. Smith, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), 94–2894.

When a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement, the promise must be fulfilled. When the state was unable to fulfill its promise, withdrawal of a no contest plea was in order. State v. Castillo, 205 Wis. 2d 599, 556 N.W.2d 425 (Ct. App. 1996), 95–1628.

Whether a defendant knowingly entered an *Alford*, 400 U.S. 25 (1970), plea must be determined by the court based on the personal colloquy with the defendant and not whether specific words were used in making the plea. State v. Salentine, 206 Wis. 2d 419, 557 N.W.2d 439 (Ct. App. 1996), 95–3494.

One type of manifest injustice that would allow postconviction withdrawal of a guilty plea is the failure to establish a sufficient factual basis that the defendant committed the offense. State v. Johnson, 207 Wis. 2d 239, 558 N.W.2d 375 (1997), 95–0072.

A defendant is automatically prejudiced when the prosecutor materially and substantially breaches a plea agreement. New sentencing is required. State v. Smith, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), 94–3364.

Discussing requirements for accepting a no contest plea. State v. McKee, 212 Wis. 2d 488, 569 N.W.2d 93 (Ct. App. 1997), 97–0163.

A plea not knowingly and intelligently made violates due process and entitles the defendant to withdraw the plea. The plea may be involuntary either because the defendant does not have a full understanding of the charge or the nature of the rights being waived. State v. Van Camp, 213 Wis. 2d 131, 569 N.W.2d 577 (1997), 96–0600.

The test to determine a knowing and intelligent no contest plea is whether the defendant has made a prima facie showing that the plea was made without the court's conformance with this section and whether the defendant has properly alleged that the defendant in fact did not know or understand the information that should have been provided. The state must then prove that the plea was knowingly and intelligently made by clear and convincing evidence. State v. Van Camp, 213 Wis. 2d 131, 569 N.W.2d 577 (1997), 96–0600.

The unintentional misstatement of a plea agreement, promptly rectified by the efforts of both counsel, did not deny the defendant's due process right to have the full benefit of a relied upon plea bargain. State v. Knox, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), 97–0682.

The court's acceptance of a guilty plea and order to implement a diversion agreement, the successful completion of which would have resulted in dismissal of criminal charges, constituted "sentencing." The standard to be applied in deciding a motion to withdraw the guilty plea was the "manifest injustice" standard applicable to such motions after sentence has been entered. State v. Barney, 213 Wis. 2d 344, 570 N.W.2d 731 (Ct. App. 1997), 96–3240.

A conviction following an *Alford*, 400 U.S. 25 (1970), plea does not prevent imposing as a condition of probation that the defendant complete a treatment program that requires acknowledging responsibility for the crime that resulted in the conviction. The imposition of the condition does not violate the defendant's due process rights. There is nothing inherent in the plea that gives the defendant any rights as to punishment. State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 579 N.W.2d 698 (1998), 96–2441.

In order for a plea to be knowingly and intelligently made, the defendant must be informed of the "direct consequences" of the plea, but due process does not require informing the defendant of collateral consequences. Direct consequences are definite, immediate, and largely automatic and do not depend on the defendant's future psychological condition. State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 579 N.W.2d 698 (1998), 96–2441.

The state's burden of proving that a plea was knowingly and voluntarily made cannot be proved by a negative inference. There must be some affirmative evidence of the fact. State v. Nichelson, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), 97–3136.

The defendant's misunderstanding of the defendant's citizenship status did not render his plea not voluntarily, knowingly, or intelligently entered. A defendant does not have a constitutional right to be informed of the collateral consequences of a plea. There is no distinction between lack of awareness and an affirmative misunderstanding of a collateral consequence. State v. Rodriguez, 221 Wis. 2d 487, 585 N.W.2d 701 (Ct. App. 1998), 97–3097.

Parole eligibility is not a statutorily or constitutionally necessary component of a valid plea colloquy in a case in which a life sentence is imposed. State v. Byrge, 225 Wis. 2d 702, 594 N.W.2d 388 (Ct. App. 1999), 97–3217.

No manifest injustice entitling a defendant to withdraw a plea occurs when the defendant is not informed of a collateral consequence of the plea. That a conviction would result in the defendant's permanent prohibition from possessing firearms under federal law was a collateral consequence of his plea. A direct consequence must have an effect on the range of punishment for which the conviction is entered, and the firearms prohibition arises outside of the state court proceedings under which the plea is taken and sentence imposed. State v. Kosina, 226 Wis. 2d 482, 595 N.W.2d 464 (Ct. App. 1999), 98–3421.

The trial court did not have an obligation to verify the accuracy of the information contained in a guilty plea questionnaire when it did not rely on the incorrect information contained therein in conducting a personal colloquy with the defendant to describe the correct elements of the crime and insure that the defendant understood the nature of the crimes. State v. Brandt, 226 Wis. 2d 610, 594 N.W.2d 759 (1999), 97–1489.

It was not fatal to a conviction entered on a plea of no contest that the defendant did not personally state "I plead no contest" when the totality of the facts, including a signed guilty plea questionnaire and colloquy with the judge on the record, indicated an intent to plead no contest. State v. Burns, 226 Wis. 2d 762, 594 N.W.2d 799 (1999), 96–3615.

The purpose of the court inquiry under sub. (1) (b) as to basic facts is to protect a defendant who understands the charge and voluntarily pleads guilty but does not realize that the conduct does not actually fall within the statutory definition of the charge. The purpose is not to resolve factual disputes about what did or did not happen; that is for a trial, which the defendant is waiving the right to. State v. Merryfield, 229 Wis. 2d 52, 598 N.W.2d 251 (Ct. App. 1999), 98–1106.

A claim of insufficient factual basis for charging a crime survives a no contest plea and can be raised in a postconviction motion. State v. Higgs, 230 Wis. 2d 1, 601 N.W.2d 653 (Ct. App. 1999), 98–1811.

Plea withdrawals before sentencing are subject to a liberal "fair and just" standard that facilitates the efficient administration of justice by reducing the number of appeals contesting the knowing and voluntariness of pleas. Reasons that have been considered fair and just are genuine misunderstanding of the plea's consequences, haste and confusion in entering the pleas, and coercion on the part of trial counsel. State v. Shimek, 230 Wis. 2d 730, 601 N.W.2d 865 (Ct. App. 1999), 99–0291.

Because the state failed to provide the defendant with exculpatory evidence related to his confession to the police and because that failure caused the defendant to plead guilty, the defendant's post–sentencing motion to withdraw a guilty plea should have been granted. State v. Sturgeon, 231 Wis. 2d 487, 605 N.W.2d 589 (Ct. App. 1999), 98–2885.

The state did not violate the sentencing terms of a plea agreement by failing to recite the express terms of the sentencing recommendation and by reciting a less than neutral statement of the recommendation. State v. Hanson, 2000 WI App 10, 232 Wis. 2d 291, 606 N.W.2d 278, 99–0120.

A defendant should be freely allowed to withdraw a plea, prior to sentencing, for any fair and just reason, unless the prosecution will be substantially prejudiced. The state bears the burden of demonstrating substantial prejudice once a defendant has offered a fair and just reason for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, 98–2196.

If the court fails to establish a factual basis that the defendant admits to the offense pleaded to, manifest injustice justifying withdrawal of a plea exists. A defendant is not required to personally articulate the specific facts that constitute the elements of the crime charged. All that is required is that the factual basis is developed on the record. State v. Thomas, 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836, 97–2665.

If the defendant understands before entering a plea that the trial court will not be bound by the prosecutor's sentence recommendation, the trial court's deviation from the recommendation does not result in manifest injustice. State v. Williams, 2000 WI 78, 236 Wis. 2d 293, 613 N.W.2d 132, 99–0752.

A defendant found guilty following a fair and error–free trial may not then object to the trial court's pretrial rejection of an *Alford*, 400 U.S. 25 (1970), plea. State v. Williams, 2000 WI App 123, 237 Wis. 2d 591, 614 N.W.2d 11, 99–0812.

That a defendant would be subject to a presumptive mandatory release date under s. 302.11 (1g) (am) was a collateral consequence of the defendant's entry of a plea, and the court was not required to inform the defendant of the presumptive mandatory release date for the plea to have been knowingly entered. State v. Yates, 2000 WI App 224, 239 Wis. 2d 17, 619 N.W.2d 132, 99–1643.

If the circuit court fails to establish a factual basis that the defendant admits to the offense pleaded to, manifest injustice occurs. The inquiry requirement of sub. (1) (b) allows the judge to establish the factual basis for the plea as the judge sees fit and does not require that the judge satisfy the defendant that he or she committed the crime. A factual basis may be found solely in a stipulation to the facts stated in the complaint. State v. Black, 2001 WI 31, 242 Wis. 2d 126, 624 N.W.2d 363, 99–0230.

Once a court decides to accept a plea agreement, it cannot reverse its acceptance. State v. Terrill, 2001 WI App 70, 242 Wis. 2d 415, 625 N.W.2d 353, 00–2152.

When a plea agreement indicates that a recommendation is to be for concurrent sentences and consecutive sentences are recommended, without correction at the sentencing hearing, there is a material and substantial breach of the agreement. Absent an objection, the right to directly appeal is waived and the defendant is entitled to a remedy for the breach only if there is ineffective assistance of counsel, the remedy for which is allowing the withdrawal of the plea or specific performance of the agreement. State v. Howard, 2001 WI App 137, 246 Wis. 2d 475, 630 N.W.2d 244, 00–2046.

A plea agreement in which the prosecution agreed to make no specific sentencing recommendation was not breached by the prosecutors commenting that the case was, "if not the most serious case I've handled this year, it is certainly among the top two or three" and "this is one of the most serious non–fatal crimes that I have dealt with." State v. Richardson, 2001 WI App 152, 246 Wis. 2d 711, 632 N.W.2d 84, 00–2129.

The clear and convincing evidence and close case rules do not apply in determining a breach of a plea agreement. Historical facts are reviewed with a clearly erroneous standard and whether the state's conduct was a substantial and material breach is a question of law. State v. Williams, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733, 00–0535.

A defendant has a constitutional right to have a negotiated plea bargain enforced, if it was relied on. A prosecutor is not required to enthusiastically advocate for a bargained for sentence and may inform the court about the character of the defendant, even if it is negative. The prosecutor may not personalize information presented in a way that indicates that the prosecutor has second thoughts about the agreement. State v. Williams, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733, 00–0535.

When a defendant repudiates a negotiated plea agreement on the ground that it contains multiplicitous counts, the defendant materially and substantially breaches the agreement. When the defendant successfully challenges the plea and a conviction on multiplicity grounds and the information has been amended pursuant to a negotiated plea agreement by which the state made charging concessions, ordinarily the remedy is to reverse the convictions and sentences, vacate the plea agreement, and reinstate the original information, but a different remedy may be appropriate. State v. Robinson, 2002 WI 9, 249 Wis. 2d 553, 638 N.W.2d 564, 00–2435.

Generally, once counsel is appointed, the day–to–day conduct of the defense rests with the attorney. However, a defense attorney may not as a matter of trial strategy admit a client's guilt, contrary to the client's not guilty plea, unless the defendant unequivocally understands and consents to the admission. State v. Gordon, 2002 WI App 53, 250 Wis. 2d 702, 641 N.W.2d 183, 01–1679.

A valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements. State v. Trochinski, 2002 WI 56, 253 Wis. 2d 38, 644 N.W.2d 891, 00–2545.

Once a defendant enters a plea, an evidentiary hearing is necessary to determine whether a breach of a plea agreement has occurred before the state may be permitted to withdraw from it. When after entry of the plea and before sentencing the trial court

warned that, if the defendant "screwed up" while on bail, the state would be free to change its sentencing recommendation, which the defendant acknowledged and agreed to, there was an amendment of the plea agreement. The state did not withdraw from the agreement when, based on the defendant's subsequent misconduct, it recommended a harsher sentence than originally agreed to. State v. Zuniga, 2002 WI App 233, 257 Wis. 2d 625, 652 N.W.2d 423, 01–2806.

In the absence of any attachments to a waiver of rights form or any other evidence in the record demonstrating that the defendant had knowledge of the elements of the offense charged, coupled with the trial court's failure to ascertain the defendant's understanding of the elements during the plea colloquy, the defendant made a prima facie showing that the colloquy failed to meet the requirements of sub. (1) (a) and *Bangert*, 131 Wis. 2d 246 (1986). State v. Lange, 2003 WI App 2, 259 Wis. 2d 774, 656 N.W.2d 480, 01–2584.

The district attorney's contact with the division of community corrections to complain about a presentence investigation sentence recommendation, which resulted in a change in recommendation from probation to incarceration, breached the plea agreement in which the district attorney's office agreed to make no sentence recommendation. State v. Howland, 2003 WI App 104, 264 Wis. 2d 279, 663 N.W.2d 340, 02–2083.

When in closing argument counsel concedes guilt on a lesser count in a multiple–count case, in light of overwhelming evidence on that count and in an effort to gain credibility and win acquittal on the other charges, the concession is a reasonable tactical decision, and counsel is not deemed to have been constitutionally ineffective by admitting a client's guilt contrary to the client's plea of not guilty. State v. Gordon, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, 01–1679.

Judicial participation in the bargaining process raises a conclusive presumption that the plea was involuntary. Judicial participation in plea negotiations before a plea agreement has been reached is barred. State v. Williams, 2003 WI App 116, 265 Wis. 2d 229, 666 N.W.2d 58, 02–1651.

Defendant's automatic ineligibility for Medicare and Medicaid benefits as the result of a drug trafficking conviction imposed by operation of federal law by a federal tribunal was a collateral consequence of the defendant's guilty plea and was not grounds for plea withdrawal. State v. Merten, 2003 WI App 171, 266 Wis. 2d 588, 668 N.W.2d 750, 02–1530.

There is compliance with *Bangert*, 131 Wis. 2d 246 (1986), as long as there is a record that the defendant was present when rights were given en masse and was personally questioned by the court to establish that the defendant understood the rights, had no questions, and waived those rights. State v. Stockland, 2003 WI App 177, 266 Wis. 2d 549, 668 N.W.2d 810, 02–2129.

When discussing a plea recommendation, the state may not give a less than neutral recitation of the agreement's terms. Reference to the plea agreement was not less than neutral when the prosecutor agreed with the presentence report that the defendant needed to be incarcerated, without commenting on the sentence recommendation in the report. State v. Stenseth, 2003 WI App 198, 266 Wis. 2d 959, 669 N.W.2d 776, 02–3330.

The defendant's due process rights were violated when the investigating detective in the case gave a sentencing recommendation to the sentencing court, written on police department letterhead, that undermined the state's plea–bargained recommendation, in effect breaching the plea agreement when the court had also forwarded the letter to the presentence investigation writer to assess and evaluate. State v. Matson, 2003 WI App 253, 268 Wis. 2d 725, 674 N.W.2d 51, 03–0251.

The prosecution may discuss negative facts about the defendant in order to justify a recommended sentence within the parameters of a plea agreement. A defendant is entitled to a neutral recitation of the terms of the plea agreement. The prosecutor may not overtly or covertly convey to the court that a sentence harsher than that recommended is warranted, but the state is not obligated to say something nice or positive about the defendant in order to avoid breaching a plea agreement. State v. Naydihor, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220, 01–3093.

A defendant breached plea agreements entered in previous completed cases for which the defendant had already served the sentences by collaterally attacking those convictions in a subsequent case in which they were found invalid for penalty enhancement purposes. State v. Deilke, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945, 02–2897. See also State v. Bembenek, 2006 WI App 198, 296 Wis. 2d 422, 724 N.W.2d 685, 04–1963.

If the court is aware of a plea agreement, the court must advise the defendant personally that the court is not bound by the terms of that agreement and ascertain that the defendant understands this information. When the defendant shows that the court failed to inform the defendant that it was not bound by the plea agreement, and the defendant alleges that he did not understand that the court was not bound, the defendant is entitled to an evidentiary hearing on a motion to withdraw the plea. State v. Hampton, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, 01–0509.

The strategic decision by defense counsel to forego an objection to the state's breach of a plea agreement without consulting the defendant was tantamount to entering a renegotiated plea agreement without the defendant's knowledge or consent. On that basis, defense counsel's performance was deficient, and, because counsel's deficient performance involved a breach of a plea agreement, the defendant was automatically prejudiced. State v. Sprang, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, 03–2240.

At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot be immunized by a plea agreement between the defendant and the state. A plea agreement that does not allow the sentencing court to be apprised of relevant information is void as against public policy. The fact that the prosecutor's comments were compelling and delivered by strong words does not transform the commentary into a plea bargain violation. State v. Jackson, 2004 WI App 132, 274 Wis. 2d 692, 685 N.W.2d 839, 03–1805.

A prosecutor may not make comments that suggest the prosecutor believes the disposition he or she is recommending pursuant to a plea agreement is insufficient, but may provide relevant negative information including information that has come to light after a plea agreement has been reached. A prosecutor can assert that a recommendation is appropriate and at the same time argue that the circumstances were so severe that the court should impose no less than the recommended sentence. State v. Liukonen, 2004 WI App 157, 276 Wis. 2d 64, 686 N.W.2d 689, 03–1539. See also State v. Bokenyi, 2014 WI 61, 355 Wis. 2d 28, 848 N.W.2d 759, 12–2557.

A plea agreement that leads a defendant to believe that a material advantage or right has been preserved when, in fact, it cannot legally be obtained produces a plea that is as a matter of law neither knowing nor voluntary and the defendant must be allowed to withdraw the plea. Even if the trial court had rejected the illegal provision at sentencing, it would not have cured the error when the defendant was induced to enter the plea by a promise that the state could never keep. State v. Dawson, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12, 03–2116.

When a defendant entered a plea believing the defendant would not be subject to the collateral consequences that actually applied and that belief was based on affirmative, incorrect statements on the record by the defendant's counsel and the prosecutor that were not corrected by the court, the plea was not knowingly and voluntarily entered and could be withdrawn. State v. Brown, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, 03–2915.

Williams, 2003 WI App 116, expressly applies only to direct judicial participation in the plea bargaining process itself. A judge's comments on the strength of the state's case and urging a defendant to carefully consider his or her chances of prevailing at trial are many steps removed from the direct judicial participation in plea negotiations that occurred in *Williams*. State v. Hunter, 2005 WI App 5, 278 Wis. 2d 419, 692 N.W.2d 256, 03–2348.

The state is not required to correct a misstated sentence recommendation forcefully or enthusiastically. It is sufficient to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process. State v. Bowers, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, 04–1093.

The state was free to recommend consecutive sentences under a plea agreement that contained no provision regarding whether the sentence for the pled–to charges was to run concurrent or consecutive with the sentence entered in another proceeding. State v. Bowers, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, 04–1093.

Wisconsin eliminated parole and good–time credit when it adopted its "truth–in–sentencing" scheme. The lack of parole eligibility and good–time credit are not direct consequences of a plea that a court must inform a defendant of prior to accepting a plea. State v. Plank, 2005 WI App 109, 282 Wis. 2d 522, 699 N.W.2d 235, 04–2280.

A defendant seeking to withdraw a plea of guilty or no contest prior to sentencing must show a fair and just reason for allowing the withdrawal, which is some adequate reason for defendant's change of heart other than the desire to have a trial. A lack of knowledge of sex offender registration or that one is eligible for a ch. 980 commitment are fair and just reasons for withdrawing a guilty plea. Prejudice needed to merit a denial of a plea withdrawal must be significant in order to trump a defendant's fair and just reason. Entitlement to withdraw pleas to some charges does not entitle the defendant to withdraw all guilty pleas. State v. Nelson, 2005 WI App 113, 282 Wis. 2d 502, 701 N.W.2d 32, 04–1954.

The state is free to negotiate away any right it may have to recommend a sentence, but the state does not have a right to make an agreement to stand mute in the face of factual inaccuracies or to withhold relevant factual information from the court. Such an agreement would violate a prosecutor's duty and result in sentences based upon incomplete facts or factual inaccuracies, a notion that is abhorrent to the legal system. State v. Neuaone, 2005 WI App 124, 284 Wis. 2d 473, 700 N.W.2d 298, 04–0196.

A court is not required to conduct an on–the–record colloquy with respect to a defendant's desire to abandon a plea of not guilty by reason of mental disease or defect. Only fundamental constitutional rights warrant this special protection and such a plea falls outside the realm of fundamental rights. State v. Francis, 2005 WI App 161, 285 Wis. 2d 451, 701 N.W.2d 632, 04–1360.

If a defendant makes a prima facie showing that the defendant was not informed of the direct consequences of a plea, the burden shifts to the state to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered. The state was required to prove that the defendant knew the correct maximum sentence despite being given erroneous information at every stage of the proceeding. The defendant was not required to show that the misinformation caused the plea. State v. Harden, 2005 WI App 252, 287 Wis. 2d 871, 707 N.W.2d 173, 05–0262.

For purposes of plea withdrawal motions, sentencing, when a deferred prosecution agreement is involved, encompasses the initial disposition of the case after the parties enter the agreement and the agreement is ratified by the trial court and a motion for plea withdrawal after entry of the agreement is subject to the standard for withdrawal of a plea after sentencing. State v. Daley, 2006 WI App 81, 292 Wis. 2d 517, 716 N.W.2d 146, 05–0048.

Although a circuit court must establish that a defendant understands every element of the charges pled to, the court is not expected to explain every element of every charge in every case. *Bangert* , 131 Wis. 2d 246 (1986), allows a court to tailor a plea colloquy to the individual defendant, but in customizing a plea colloquy a circuit court must do more than merely record the defendant's affirmation of understanding. A statement from defense counsel that he or she has reviewed the elements of the charge, without some summary of the elements or detailed description of the conversation, cannot constitute an affirmative showing that the nature of the crime has been communicated. State v. Brown, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906, 03–2662.

The circuit court properly advised the defendant of the range of punishments associated with his crimes when it informed him of the maximum term of imprisonment that could be imposed. Nothing in sub. (1) (a) or *Bangert*, 131 Wis. 2d 246 (1986), requires a sentencing court to make the maximum term of confinement associated with a bifurcated sentence explicit prior to accepting a plea of guilty or no contest. State v. Sutton, 2006 WI App 118, 294 Wis. 2d 330, 718 N.W.2d 146, 05–1693.

Sub. (2) uses the term "likely" and not "shall," meaning the defendant need not prove he definitely will be deported as a result of the case in question. Even though an earlier conviction sparked an investigation and immigration detainer, that an additional sexual assault conviction obviously would be included as part of the federal Immigration and Naturalization Service's information when determining whether to deport him, the defendant had shown his plea in this case was likely to result in his deportation requiring that he be permitted to withdraw his plea. State v. Bedolla, 2006 WI App 154, 295 Wis. 2d 410, 720 N.W.2d 158, 05–2717.

A package plea agreement, which is a plea agreement contingent on two or more codefendants all entering pleas according to the terms of the agreement, is not involuntary if the defendant felt pressure in the sense of a psychological need to try to help his codefendants get the benefit of the package agreement. State v. Goyette, 2006 WI App 178, 296 Wis. 2d 359, 722 N.W.2d 731, 04–2211.

Compliance with the *Bangert*, 131 Wis. 2d 246 (1986), requirements does not permit a circuit court to rely on a defendant's plea colloquy responses to deny the defendant an evidentiary hearing on a properly pled postconviction motion that asserts a non–*Bangert* reason why the plea was not knowing or voluntary. Under *Howell*, 2006 WI App 182, when a defendant convicted on a guilty or no contest plea asserts that the responses given during a plea colloquy were false and the defendant provides

non–conclusory information that plausibly explains why the answers were false, the defendant must be given an evidentiary hearing on the defendant's plea withdrawal motion. State v. Basley, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671, 05–2449.

Establishing a sufficient factual basis under sub. (1) (b) requires a showing that the conduct the defendant admits to constitutes the offense charged. The factual basis requirement protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that the defendant's conduct does not actually fall within the charge. When the factual basis relied upon by the court in this case in accepting the defendant's guilty plea raised a substantial question as to whether the defendant had committed sexual assault of a child or had herself been the victim of rape, the circuit court was required to make further inquiry to establish a sufficient factual basis to support the plea. State v. Lackershire, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23, 05–1189.

To ascertain a defendant's understanding of a charge, a circuit court might: 1) summarize the nature of the charge by reading the jury instructions; 2) ask defendant's counsel about his or her explanation to the defendant and ask counsel or the defendant to summarize the explanation; or 3) refer to the record or other evidence of the defendant's understanding of the nature of the charge. State v. Howell, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48, 05–0731.

A defendant's affirmative response that the defendant understands the nature of the charge, without establishing the defendant's knowledge of the nature of the charge, submits more to a perfunctory procedure rather than to the constitutional standard that a plea be affirmatively shown to be voluntarily and intelligently made. A defendant must at some point have expressed the defendant's knowledge of the nature of the charge to satisfy the requirement of this section. State v. Howell, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48, 05–0731.

A defendant may invoke both *Bangert*, 131 Wis. 2d 246 (1986), and *Nelson*, 54 Wis. 2d 489 (1972)/*Bentley*, 201 Wis. 2d 303 (1996), in a single postconviction motion to withdraw a plea of guilty or no contest. A defendant invokes *Bangert* when the plea colloquy is defective; a defendant invokes *Nelson*/*Bentley* when the defendant alleges that some factor extrinsic to the plea colloquy, such as ineffective assistance of counsel or coercion, renders a plea infirm. State v. Howell, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48, 05–0731.

Upon a motion to withdraw a plea before sentencing, the defendant faces three obstacles: 1) the defendant must proffer a fair and just reason for withdrawing the plea; 2) the circuit court must find the reason credible; and 3) the defendant must rebut evidence of substantial prejudice to the state. If the defendant does not overcome these obstacles in the view of the circuit court and is not permitted to withdraw the plea, the defendant's burden to reverse the circuit court on appeal becomes relatively high. State v. Jenkins, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24, 05–0302.

Misinformation as to one charge did not render all the defendants' pleas under a plea agreement unknowing, involuntary, and not intelligently entered. A return of the parties to pre–plea positions is not the mandated remedy when convictions are based on a negotiated plea agreement and an error later surfaces as to one count. The appropriate remedy depends upon the totality of the circumstances and a consideration of the parties' interests, a matter committed to the sentencing court's discretion. State v. Roou, 2007 WI App 193, 305 Wis. 2d 164, 738 N.W.2d 173, 06–1574.

Circuit courts may not sua sponte vacate fully and fairly entered and accepted pleas. When the state never asked the circuit court to sua sponte vacate a guilty plea, but merely acquiesced in that decision until it filed its motion for reconsideration, the state was not judicially estopped from seeking to have the circuit court comply with the law. State v. Rushing, 2007 WI App 227, 305 Wis. 2d 739, 740 N.W.2d 894, 06–3152.

Wisconsin's read–in procedure does not require a defendant to admit guilt of a read–in charge for purposes of sentencing and does not require a circuit court to deem the defendant to admit to the read–in crime for purposes of sentencing. The terms "admit" or "deemed admitted" should be avoided in referring to a defendant's agreement to read in a dismissed charge. A court should advise a defendant that it may consider read–in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read–in charges; and that the state is prohibited from future prosecution of the read–in charge. A court is not barred from accepting a defendant's admission of guilt of a read–in charge. State v. Straszkowski, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, 06–0064.

Williams, 2000 WI 78, does not prohibit a trial judge from informing a defendant that the judge intends to exceed the sentencing recommendation and allowing the defendant to withdraw a plea. State v. Marinez, 2008 WI App 105, 313 Wis. 2d 490, 756 N.W.2d 570, 07–0964.

A circuit court may not rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in–court plea colloquy. The form provides a defendant and counsel the opportunity to review together a written statement of the information a defendant should know before entering a guilty plea. A completed form can be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea. The plea colloquy cannot, however, be reduced to determining whether the defendant has read and filled out the form. State v. Hoppe, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, 07–0905.

Courts do not construe plea bargains against the drafter. When language is equally capable of two constructions, the construction that would safeguard the public interests, substantially, must be given preference over that construction that secures only insufficient or unsubstantial advantages to the public. State v. Wesley, 2009 WI App 118, 321 Wis. 2d 151, 772 N.W.2d 232, 08–1338.

When a plea agreement merely prohibited the state from recommending a particular length of sentence, the plea agreement did not curtail the state's ability to advocate its position that the defendant receive prison time. The state's recitation of the pre–sentence investigation report's recommendation for a specific sentence was simply that, a recitation, and the state's discussion of the particulars of the crime did not amount to an endorsement of the report's recommendation. State v. Duckett, 2010 WI App 44, 324 Wis. 2d 244, 781 N.W.2d 522, 09–0958.

Deciding whether to reject a plea agreement is squarely within the court's authority; to hold otherwise would permit encroachment by the executive branch into the realm that has historically been that of the judicial branch. Consideration of the views of the prosecutor as well as the defense attorney enter into that determination. Authority vests in the circuit court to determine what pleas are in the public interest without permitting the court to intrude on the authority of the prosecutor to decide what charges to file or whether to file charges in the first instance. Discussing factors to be considered by the court. State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341, 08–0755.

Matson, 2003 WI App 253, does not stand for the proposition that law enforcement views can never be properly considered by a court. Considering law enforcement representatives' views as a factor in determining whether to reject the proposed plea agreement is quite a different matter from allowing law enforcement to slip a harsher sentencing recommendation to a court while the prosecutor uses a lesser sentencing recommendation to procure a plea from the defendant. Here, the consideration of law enforcement's views was only one factor, of several noted in the record, in the circuit court's decision, and it was not obtained after the prosecution had secured the defendant's plea. State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341, 08–0755.

When a defendant is told that the defendant faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law, the circuit court has not violated the plea colloquy requirements outlined in this section and the *Bangert*, 131 Wis. 2d 246 (1986), line of cases and the circuit court has still fulfilled its duty to inform the defendant of the range of punishments. However, when the difference is significant, or when the defendant is told the sentence is lower than the amount allowed by law, a defendant's due process rights are at greater risk, and a *Bangert* violation may be established. State v. Cross, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, 09–0003.

Given the provision's placement within the statute, the context requires circuit courts to give the sub. (1) (c) deportation advisement at the plea hearing. The duty set forth in sub. (1) (c) is imposed solely on the circuit court. A defendant's action or inaction cannot alter that duty. A defendant may neither waive nor forfeit the right to plea withdrawal under sub. (2), which provides a specific remedy when a defendant later shows that the plea is likely to result in the defendant's deportation. State v. Vang, 2010 WI App 118, 328 Wis. 2d 251; 789 N.W.2d 115, 09–2162.

When the circuit court did not inform the defendant that it was not bound by the plea agreement, the circuit court erred; however, given that the circuit court accepted the plea agreement, the defendant did not demonstrate that withdrawal of his plea was necessary to correct a manifest injustice. The defendant was not affected by the defect in his plea colloquy; in fact, he received the benefit of the plea agreement when the court accepted the plea, dropping one of two charges. State v. Johnson, 2012 WI App 21, 339 Wis. 2d 421, 811 N.W.2d 441, 11–0348.

The pleading requirements for a motion to withdraw a guilty plea under sub. (2) when there is no transcript of the plea hearing are those set forth in *Bentley*, 201 Wis. 2d 303 (1996). Applying the *Bentley*–type standard of review, the court independently reviews whether a defendant's motion alleges sufficient facts that, if true, would entitle the defendant to withdraw his or her plea. State v. Negrete, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, 10–1702.

Inconclusive assertions, such as "I do not recall," will not support plea withdrawal because the truth or falsity of the defendant's statement has no bearing on whether the court actually advised the defendant of the potential immigration consequences of the plea. Whether the defendant remembers being told is not the operative fact upon which the right of withdrawal under sub. (2) is based; rather, the operative fact is whether the judge fulfilled the statutory requirement. If the defendant does not allege that the court did not tell him or her of the potential immigration consequences of the plea, the defendant has not met the first element of sub. (2), and the motion to withdraw may be denied without an evidentiary hearing. State v. Negrete, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, 10–1702.

Plea bargains should pin down whether a district attorney is agreeing not to prosecute a dismissed charge. The term "dismissed outright" should be discontinued. It leads to misunderstanding. As a general rule, parties may not immunize certain offenses from consideration by the court. Rather, the court is expected to utilize the fullest amount of relevant information concerning a defendant's life and character in fashioning a sentence. It is the responsibility of defense counsel to assure that the defendant understands and consents to the terms of any plea bargain and appreciates the authority and independence of the sentencing court. State v. Frey, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436, 10–2801.

When a good–faith legal error is made at the plea hearing regarding the maximum periods of initial confinement and extended supervision, and when that error is corrected at the sentencing hearing, to the defendant's benefit, there is no manifest injustice. State v. Lichty, 2012 WI App 126, 344 Wis. 2d 733, 823 N.W.2d 830, 11–2873.

The defendant's plea colloquy was not defective when the trial court did not explain party to a crime liability during the plea hearing. Party to a crime liability includes situations in which the defendant directly commits the crime, and the defendant directly committed the robbery in question. Therefore, an explanation of party to a crime liability in this case would have been superfluous. State v. Brown, 2012 WI App 139, 345 Wis. 2d 333, 824 N.W.2d 916, 12–0236.

The felony or misdemeanor designation of a charge is not part of the "nature of the charge" under sub. (1). Accordingly, a circuit court accepting a plea is not required to specifically inform the defendant of the applicable designation. The term "nature of the charge" refers to the elements of the offense in relation to the facts associated with that charge. A circuit court's plea colloquy duties related to the "nature of the charge" can be satisfied by summarizing the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute. State v. Robles, 2013 WI App 76, 348 Wis. 2d 325, 833 N.W.2d 184, 12–0307.

A court is not required to inform a defendant during a plea colloquy that the defendant may plead guilty to a crime and still have a jury trial on the issue of mental responsibility. Because neither the federal or state constitutions confers a right to an insanity defense, a court has no obligation to personally address a defendant in regard to the withdrawal of a not guilty by reason of mental disease or defect plea, although it is the better practice to do so. State v. Burton, 2013 WI 61, 349 Wis. 2d 1, 832 N.W.2d 611, 11–0450.

The state did not breach a plea agreement when two police officers, one of whom the defendant shot during the execution of a search warrant, requested during the sentencing hearing that the sentencing court impose the maximum sentence. The police officers were not speaking to the court as investigating officers, but as victims of a crime, which they have a right to do. In Wisconsin, every crime victim has the right to make a statement to the court at disposition. State v. Stewart, 2013 WI App 86, 349 Wis. 2d 385, 836 N.W.2d 456, 12–1457.

The defendant was not entitled to withdraw his guilty plea when the trial court, in providing him the immigration warning pursuant to sub. (1) (c), did not state the statutory language verbatim, but instead gave a warning that substantially complied with

the statute and included very slight linguistic differences that in no way altered the meaning of the warning. State v. Mursal, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173, 12–2775.

The defendant breached a plea agreement when the defendant was charged with new crimes and the agreement provided that the state reserved the right to withdraw from the agreement if the defendant committed any new or additional crime pending sentencing. The circuit court's decision to hold the defendant to his plea and allow the state to make a recommendation at sentencing, when the state had agreed not to make a recommendation under the agreement, was an appropriate exercise of discretion in crafting a remedy for the breach. State v. Reed, 2013 WI App 132, 351 Wis. 2d 517, 839 N.W.2d 877, 12–2191.

Under *Padilla*, 559 U.S. 356 (2010), counsel's failure to advise a defendant concerning clear deportation consequences of a plea bargain is prejudicial if the defendant shows that a decision to reject the plea bargain would have been rational under the circumstances. The defendant is not required to show that there would be a different outcome or that the defendant had real and viable challenges to the underlying veracity of the conviction. State v. Mendez, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895, 13–1862. See also State v. Shata, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, 13–1437.

Under s. 972.14 (3) (a), if a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court. Section 972.14 does not specify any particular party to read a victim's statement. The sole limitation on the victim's statement is that it be relevant to the sentence. If a judge does not ensure compliance with the victims' rights statutes, the judge can be fined under s. 950.11. A prosecutor's reference to a victim's letter will not automatically operate as a breach of a plea agreement. In fact, a victim's wishes may often come to bear in considering the need to protect the public, and it is incumbent on both the court and the prosecutor to ensure compliance with the victims' rights statutes. State v. Bokenyi, 2014 WI 61, 355 Wis. 2d 28, 848 N.W.2d 759, 12–2557.

To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice, that is, that there are serious questions affecting the fundamental integrity of the plea. The defendant has the burden to establish manifest injustice. State v. Dillard, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44, 12–2044.

Under the totality of the circumstances of this case, in which a no–contest plea was entered to avoid a consequence that was a legal impossibility, the defendant had the right as a matter of law to withdraw the defendant's no–contest plea on the ground that it was not entered knowingly, intelligently, and voluntarily. When deciding whether to accept the state's plea offer or go to trial, the state, the court, and the defendant's trial counsel mistakenly advised the defendant that he was facing a mandatory sentence of life in prison without the possibility of extended supervision. The fundamental error of law about the applicability of the persistent repeater enhancer to the defendant that pervaded the plea negotiations and sentencing rendered the defendant's plea unknowing, unintelligent, and involuntary. State v. Dillard, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44, 12–2044.

While a defendant may generally be able to wait until after sentencing to decide whether to allege a deficiency in the plea colloquy, that proposition does not apply when a concern about the defendant's understanding of the plea has been raised prior to sentencing and the defendant specifically elects to proceed with sentencing. The defendant in this case, after being made aware that the state believed the plea agreement allowed it to make a specific recommendation and that the state intended to do so, waived his right to seek plea withdrawal when he elected to move forward with sentencing. State v. Fortes, 2015 WI App 25, 361 Wis. 2d 249, 862 N.W.2d 154, 14–0714.

Negrete, 2012 WI 92, governs a non–citizen's motion to withdraw a guilty plea under sub. (2) based on "likely" deportation. It does not govern "likely" exclusion from admission. Under *Negrete*, the defendant must allege facts demonstrating a causal nexus between the entry of the guilty plea and the federal government's likely institution of deportation proceedings. Sub. (2) does not require a showing that the federal government has taken steps to exclude the defendant from admission. In this case, the text of the federal statute and the necessity that a defendant take affirmative steps to leave the country in order to actually be excluded from admission satisfy the "likely" test. State v. Valadez, 2016 WI 4, 366 Wis. 2d 332, 874 N.W.2d 514, 14–0678.

When a plea agreement is silent regarding concurrent or consecutive sentences, the defendant has not bargained for the state's promise to refrain from recommending the sentences be served consecutively. Whether a sentence recommendation involves four charges or one charge in addition to a sentence already being served, a recommendation of consecutive sentences has the same effect on the defendant. State v. Tourville, 2016 WI 17, 367 Wis. 2d 285, 876 N.W.2d 735, 14–1248.

The *Nelson*, 54 Wis. 2d 489 (1972)/*Bentley*, 201 Wis. 2d 303 (1996), test has two prongs: 1) if a motion to withdraw a guilty plea after judgment and sentence alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing; and 2) if the defendant fails to allege sufficient facts in the defendant's motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. The correct interpretation of this test is that an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that the defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts. State v. Sulla, 2016 WI 46, 369 Wis. 2d 225, 880 N.W.2d 659, 13–2316.

The phrase "potential punishment" in sub. (1) (a) has not been defined in the statutes or the case law. In analyzing whether a defendant was correctly advised of the potential punishment, cases have looked to the maximum statutory penalty, that is, the maximum sentence provided for by statute. The opinion in this case provides a glossary of terms to assist readers and the courts in using and understanding the correct terminology for discussing the duty of circuit courts to advise a defendant of the potential punishment before accepting a plea. State v. Finley, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d 761, 14–2488.

When, during the plea colloquy, the court erroneously informed the defendant that the maximum statutory penalty the defendant faced if convicted was lower than the maximum actually allowed by law, and the state failed to prove that the defendant knew the potential punishment he faced at the time he entered his plea, the defendant's plea was not entered knowingly, intelligently, and voluntarily, and he was entitled to withdraw his plea. Under those circumstances, the defect could not be remedied by reducing the sentence to the maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea. State v. Finley, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d 761, 14–2488.

Sub. (2) is subject to harmless error analysis under this section and s. 971.26. *Douangmala*, 2002 WI 62, was objectively wrong because it failed to properly consider the harmless error statutes, this section and s. 971.26, and is thus overruled. The mandatory "shall" in sub. (2) did not control when both of the harmless error savings statutes also use the mandatory "shall" language. All of the relevant statutes use "shall," and, accordingly, none is "more mandatory" than any other. This section and ss. 805.18 and 971.26 are most comprehensibly harmonized by applying harmless error analysis. State v. Reyes Fuerte, 2017 WI 104, 378 Wis. 2d 504, 904 N.W.2d 773, 15–2041.

The defendant's guilty plea to second–degree sexual assault of a child was not knowing, intelligent, and voluntary because the defendant was incorrectly informed that he faced a potential sentence of 100 years if convicted of both first–degree and second–degree sexual assault. Because second–degree sexual assault is a lesser–included offense to first–degree sexual assault, the defendant could not have lawfully been convicted of both offenses. Thus, the defendant was not truly aware of the direct consequences of his plea and was entitled to withdraw it. State v. Douglas, 2018 WI App 12, 380 Wis. 2d 159, 908 N.W.2d 466, 16–1865.

The requirements established under *Bangert*, 131 Wis. 2d 246 (1986), and its progeny for a valid plea apply only to the guilt phase of a defendant's plea of not guilty by reason of mental disease or defect (NGI). Although a circuit court must correctly advise a defendant pleading NGI of the maximum term of imprisonment the defendant faces, the court need not advise the defendant of the potential range of civil commitment the defendant will face if found not mentally responsible for the defendant's crimes. State v. Fugere, 2018 WI App 24, 381 Wis. 2d 142, 911 N.W.2d 127, 16–2258.

Lifetime global positioning system (GPS) tracking is not a punishment such that due process requires a defendant be informed of it before entering a plea of guilty. Neither the intent nor effect of lifetime GPS tracking is punitive. Consequently, the defendant in this case was not entitled to withdraw his plea because the circuit court was not required to inform the defendant that his guilty plea would subject him to lifetime GPS tracking. State v. Muldrow, 2018 WI 52, 381 Wis. 2d 492, 912 N.W.2d 74, 16–0740.

The intent–effects test is the proper test used to determine whether a sanction rises to the level of punishment such that due process requires a defendant be informed of it before entering a plea of guilty. Under the intent–effects test, the court first looks to the statute's primary function, intent. Determining whether the legislature intended a statute to be punitive is primarily a matter of statutory construction. The court also considers whether the effect of the statute is penal or regulatory in character. To aid its determination of the effect, the court applies the seven factors set out in *Mendoza–Martinez*, 372 U.S. 144 (1963): 1) whether the sanction involves an affirmative disability or restraint; 2) whether the sanction has historically been regarded as a punishment; 3) whether the sanction comes into play only on a finding of scienter; 4) whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence; 5) whether the behavior to which the sanction applies is already a crime; 6) whether an alternative purpose to which the sanction may rationally be connected is assignable for it; and 7) whether the sanction appears excessive in relation to the alternative purpose assigned. State v. Muldrow, 2018 WI 52, 381 Wis. 2d 492, 912 N.W.2d 74, 16–0740.

A circuit court is not required at the guilt phase to inform a defendant who has pled not guilty by reason of mental disease or defect (NGI) of the maximum possible term of civil commitment because: 1) a defendant who prevails at the responsibility phase of the NGI proceeding has proven an affirmative defense in a civil proceeding, avoiding incarceration, and is not waiving any constitutional rights by so proceeding in that defense; and 2) an NGI commitment is not punishment but, rather, is a collateral consequence to one who successfully mounts an NGI defense to criminal charges. State v. Fugere, 2019 WI 33, 386 Wis. 2d 76, 924 N.W.2d 469, 16–2258.

A circuit court may utilize a waiver of rights form for a defendant who is pleading guilty, but the use of that form does not otherwise eliminate the circuit court's plea colloquy duties. While a circuit court must exercise great care when conducting a plea colloquy so as to best ensure that a defendant is knowingly, intelligently, and voluntarily entering a plea, a formalistic recitation of the constitutional rights being waived is not required. State v. Pegeese, 2019 WI 60, 387 Wis. 2d 119, 928 N.W.2d 590, 17–0741.

Because Wisconsin does not permit conditional guilty pleas in the federal form, "stipulated trials," which ultimately have the same effect, are also not permissible. State v. Beyer, 2021 WI 59, 397 Wis. 2d 616, 960 N.W.2d 408 19–1983.

When the accused rejected a plea bargain on a misdemeanor charge and instead requested a jury trial, the prosecutor did not act vindictively in raising the charge to a felony. United States v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).

The defendant's acceptance of the prosecutor's proposed plea bargain did not bar the prosecutor from withdrawing the offer. Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984).

When a defendant knowingly entered a guilty plea and the state's evidence supported a conviction, the conviction was valid even though the defendant gave testimony inconsistent with the plea. Hansen v. Mathews, 424 F.2d 1205 (1970).

Following a guilty plea, the defendant could not raise a speedy trial issue. United States v. Gaertner, 583 F.2d 308 (1978).

Guilty Pleas in Wisconsin. Bishop. 58 MLR 631 (1975).

Criminal Law—Pleas of Guilty—Plea Bargaining—The American Bar Association's Standards on Criminal Justice and Wis. Stat. Section 971.08. 1971 WLR 583.

The Immigration Consequence of a Plea. Odrcic. Wis. Law. May 2018.

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 was not error for the court to accept a plea before an amended complaint was filed when the 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 did not invalidate the conviction when the consents were actually obtained and the defendant waived the defect. Failure to dismiss the charges in one of the counties did not deprive the court of jurisdiction. Failure of a district attorney to specifically consent to one offense did not invalidate the procedure when the error was clerical. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972).

Although the statute requires a plea of guilty to both the primary case and the case being consolidated, it is a logical extension to allow the defendant to ask for the consolidation of a case from another county to which a guilty plea has been entered with a case in which guilt was found by the court. State v. Rachwal, 159 Wis. 2d 494, 465 N.W.2d 490 (1991).

In a consolidated case, amendment of the charges from another county is not permissible. When amendment of those charges occurs after consolidation, the original trial court retains jurisdiction. If the original charge does not have the identical elements of the amended charge, double jeopardy does not prevent prosecution of the original charge in the original county although a guilty plea was entered to the amended charge in the other court. State v. Dillon, 187 Wis. 2d 39, 522 N.W.2d 530 (Ct. App. 1994).

971.095 Consultation with and notices to victim. (1) In this section:

(a) "District attorney" has the meaning given in s. 950.02 (2m).

(b) "Victim" has the meaning given in s. 950.02 (4).

(2) In any case in which a defendant has been charged with a crime, the district attorney shall, as soon as practicable, offer all of the victims in the case who have requested the opportunity an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations. The duty to confer under this subsection does not limit the obligation of the district attorney to exercise his or her discretion concerning the handling of any criminal charge against the defendant.

(3) At the request of a victim, a district attorney shall make a reasonable attempt to provide the victim with notice of the date, time and place of scheduled court proceedings in a case involving the prosecution of a crime of which he or she is a victim and any changes in the date, time or place of a scheduled court proceeding for which the victim has received notice. This subsection does not apply to a proceeding held before the initial appearance to set conditions of release under ch. 969.

(4) If a person is arrested for a crime but the district attorney decides not to charge the person with a crime, the district attorney shall make a reasonable attempt to inform all of the victims of the act for which the person was arrested that the person will not be charged with a crime at that time.

(5) If a person is charged with committing a crime and the charge against the person is subsequently dismissed, the district attorney shall make a reasonable attempt to inform all of the victims of the crime with which the person was charged that the charge has been dismissed.

(6) A district attorney shall make a reasonable attempt to provide information concerning the disposition of a case involving a crime to any victim of the crime who requests the information.

History: 1997 a. 181.

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.

3. The interests of the victim, as defined in s. 950.02 (4).

(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; 1997 a. 181.

A federal court applied balancing test is applicable to review the exercise of a trial court's discretion on a request for the substitution of trial counsel, with the associated request for a continuance. Phifer v. State, 64 Wis. 2d 24, 218 N.W.2d 354 (1974).

A party requesting a continuance on grounds of surprise must show: 1) actual surprise from an unforeseeable development; 2) when surprise is caused by unexpected testimony, the probability of producing contradictory or impeaching evidence; and 3) resulting prejudice if the request is denied. Angus v. State, 76 Wis. 2d 191, 251 N.W.2d 28 (1977).

A delay of 84 days between a defendant's first court appearance and trial on misdemeanor traffic charges was not so inordinate as to raise a presumption of prejudice. State v. Mullis, 81 Wis. 2d 454, 260 N.W.2d 696 (1978).

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

Violations of the right to a speedy trial are waived by entry of a guilty plea. State v. Asmus, 2010 WI App 48, 324 Wis. 2d 427, 782 N.W.2d 435, 08–2980.

Following a guilty plea, the defendant could not raise a speedy trial issue. United States v. Gaertner, 583 F.2d 308 (1978).

971.105 Child victims and witnesses; duty to expedite proceedings. In all criminal and delinquency cases, juvenile fact–finding hearings under s. 48.31 and juvenile dispositional hearings 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; 1995 a. 77.

971.109 Freezing assets of a person charged with financial exploitation of an elder person. (1) DEFINITIONS. In this section:

(a) "Elder person" means any individual who is 60 years of age or older.

(b) "Financial exploitation" has the meaning given in s. 46.90 (1) (ed).

(2) SEIZURE OF ASSETS. (a) If a defendant is charged with a crime that is financial exploitation, the crime involves the taking or loss of property valued at more than $2,500, and the crime victim is an elder person, a prosecuting attorney may file a petition with the court in which the defendant has been charged to freeze the funds, assets, or property of the defendant in an amount up to 100 percent of the alleged value of funds, assets, or property in the defendant's pending criminal proceeding for purposes of restitution to the crime victim. The hearing on the petition may be held ex parte. The rules of evidence do not apply in a hearing under this paragraph.

(b) In the hearing under par. (a), if there is a showing of probable cause that the defendant used, was using, is about to use, or is intending to use any funds, assets, or property in a way that constitutes or would constitute financial exploitation, the court shall issue an order to freeze or seize the funds, assets, or property of the defendant in the amount calculated under par. (a). A copy of the order shall be served upon the defendant whose funds, assets, or property has been frozen or seized.

(c) The court's order shall prohibit the sale, gifting, transfer, or wasting of the funds, assets, or real or personal property of the elder person that are owned by or vested in the defendant without the express permission of the court. The court's order shall be binding upon a financial institution, as defined in s. 943.80 (2), and any 3rd party that is in possession of the funds, assets, or property.

(3) RELEASE OF FUNDS. At any time within 30 days after service of the order under sub. (2) (b), the defendant or any person claiming an interest in the funds, assets, or property may file a petition to release the funds, assets, or property. The court shall hold a hearing on the motion within 10 days from the date the motion is filed. The procedure under s. 968.20 applies to a petition under this subsection.

(4) DISMISSAL OR ACQUITTAL. If the prosecution of a charge of financial exploitation is dismissed or if a judgment of acquittal is entered, the court shall vacate the order issued under sub. (2) (b).

(5) CONVICTION. If the prosecution of a charge of financial exploitation results in a conviction, the court may order that the funds, assets, or property that were frozen or seized under sub. (2) (b) be released only for the purpose of paying restitution ordered under s. 973.20 (2).

History: 2021 a. 76.

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, if applicable, or the date of release to extended supervision, 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; 1995 a. 48; 1997 a. 283.

A request for prompt disposition under this section must comply with sub. (1) in order to impose on the state the obligation to bring the case to trial within 120 days. State v. Adams, 207 Wis. 2d 568, 558 N.W.2d 923 (Ct. App. 1996), 96–1680.

Whether dismissal under sub. (7) is with or without prejudice is within the court's discretion. State v. Davis, 2001 WI 136, 248 Wis. 2d 986, 637 N.W.2d 62, 00–0889.

The responsibility for complying with the sub. (2) 120–day time limit for bringing a case to trial cannot be imposed on the defendant. Once the district attorney receives the request under sub. (1), the responsibility for prompt disposition is placed on the district attorney. The trial court erred when it failed to dismiss the case when the 120–day time limit was not met. State v. Lewis, 2004 WI App 211, 277 Wis. 2d 446, 690 N.W.2d 668, 03–3191.

Violations of the right to a speedy trial are waived by entry of a guilty plea. When a defendant chooses to accept a plea agreement rather than inconveniencing the district attorney by requiring the filing of a new complaint, the protections of this section are forfeited. State v. Asmus, 2010 WI App 48, 324 Wis. 2d 427, 782 N.W.2d 435, 08–2980.

The specific conclusion by the *Davis*, 2001 WI 136, and *Adams*, 207 Wis. 2d 568 (1996), courts was that the "subject to s. 971.10" language following the 120–day time period in sub. (2) refers to the court's authority to grant a continuance for the reasons specified in s. 971.10 (3) (a). The defendant's conclusion that the 120–day time period cannot be extended is fundamentally inconsistent with the *Davis* court's conclusion that failure to bring a case to trial within 120 days triggers dismissal, which can be without prejudice and allow for refiling. State v. Butler, 2014 WI App 4, 352 Wis. 2d 484, 844 N.W.2d 392, 12–2243.

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.

If two defendants were charged and the cases consolidated, and one then pleads guilty, there is no need for a severance, especially if the trial is to the court. Nicholas v. State, 49 Wis. 2d 678, 183 N.W.2d 8 (1971).

Severance is not required if the two 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 Wis. 2d 389, 217 N.W.2d 657 (1974).

Due process of law was not violated, nor did the trial court abuse its discretion, by denying the defendant's motion to sever three counts of sex offenses from a count of first–degree murder. Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974).

In a joint trial on charges of burglary and obstructing an officer, while evidence as to the fabrication of an alibi by the defendant was probative as to the burglary, the substantial danger that the jury might employ the 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 the defendant guilty of burglary. Peters v. State, 70 Wis. 2d 22, 233 N.W.2d 420 (1975).

Joinder was not prejudicial to the defendant moving for severance when the possibly prejudicial effect of inadmissible hearsay regarding the other defendant was presumptively cured by instructions. State v. Jennaro, 76 Wis. 2d 499, 251 N.W.2d 800 (1977).

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

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

The trial court properly deleted implicating references from a codefendant's confession rather than granting the defendant's motion for severance under sub. (3). Pohl v. State, 96 Wis. 2d 290, 291 N.W.2d 554 (1980).

The trial court did not abuse its discretion in denying a severance motion and failing to caution the jury against prejudice when two counts were joined. State v. Bettinger, 100 Wis. 2d 691, 303 N.W.2d 585 (1981).

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

The trial court abused its discretion in denying a motion for severance of codefendants' trials when the movant made an initial showing that his codefendant's testimony would have established his alibi defense and his entire defense was based on the alibi. State v. Brown, 114 Wis. 2d 554, 338 N.W.2d 857 (Ct. App. 1983).

Joinder under sub. (2) was proper when two robberies were instigated by one defendant's prostitution and the other defendant's systematic robbing of customers who refused to pay. State v. King, 120 Wis. 2d 285, 354 N.W.2d 742 (Ct. App. 1984).

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

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

If an appellate court vacates a conviction on one or more counts when multiple counts are tried together, the defendant is entitled to a new trial on the remaining counts upon showing compelling prejudice arising from evidence introduced to support the vacated counts. State v. McGuire, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996), 95–3138.

A violation of sub. (3) does not require a new trial in all cases but is subject to harmless error analysis. State v. King, 205 Wis. 2d 81, 555 N.W.2d 189 (Ct. App. 1996), 95–3442.

Simultaneous trials of two defendants before two juries is permissible. An impermissible confession in one case not heard by the jury in that case accomplishes the required severance of the cases. State v. Avery, 215 Wis. 2d 45, 571 N.W.2d 907 (Ct. App. 1997), 96–2873.

For severance to be granted, it is not sufficient to show that some prejudice was caused. Any joinder of offenses is apt to involve some element of prejudice to the defendant, since a jury is likely to feel that a defendant charged with several crimes must be a bad individual who has done something wrong. However, if the notion of involuntary joinder is to retain any validity, a higher degree of prejudice, or certainty of prejudice, must be shown before relief will be in order. State v. Linton, 2010 WI App 129, 329 Wis. 2d 687, 791 N.W.2d 222, 09–2256.

Sub. (1) is broadly construed in favor of initial joinder. The court has historically favored initial joinder particularly when the charged crimes were all committed by the same defendant. State v. Salinas, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609, 13–2686.

In assessing whether separate crimes are sufficiently "connected together" for purposes of initial joinder under sub. (1), the court looks to a variety of factors, including: 1) are the charges closely related; 2) are there common factors of substantial importance; 3) did one charge arise out of the investigation of the other; 4) are the crimes close in time or close in location, or do the crimes involve the same victims; 5) are the crimes similar in manner, scheme, or plan; 6) was one crime committed to prevent punishment for another; and 7) would joinder serve the goals and purposes of this section. State v. Salinas, 2016 WI 44, 369 Wis. 2d 9, 879 N.W.2d 609, 13–2686.

In evaluating the potential for prejudice, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant. State v. Watkins, 2021 WI App 37, 398 Wis. 2d 558, 961 N.W.2d 884, 19–1996.

Criminal Law—Joinder and Severance Under the New Wisconsin Criminal Procedure Code. 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.

(4) The fact that a defendant is not competent to proceed does not preclude a hearing under s. 968.38 (4) or (5) unless the probable cause finding required to be made at the hearing cannot be fairly made without the personal participation of the defendant.

History: 1981 c. 367; 1997 a. 182; 1999 a. 188.

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); Nor-

wood 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]

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

A probationer has a right to a competency determination when, during a revocation proceeding, the administrative law judge has reason to doubt the probationer's competence. The determination shall be made by the circuit court in the county of sentencing, which shall adhere to this section and s. 971.14 to the extent practicable. State ex rel. Vanderbeke v. Endicott, 210 Wis. 2d 502, 563 N.W.2d 883 (1997), 95–0907.

There is a higher standard for determining competency to represent oneself than for competency to stand trial, based on the defendant's education, literacy, fluency in English, and any physical or psychological disability that may affect the ability to communicate a defense. When there is no pre–trial finding of competency to proceed and postconviction relief is sought, the court must determine if it can make a meaningful nunc pro tunc inquiry. If it cannot, or it finds that it can but the defendant was not competent, a new trial is required. State v. Klessig, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), 95–1938.

A prior mental illness or a mental illness diagnosis made subsequent to the proceeding in question may create a reason to doubt competency, but neither categorically creates a reason to doubt competency. State v. Farrell, 226 Wis. 2d 447, 595 N.W.2d 64 (Ct. App. 1999), 98–1179.

This section codifies the two–part "understand–and–assist" due process test for determining competency set forth in *Dusky*, 362 U.S. 402 (1960), that considers whether a defendant: 1) has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; and 2) has a rational as well as factual understanding of the proceedings. Thus, a defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense. State v. Byrge, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477, 97–3217. See also State v. Smith, 2016 WI 23, 367 Wis. 2d 483, 878 N.W.2d 135, 13–1228.

It is entirely reasonable that a competency examination designed to address a defendant's ability to understand the proceedings and assist counsel may also address issues of future dangerousness, which a court may reasonably consider when gauging the need for public protection in setting a sentence. State v. Slagoski, 2001 WI App 112, 244 Wis. 2d 49, 629 N.W.2d 50, 00–1586.

A judge who carefully considered the transcribed record and her recollection of a previous proceeding involving the defendant did not impermissibly testify. There is no substantive difference between a judge's observation of a defendant's demeanor at the time of a competency hearing and the judge's observations of the defendant at an earlier proceeding. Both may be probative. State v. Meeks, 2002 WI App 65, 251 Wis. 2d 361, 643 N.W.2d 526, 01–0263.

Reversed on other grounds. 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859, 01–0263.

Counsel's testimony on opinions, perceptions, and impressions of a former client's competency violated the attorney–client privilege and should not have been revealed without the consent of the former client. State v. Meeks, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859, 01–0263.

971.14 Competency proceedings. (1g) DEFINITION. In this section, "department" means the department of health services.

(1r) 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 audiovisual 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, the court shall order the individual to the facility designated by the department.

(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 necessary, 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, the sheriff of the county in which the court is located shall transport any defendant not free on bail to the examining facility within a reasonable time after the examination is ordered and shall transport the defendant to the jail within a reasonable time after the sheriff and county department of community programs of the county in which the court is located receive 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). The examiner shall provide an opinion as to whether the defendant's treatment should occur in an inpatient facility designated by the department, in a community–based treatment program under the supervision of the department, or in a jail or a locked unit of a facility that has entered into a voluntary agreement with the state to serve as a location for treatment.

(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. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:

1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

(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. Upon the request of the sheriff or jailer charged with care and control of the jail in which the defendant is being held pending or during a trial or sentencing proceeding, the court shall cause a copy of the report to be delivered to the sheriff or jailer. The sheriff or jailer may provide a copy of the report to the person who is responsible for maintaining medical records for inmates of the jail, or to a nurse licensed under ch. 441, to a physician licensed under subch. II of ch. 448, or to a physician assistant licensed under subch. IX of ch. 448 who is a health care provider for the defendant or who is responsible for providing health care services to inmates of the jail. The report shall not be otherwise disclosed prior to the hearing under this subsection.

NOTE: The cross–reference to subch. IX of ch. 448 was changed from subch. VIII of ch. 448 by the legislative reference bureau under s. 13.92 (1) (bm) 2. to reflect the renumbering under s. 13.92 (1) (bm) 2. of subch. VIII of ch. 448.

(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 audiovisual 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) 1. 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 for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less. The department shall determine whether the defendant will receive treatment in an appropriate institution designated by the department, while under the supervision of the department in a community–based treatment program under contract with the department, or in a jail or a locked unit of a facility that has entered into a voluntary agreement with the state to serve as a location for treatment. The sheriff shall transport the defendant to the institution, program, jail, or facility, as determined by the department.

2. If, under subd. 1., the department commences services to a defendant in jail or in a locked unit, the department shall, as soon as possible, transfer the defendant to an institution or provide services to the defendant in a community–based treatment program consistent with this subsection.

3. Days spent in commitment under this paragraph are considered days spent in custody under s. 973.155.

4. A defendant under the supervision of the department placed under this paragraph in a community–based treatment program is in the custody and control of the department, subject to any conditions set by the department. If the department believes that the defendant under supervision has violated a condition, or that permitting the defendant to remain in the community jeopardizes the safety of the defendant or another person, the department may designate an institution at which the treatment shall occur and may request that the court reinstate the proceedings, order the defendant transported by the sheriff to the designated institution, and suspend proceedings consistent with subd. 1.

(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 department determines that the defendant should be subject to such a court order, the department 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 hearing be held more than 20 days after a motion is filed under this paragraph.

(b) The defendant shall be periodically reexamined by the department examiners. 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) indicating the defendant has regained competency or is not competent and unlikely to become competent in the remaining commitment period, the court shall hold a hearing within 14 days of receipt of the report and 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) (d), 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 55.135, 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 55.135 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 or 51.45 (13) or a petition for protective placement under s. 55.075. 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 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 Wis. 2d xiii (1987); 1987 a. 85, 403; 1989 a. 31, 107; Sup. Ct. Order, 158 Wis. 2d xvii (1990); 1991 a. 32; 1995 a. 27 s. 9126 (19); 1995 a. 268; 1997 a. 252; 2001 a. 16; 2003 a. 122; 2005 a. 264; 2007 a. 20 ss. 3871 to 3874, 9121 (6) (a); 2009 a. 214; 2017 a. 140; 2021 a. 23; s. 13.92 (1) (bm) 2.

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, 270 N.W.2d 402 (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 redetermination 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]

The legislature intended by the reference to s. 973.155 in sub. (5) (a) that good time credit be accorded persons committed as incompetent to stand trial. State v. Moore, 167 Wis. 2d 491, 481 N.W.2d 633 (1992).

A competency hearing may be waived by defense counsel without affirmative assent of the defendant. State v. Guck, 176 Wis. 2d 845, 500 N.W.2d 910 (1993).

The state bears the burden of proving competency when put at issue by the defendant. A defendant shall not be subject to a criminal trial when the state fails to prove competence by the greater weight of the credible evidence. A trial court's competency determination should be reversed only when clearly erroneous. State v. Garfoot, 207 Wis. 2d 214, 558 N.W.2d 626 (1997), 94–1817. See also State v. Byrge, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477, 97–3217; State v. Smith, 2016 WI 23, 367 Wis. 2d 483, 878 N.W.2d 135, 13–1228.

A probationer has a right to a competency determination when, during a revocation proceeding, the administrative law judge has reason to doubt the probationer's competence. The determination shall be made by the circuit court in the county of sentencing, which shall adhere to this section and s. 971.13 to the extent practicable. State ex rel. Vanderbeke v. Endicott, 210 Wis. 2d 502, 563 N.W.2d 883 (1997), 95–0907.

The burden of proof under sub. (4) (b), when a defendant claims to be competent, does not violate equal protection guarantees. It balances the fundamental rights of not being tried when incompetent and of not having liberty denied because of incompetence. State v. Wanta, 224 Wis. 2d 679, 592 N.W.2d 645 (Ct. App. 1999), 98–0318.

When a competency examination was ordered, but never occurred, the time limits under sub. (2) did not begin to run and no violation occurred. State ex rel. Hager v. Marten, 226 Wis. 2d 687, 594 N.W.2d 791 (1999), 97–3841.

If the court determines under sub. (4) (d) that the defendant is not competent and not likely to become competent within 12 months, the proceedings shall be suspended and the defendant may be civilly committed under sub. (6) (a) as well as sub. (6) (b). When a prosecutor was subsequently notified that the defendant was not an appropriate candidate for civil commitment because he was not mentally retarded, the state was authorized to request for reevaluation under sub. (6) (d). State v. Carey, 2004 WI App 83, 272 Wis. 2d 697, 679 N.W.2d 910, 03–1578.

The fact that a defendant was deemed competent to stand trial should not create a presumption that the defendant is competent at a later date when the same defendant pursues postconviction relief. State v. Daniel, 2015 WI 44, 362 Wis. 2d 74, 862 N.W.2d 867, 12–2692.

There is no statute directly governing postconviction competency proceedings, but courts will look to this section for guidance. Once a defense attorney raises the issue of competency at a postconviction hearing, the burden is on the state to prove by a preponderance of the evidence that the defendant is competent to proceed. State v. Daniel, 2015 WI 44, 362 Wis. 2d 74, 862 N.W.2d 867, 12–2692.

A proceeding to determine whether a defendant is competent is separate and distinct from the defendant's underlying criminal proceeding. Thus, an order that a defendant is not competent to proceed is a final order issued in a special proceeding and is appealable as of right pursuant to s. 808.03 (1). State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, 16–2017.

Involuntary medication orders are subject to an automatic stay pending appeal. On a motion to lift an automatic stay, the state must: 1) make a strong showing that it is likely to succeed on the merits of the appeal; 2) show that the defendant will not suffer irreparable harm if the stay is lifted; 3) show that no substantial harm will come to other interested parties if the stay is lifted; and 4) show that lifting the stay will do no harm to the public interest. State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, 16–2017.

Under *Sell,* 539 U.S. 166 (2003), a court may order involuntary medication for the purpose of competency to stand trial only if four factors are met: 1) important governmental interests are at stake; 2) involuntary medication will significantly further the government's interest in prosecuting the offense; 3) involuntary medication is necessary to further those interests; and 4) administration of the drugs is medically appropriate. Sub. (4) (b) does not require the circuit court to determine whether the *Sell* factors have been met. Rather, it requires circuit courts to order involuntary medication for a defendant who is found incompetent to refuse medication under sub. (3) (dm). The mere inability of a defendant to express an understanding of medication or to make an informed choice about it is constitutionally insufficient to override a defendant's significant liberty interest in avoiding the unwanted administration of antipsychotic drugs. To the extent that subs. (3) (dm) and (4) (b) require circuit courts to order involuntary medication when the *Sell* standard has not been met, the statute is unconstitutional. State v. Fitzgerald, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165, 18–1214.

Because tolling the statutory period under sub. (5) for commitment may result in a defendant being held for a period longer than 12 months, such tolling is a violation of the statute's unambiguous command that commitment to bring a defendant to competency be limited to a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less. A circuit court therefore lacks authority to toll the statutory period set out by sub. (5). State v. Green, 2021 WI App 18, 396 Wis. 2d 658, 957 N.W.2d 583, 20–0298.

While the *Sell*, 539 U.S. 166 (2003), standard does not require certainty but rather asks the court to make a determination about whether it is "substantially likely" that the administration of drugs will render a defendant competent, such a "substantial likelihood" must reasonably be founded on evidence specific to the defendant being involuntarily medicated. State v. Green, 2021 WI App 18, 396 Wis. 2d 658, 957 N.W.2d 583, 20–0298.

This section does not require an examiner to make a determination regarding whether a defendant requires medication to be restored to competency. Rather, this section provides that, if sufficient information is available to the examiner to reach an opinion on the issue, then the report shall include the examiner's opinion on whether the defendant needs medication or treatment. Nothing in this section conflicts with a circuit court's obligation to consider particularized information about the defendant in determining whether the second and fourth *Sell*, 539 U.S. 166 (2003), factors are satisfied. State v. Green, 2021 WI App 18, 396 Wis. 2d 658, 957 N.W.2d 583, 20–0298.

Wisconsin's new competency to stand trial statute. Fosdal & 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 Wis. 2d 408, 184 N.W.2d 156 (1971).

Psychomotor epilepsy may be legally classified as a mental disease or defect. Sprague v. State, 52 Wis. 2d 89, 187 N.W.2d 784 (1971).

The state does not have to produce evidence contradicting an insanity defense. The burden is on the defendant. Gibson v. State, 55 Wis. 2d 110, 197 N.W.2d 813 (1972).

A voluntarily drugged condition is not a form of insanity that can constitute a mental defect or disease. Medical testimony cannot be used both on the issue of guilt to prove lack of intent and also to prove insanity. Gibson v. State, 55 Wis. 2d 110, 197 N.W.2d 813 (1972).

The legislature, in enacting the ALI Institute definition of insanity as this section, deliberately and positively excluded "antisocial conduct" from the statutory definition of "mental disease or defect." Simpson v. State, 62 Wis. 2d 605, 215 N.W.2d 435 (1974).

The jury was not obliged to accept the testimony of two medical witnesses, although the state did not present medical testimony, because it was the jury's responsibility to determine the weight and credibility of the medical testimony. Pautz v. State, 64 Wis. 2d 469, 219 N.W.2d 327 (1974).

The court properly directed the verdict against the defendant on the issue of mental disease or defect. State v. Leach, 124 Wis. 2d 648, 370 N.W.2d 240 (1985).

Discussing use of expert evidence of personality dysfunction in the guilt phase of a criminal trial. State v. Morgan, 195 Wis. 2d 388, 536 N.W.2d 425 (Ct. App. 1995), 93–2611.

When a defendant requests an 11th–hour change to a not guilty by reason of mental disease or defect plea, the defendant has the burden of showing why the change is appropriate. There must be an offer of proof encompassing the elements of the defense and a showing of why the plea was not entered earlier. State v. Oswald, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238, 97–1219.

A court is not required to conduct an on–the–record colloquy with respect to a defendant's desire to abandon a not guilty by reason of mental disease or defect plea. Only fundamental constitutional rights warrant this special protection, and such a plea falls outside the realm of fundamental rights. State v. Francis, 2005 WI App 161, 285 Wis. 2d 451, 701 N.W.2d 632, 04–1360.

A court is not required to inform a defendant during a plea colloquy that the defendant may plead guilty to a crime and still have a jury trial on the issue of mental responsibility. Because neither the federal or state constitutions confers a right to an insanity defense, a court has no obligation to personally address a defendant in regard to the withdrawal of a not guilty by reason of mental disease or defect plea, although it is the better practice to do so. State v. Burton, 2013 WI 61, 349 Wis. 2d 1, 832 N.W.2d 611, 11–0450.

Although expert testimony may be helpful to a defendant in the responsibility phase of the trial, a favorable expert opinion is not an indispensable prerequisite to a finding of mental disease or defect. Although expert testimony is not required, it is highly unlikely that a defendant's own testimony, standing alone, will be sufficient to satisfy the burden of proof. State v. Magett, 2014 WI 67, 355 Wis. 2d 617, 850 N.W.2d 42, 10–1639.

Because every person is competent to be a witness under s. 906.01 and there is no exception in s. 906.01 for defendants who have entered a plea of not guilty by reason of mental disease or defect, a defendant is competent to testify to the defendant's own mental health at the responsibility phase of a trial. This does not mean, however, that the defendant's testimony alone is sufficient to raise a question for the jury. State v. Magett, 2014 WI 67, 355 Wis. 2d 617, 850 N.W.2d 42, 10–1639.

Consumption of prescription medication cannot give rise to a mental defect that would sustain an insanity defense. Furthermore, it is established law that one who mixes prescription medication with alcohol is responsible for any resulting mental state. State v. Anderson, 2014 WI 93, 357 Wis. 2d 337, 851 N.W.2d 760, 11–1467.

Although a better practice, a circuit court is not required to conduct a right–to–testify colloquy at the responsibility phase of a bifurcated trial resulting from a plea of not guilty by reason of mental disease or defect. State v. Lagrone, 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636, 13–1424.

The Power of the Psychiatric Excuse. Halleck. 53 MLR 229 (1970).

The Insanity Defense: Conceptual Confusion and the Erosion of Fairness. MacBain. 67 MLR 1 (1983).

Criminal Law—First Degree Murder—Evidence of Diminished Capacity Inadmissible to Show Lack of Intent. Gertig. 1976 WLR 623.

971.16 Examination of defendant. (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. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:

(a) The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

(b) The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

(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 15 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 15 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; 1995 a. 268; 2005 a. 244; 2021 a. 131.

Denying the defendant's motion for a directed verdict after the defendant's sanity witnesses had testified and the state had rested, then allowing three witnesses appointed by the court to testify, was not an abuse of discretion. State v. Bergenthal, 47 Wis. 2d 668, 178 N.W.2d 16 (1970).

The rules stated in *Bergenthal*, 47 Wis. 2d 668 (1970), apply to a trial to the court. Lewis v. State, 57 Wis. 2d 469, 204 N.W.2d 527 (1973).

It was not error to allow a psychiatrist to express an opinion that no psychiatrist could form an opinion as to the defendant's legal sanity because of unknown variables. Kemp v. State, 61 Wis. 2d 125, 211 N.W.2d 793 (1973).

"Mental condition" under sub. (3) refers to the defense of mental disease or defect, not to an intoxication defense. Loveday v. State, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

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 right. State v. Burdick, 166 Wis. 2d 785, 480 N.W.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 selected 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 selected 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 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; 1995 a. 27 s. 9126 (19); Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); 2007 a. 20 s. 9121 (6) (a).

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

The decision to withdraw a not guilty by reason of mental defect plea belongs to the defendant, not counsel. State v. Byrge, 225 Wis. 2d 702, 594 N.W.2d 388 (Ct. App. 1999), 97–3217.

Section 972.01 (1), which requires state consent to the waiver of a jury in a criminal trial, applies when a defendant seeks to waive a jury in the responsibility phase of a bifurcated trial. The state has a legitimate interest in having the decision of mental responsibility decided by a jury. State v. Murdock, 2000 WI App 170, 238 Wis. 2d 301, 617 N.W.2d 175, 99–0566.

A defendant can only be found not guilty by reason of mental disease or defect after admitting to the criminal conduct or being found guilty. While the decision made in the responsibility phase is not criminal in nature, the mental responsibility phase remains a part of the criminal case in general, and the defendant is entitled to invoke the 5th amendment at the mental responsibility phase without penalty. State v. Langenbach, 2001 WI App 222, 247 Wis. 2d 933, 634 N.W.2d 916, 01–0851.

Although a better practice, a circuit court is not required to conduct a right–to–testify colloquy at the responsibility phase of a bifurcated trial resulting from a plea of not guilty by reason of mental disease or defect. State v. Lagrone, 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636, 13–1424.

A directed verdict against a criminal defendant on the issue of insanity was constitutional. Leach v. Kolb, 911 F.2d 1249 (1990).

The trial court's wholesale exclusion of the defendant's proffered expert and lay testimony regarding post–traumatic stress disorder from the guilt phase of a murder trial did not violate the defendant's right to present a defense and to testify on the defendant's own behalf. Morgan v. Krenke, 232 F.3d 562 (2000).

Restricting the Admission of Psychiatric Testimony on a Defendant's Mental State: Wisconsin's *Steele* Curtain. Conley. 1981 WLR 733.

971.17 Commitment of persons found not guilty by reason of mental disease or mental defect.

(1) COMMITMENT PERIOD. (a) *Felonies committed before July 30, 2002.* Except as provided in par. (c), when a defendant is found not guilty by reason of mental disease or mental defect of a felony committed before July 30, 2002, the court shall commit the person to the department of health services for a specified period not exceeding two–thirds of the maximum term of imprisonment that could be imposed against an offender convicted of the same felony, including imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

(b) *Felonies committed on or after July 30, 2002.* Except as provided in par. (c), when a defendant is found not guilty by reason of mental disease or mental defect of a felony committed on or after July 30, 2002, the court shall commit the person to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

(c) *Felonies punishable by life imprisonment.* If a defendant is found not guilty by reason of mental disease or mental defect of a felony that is punishable by life imprisonment, the commitment period specified by the court may be life, subject to termination under sub. (5).

(d) *Misdemeanors.* When a defendant is found not guilty by reason of mental disease or mental defect of a misdemeanor, the court shall commit the person to the department of health services for a specified period not exceeding two–thirds of the maximum term of imprisonment that could be imposed against an offender convicted of the same misdemeanor, including imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

(1g) NOTICE OF RESTRICTION ON FIREARM POSSESSION. 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.

(1h) NOTICE OF RESTRICTIONS ON POSSESSION OF BODY ARMOR. If the defendant under sub. (1) is found not guilty of a violent felony, as defined in s. 941.291 (1) (b), by reason of mental disease or defect, the court shall inform the defendant of the requirements and penalties under s. 941.291.

(1j) SEXUAL ASSAULT; LIFETIME SUPERVISION. (a) In this subsection, "serious sex offense" has the meaning given in s. 939.615 (1) (b).

(b) If a person is found not guilty by reason of mental disease or defect of a serious sex offense, the court may, in addition to committing the person to the department of health services under sub. (1), place the person on lifetime supervision under s. 939.615 if notice concerning lifetime supervision was given to the person under s. 973.125 and if the court determines that lifetime supervision of the person is necessary to protect the public.

(1m) SEXUAL ASSAULT; REGISTRATION AND TESTING. (a) 1. If the defendant under sub. (1) is found not guilty by reason of mental disease or defect for a felony or a violation of s. 165.765 (1), 2011 stats., or of s. 940.225 (3m), 941.20 (1), 944.20, 944.30 (1m), 944.31 (1), 944.33, 946.52, or 948.10 (1) (b), the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis. The judge shall inform the person that he or she may request expungement under s. 165.77 (4).

2. Biological specimens required under subd. 1. shall be obtained and submitted as specified in rules promulgated by the department of justice under s. 165.76 (4).

(b) 1m. a. Except as provided in subd. 2m., if the defendant under sub. (1) is found not guilty by reason of mental disease or defect for any violation, or for the solicitation, conspiracy, or attempt to commit any violation, of ch. 940, 944, or 948 or s. 942.08 or 942.09, or ss. 943.01 to 943.15, the court may require the defendant to comply with the reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01 (5), and that it would be in the interest of public protection to have the defendant report under s. 301.45.

b. If a court under subd. 1m. a. orders a person to comply with the reporting requirements under s. 301.45 in connection with a finding of not guilty by reason of mental disease or defect for a violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. 942.09 and the person was under the age of 21 when he or she committed the offense, the court may provide that upon termination of the commitment order under sub. (5) or expiration of the order under sub. (6) the person be released from the requirement to comply with the reporting requirements under s. 301.45.

2m. If the defendant under sub. (1) is found not guilty by reason of mental disease or defect for a violation, or for the solicitation, conspiracy, or attempt to commit a violation, of s. 940.22 (2), 940.225 (1), (2), or (3), 944.06, 948.02 (1) or (2), 948.025, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, 948.095, 948.11 (2) (a) or (am), 948.12, 948.13, or 948.30, of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies, or of s. 940.30 or 940.31 if the victim was a minor and the defendant was not the victim's parent, the court shall require the defendant to comply with the reporting requirements under s. 301.45 unless the court determines, after a hearing on a motion made by the defendant, that the defendant is not required to comply under s. 301.45 (1m).

3. In determining under subd. 1m. a. whether it would be in the interest of public protection to have the defendant report under s. 301.45, the court may consider any of the following:

a. The ages, at the time of the violation, of the defendant and the victim of the violation.

b. The relationship between the defendant and the victim of the violation.

c. Whether the violation resulted in bodily harm, as defined in s. 939.22 (4), to the victim.

d. Whether the victim suffered from a mental illness or mental deficiency that rendered him or her temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.

e. The probability that the defendant will commit other violations in the future.

g. Any other factor that the court determines may be relevant to the particular case.

4. If the court orders a defendant to comply with the reporting requirements under s. 301.45, the court may order the defendant to continue to comply with the reporting requirements until his or her death.

5. If the court orders a defendant to comply with the reporting requirements under s. 301.45, the clerk of the court in which the order is entered shall promptly forward a copy of the order to the department of corrections. If the finding of not guilty by reason of mental disease or defect on which the order is based is reversed, set aside or vacated, the clerk of the court shall promptly forward to the department of corrections a certificate stating that the finding has been reversed, set aside or vacated.

(2) INVESTIGATION AND EXAMINATION. (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 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 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.

(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 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 ser-

vices. The department of health 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 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 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 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 services. A conditionally released person is subject to the conditions set by the court and to the rules of the department of health 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 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 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 72 hours after the detention, excluding Saturdays, Sundays, and legal holidays. 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 services may detain the person in a jail or in a hospital, center or facility specified by s. 51.15 (2) (d). 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) 1. If the court finds that the person is appropriate for conditional release, the court shall notify the department of health services. Subject to subd. 2. and 3., the department of health 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 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 services and person to be released request additional time to develop the plan.

2. If the county department of the person's county of residence declines to prepare a plan, the department of health services may arrange for any other county to prepare the plan if that county agrees to prepare the plan and if the person will be living in that county. This subdivision does not apply if the person was found not guilty of a sex offense, as defined in s. 301.45 (1d) (b), by reason of mental disease or defect.

3. If the county department for the person's county of residence declines to prepare a plan for a person who was found not guilty of a sex offense, as defined in s. 301.45 (1d) (b), by reason of mental disease or defect, the department may arrange for any of the following counties to prepare a plan if the county agrees to do so:

a. The county in which the person was found not guilty by reason of mental disease or defect, if the person will be living in that county.

b. A county in which a treatment facility for sex offenders is located, if the person will be living in that facility.

(4m) NOTICE 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, domestic partner under ch. 770, 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 do all of the following in accordance with par. (c):

1. Make a reasonable attempt to 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.

2. Notify the department of corrections.

(c) The notice under par. (b) shall inform the department of corrections and the person under par. (b) 1. 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 department of corrections and to the last–known address of the person under par. (b) 1.

(d) Upon request, the department of health services shall assist district attorneys in obtaining information regarding persons specified in par. (b) 1.

(5) PETITION FOR TERMINATION. A person on conditional release, or the department of health 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 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 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 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, domestic partner under ch. 770, 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 services shall do all of the following in accordance with par. (c):

1. If the person has submitted a card under par. (d) requesting notification, make a reasonable attempt to 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.

2. Notify the department of corrections.

(c) The notice under par. (b) shall inform the department of corrections and the person under par. (b) 1. of the defendant's name and termination or discharge date. The department of health services shall send the notice, postmarked at least 7 days before the defendant's termination or discharge date, to the department of corrections and to the last–known address of the person under par. (b) 1.

(d) The department of health services shall design and prepare cards for persons specified in par. (b) 1. to send to the department. The cards shall have space for these persons to provide 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) 1. 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) or s. 301.46 (3) (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 or a psychologist 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 audiovisual means.

(7m) MOTION FOR POSTDISPOSITION RELIEF AND APPEAL. (a) A motion for postdisposition relief from a final order or judgment by a person subject to this section shall be made in the time and manner provided in ss. 809.30 to 809.32. An appeal by a person subject to this section from a final order or judgment under this section or from an order denying a motion for postdisposition relief shall be taken in the time and manner provided in ss. 808.04 (3) and 809.30 to 809.32. The person shall file a motion for postdisposition relief in the circuit court before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.

(b) An appeal by the state from a final judgment or order under this section may be taken to the court of appeals within the time specified in s. 808.04 (4) and in the manner provided for civil appeals under chs. 808 and 809.

(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 men-

tal 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 Wis. 2d xiii (1987); 1987 a. 394; 1989 a. 31, 142, 334, 359; Sup. Ct. Order, 158 Wis. 2d xvii (1990); 1991 a. 39, 189, 269; 1993 a. 16, 98, 227; 1995 a. 27 s. 9126 (19); 1995 a. 417, 425, 440, 448; 1997 a. 35, 130, 181, 252, 275; 1999 a. 89; 2001 a. 95, 109; 2003 a. 50; 2005 a. 277, 431; 2007 a. 20 ss. 3875, 9121 (6) (a); 2007 a. 116; 2009 a. 26, 28, 137, 261; 2011 a. 258; 2013 a. 20, 362; 2017 a. 131, 140; 2021 a. 131.

Cross–reference: See also ch. DHS 98, Wis. adm. code.

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]

Neither sub. (3), the due process clause, or the equal protection clause provides a right to a jury trial in recommitment proceedings. State v. M.S., 159 Wis. 2d 206, 464 N.W.2d 41 (Ct. App. 1990).

The state, and not the county, is responsible for funding the conditions for a person conditionally released under this section. Rolo v. Goers, 174 Wis. 2d 709, 497 N.W.2d 724 (1993).

It is not a denial of due process for an insanity acquitee to be confined to a state health facility for so long as he or she is considered dangerous, although sane, provided that: 1) the commitment does not exceed the maximum term of imprisonment that could have been imposed for the criminal offense charged; and 2) the state bears the burden of proof that the commitment should continue because the individual is a danger to himself, herself, or others. State v. Randall, 192 Wis. 2d 800, 532 N.W.2d 94 (1995), 93–0219.

The sentence of a defendant convicted of committing a crime while committed due to a prior not guilty by reason of mental disease or defect commitment under this section may not be served concurrent with the commitment. State v. Szulczewski, 209 Wis. 2d 1, 561 N.W.2d 781 (Ct. App. 1997), 96–1323.

A court may not order a prison sentence consecutive to a commitment under this section. A sentence can only be imposed concurrent or consecutive to another sentence. State v. Harr, 211 Wis. 2d 584, 568 N.W.2d 307 (Ct. App. 1997), 96–2815.

A commitment under this section is legal cause under s. 973.15 (8) to stay the sentence of a defendant who commits a crime while serving the commitment. Whether to stay the sentence while the commitment is in effect or to begin the sentence immediately is within the sentencing court's discretion. State v. Szulczewski, 216 Wis. 2d 495, 574 N.W.2d 660 (1998), 96–1323.

The 30–day requirement in sub. (3) (e) is directory. The failure to have a hearing within 30 days of filing a petition to revoke a conditional release does not cause the court to lose competence to decide a second petition. State v. Schertz, 2002 WI App 289, 258 Wis. 2d 351, 655 N.W.2d 175, 02–0789.

Section 51.75, the interstate compact on mental health, does not apply to individuals found not guilty of criminal charges by reason of mental disease or defect in accord with this section. State v. Devore, 2004 WI App 87, 272 Wis. 2d 383, 679 N.W.2d 890, 03–2323.

A circuit court's order for commitment under sub. (3) (a) should be reviewed under a sufficiency of the evidence standard. State v. Wilinski, 2008 WI App 170, 314 Wis. 2d 643, 762 N.W.2d 399, 08–0404.

Sub. (3) (c) facially satisfies substantive due process protections. A finding of dangerousness is not required to order the involuntary medication of an individual committed under this section. Findings of dangerousness based on the original commitment under sub. (3) and on the denial of a petition for conditional release under sub. (4) (d) continue to be present until they are changed or upset. With such a basis present, a court evaluating a motion for an involuntary medication order need not make separate or independent findings of dangerousness. State v. Wood, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63, 07–2767.

Sub. (3) (c) is facially valid on procedural due process grounds for two primary reasons: 1) the statute requires that the court grant a conditional release hearing, which the committed person may request every six months. Although that review is not specific to the medication order, it must necessarily include a review of the medication order; and 2) language in this section outside sub. (3) (c) implicitly requires periodic review. State v. Wood, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63, 07–2767.

"Property damage" in sub. (3) (a) includes not only physical harm or destruction, but also loss of goods or money. State v. Brown, 2010 WI App 113, 328 Wis. 2d 241, 789 N.W.2d 102, 09–1822.

The proper standard of review of the trial court's dangerousness finding under former sub. (2), 1987 stats., as applied under sub. (8) is the sufficiency of the evidence test. Trial courts are to determine dangerousness by considering the statutory factors of former sub. (4) (d), 2009 stats., and balancing the interests at stake. State v. Randall, 2011 WI App 102, 336 Wis. 2d 399, 802 N.W.2d 194, 09–2779.

Under the broad terms of s. 51.30 (7), the confidentiality requirements created under s. 51.30 generally apply to "treatment records" in criminal not guilty by reason of insanity (NGI) cases. All conditional release plans in NGI cases are, by statutory definition, treatment records. They are created in the course of providing services to individuals for mental illness, and thus should be deemed confidential. An order of placement in an NGI case is not a "treatment record." La Crosse Tribune v. Circuit Court, 2012 WI App 42, 340 Wis. 2d 663, 814 N.W.2d 867, 10–3120.

The 72–hour time limit in sub. (3) (e) for the Department of Health Services to submit its statement of probable cause and petition to revoke conditional release is mandatory, not directory. State v. Olson, 2019 WI App 61, 389 Wis. 2d 257, 936 N.W.2d 178, 18–1075.

The plain meaning of sub. (7m) requires a postdisposition motion when an issue has not been previously raised, and the same provision directs that postdisposition motions "shall" be made in the time and matter required by s. 809.30. State v. Klapps, 2021 WI App 5, 395 Wis. 2d 743, 954 N.W.2d 38, 19–1754.

Sub. (3) (c) is unconstitutional to the extent that it allows administration of psychotropic medication to an inmate based on a finding of incompetence to refuse without there being a finding that the inmate is dangerous to himself or others. Enis v. Department of Health and Social Services, 962 F. Supp. 1192 (1996). But see State v. Wood, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63, 07–2767.

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. 301.45 (6) (a) or (ag), the defendant may be tried in the defendant's county of residence at the time that the complaint is filed. If the defendant does not have a county of residence in this state at the time that the complaint is filed, or if the defendant's county of residence is unknown at the time that the complaint is filed, the defendant may be tried in any of the following counties:

(a) Any county in which he or she has resided while subject to s. 301.45.

(b) The county in which he or she was convicted, found not guilty or not responsible by reason of mental disease or defect or adjudicated delinquent for the sex offense that requires the person to register under s. 301.45.

(c) If the defendant is required to register under s. 301.45 (1g) (dt), the county in which the person was found to be a sexually violent person under ch. 980.

(d) If the person is required to register only under s. 301.45 (1g) (f) or (g), any county in which the person has been a student in this state or has been employed or carrying on a vocation in this state.

(10) In an action under s. 23.33 (2h), 23.335 (5m), 30.547, or 350.12 (3i) for intentionally falsifying an application for a certificate of number, a registration, or a certificate of title, the defendant may be tried in the defendant's county of residence at the time that the complaint is filed, in the county where the defendant purchased the all–terrain vehicle, utility terrain vehicle, off–highway motorcycle, boat, or snowmobile if purchased from a dealer or the county where the department of natural resources received the application.

(11) In an action under s. 943.201, the defendant may be tried in the county where the victim or intended victim resided at the time of the offense or in any other county designated under this section. In an action under s. 943.203, the defendant may be tried in the county where the victim or intended victim was located at the time of the offense or in any other county designated under this section.

(12) Except as provided in s. 971.223, in an action for a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, or for a violation of any other law arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 a defendant who is a resident of this state shall be tried in circuit court for the county where the defendant resides. For purposes of this subsection, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.

History: 1987 a. 332; 1993 a. 98, 486; 1995 a. 440; 1997 a. 198; 1999 a. 89; 2003 a. 36; 2007 a. 1; 2009 a. 180; 2015 a. 89, 170; 2017 a. 365.

When failure to file a registration form and the act of soliciting contributions were elements of the offense, venue was proper in either of the two counties under sub. (2). Blenski v. State, 73 Wis. 2d 685, 245 N.W.2d 906 (1976).

A specific instruction on venue needs to be given only when venue is contested. State v. Swinson, 2003 WI App 45, 261 Wis. 2d 633, 660 N.W.2d 12, 02–0395.

If any element of the crime charged occurred in a given county, then that county can be the place of trial. Because the crime of receiving stolen property requires more than two acts, and one of the acts is that the property must be stolen, venue is properly established in the county where that act occurred. State v. Lippold, 2008 WI App 130, 313 Wis. 2d 699, 757 N.W.2d 825, 07–1773.

The phrase "for a violation of any other law arising from or in relation to" in sub. (12) modifies both "the official functions of the subject of the investigation" and "any matter that involves elections, ethics, or lobbying regulation." Accordingly, sub. (12) establishes venue in the county where the defendant resides for an alleged violation of any other law arising from or in relation to any matter that involves elections, ethics, or lobbying regulation. State v. Jensen, 2010 WI 38, 324 Wis. 2d 586, 782 N.W.2d 415, 08–0552.

In sub. (12) "regulation" modifies only "lobbying." Because regulation modifies only the word lobbying, sub. (12) is not limited to violations of administrative regulations; rather, it encompasses violations of any matter that involves elections, ethics, and lobbying regulation. State v. Jensen, 2010 WI 38, 324 Wis. 2d 586, 782 N.W.2d 415, 08–0552.

Sub. (2) provides that where two 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. Venue is therefore appropriate in any county in which at least one of the alleged acts occurred when the charge is based on a continuous offense. State v. Elverman, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528, 14–0354.

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 circuit 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 ...., ... (year)

....(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; 1997 a. 250; 2001 a. 61.

NOTE: See 1979–80 stats. for notes and annotations relating to s. 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]

Former s. 971.20, 1979 stats., is not unconstitutional. State v. Holmes, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

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

When an initial appearance is conducted before the judge assigned to hear the matter, strict application of the filing deadline is appropriate. When the intake system does not provide adequate notice of the assigned judge prior to arraignment, deadlines are relaxed to allow the defendant to intelligently exercise the right. State ex rel. Tinti v. Circuit Court, 159 Wis. 2d 783, 464 N.W.2d 853 (Ct. App. 1990).

Once a judge is substituted, that 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 Wis. 2d 251, 490 N.W.2d 780 (Ct. App. 1992).

When 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. State ex rel. Strong v. Circuit Court, 184 Wis. 2d 223, 516 N.W.2d 451 (Ct. App. 1994).

There is no "trial court" under sub. (4) until after a bindover. A motion to reduce bail prior to the bindover was not a motion to the trial court that prevented filing a request for substitution. State ex rel. Mace v. Circuit Court, 193 Wis. 2d 208, 532 N.W.2d 720 (1995).

A defendant who is charged jointly with another defendant may not obtain substitution of a judge under sub. (6) when the codefendant is not yet before the court. Sub. (6) applies in all multiple defendant actions when a codefendant is unavailable to join or refuses to join a substitution request. State ex rel. Garibay v. Circuit Court, 2002 WI App 164, 256 Wis. 2d 438, 647 N.W.2d 455, 02–0952.

There is no requirement under this section that a judge inform a defendant of the right to substitute a judge or that a judge provide facts bearing on a defendant's exercise of the right. State v. Tappa, 2002 WI App 303, 259 Wis. 2d 402, 655 N.W.2d 223, 02–0247.

When the original judge assigned to a case is later reassigned back to the case, the original judge is not a "new judge" under sub. (5), but remains the judge "originally assigned" under sub. (4). The reassignment does not create a second opportunity to substitute the original judge. State v. Bohannon, 2013 WI App 87, 349 Wis. 2d 368, 835 N.W.2d 262, 12–1691.

When the defendant persisted with his substitution request throughout the proceedings and did not follow the procedure under sub. (11) for abandoning his substitution request, the circuit court erred in presiding over the defendant's trial, sentencing, and postconviction motions. Harmless error analysis did not apply. State v. Harrison, 2015 WI 5, 360 Wis. 2d 246, 858 N.W.2d 372, 13–0298.

Under the unique circumstances in this case, when a defendant followed a circuit court's instruction to defer filing a request for substitution of a judge until after counsel was appointed, strict compliance with the 20–day deadline for filing a request for substitution after remittitur was not warranted. Although the substitution motion was not timely filed under the statute, it was timely filed in this case because the circuit court in essence extended the deadline until after trial counsel was appointed. State v. Zimbal, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327, 15–1292.

A request for substitution of judge under sub. (7) must be filed in writing with the circuit court. State v. Zimbal, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327, 15–1292.

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 whether a change of venue should have been granted include: 1) the inflammatory nature of publicity concerning the crime; 2) the degree to which adverse publicity permeated the area from which the jury would be drawn; 3) the timing and specificity of the publicity; 4) the degree of care exercised; 5) the amount of difficulty encountered in selecting the jury panel; 6) the extent to which the jurors were familiar with the publicity; 7) the defendants use of challenges available in voir dire; 8) the state's participation in adverse publicity; 9) the severity of the offense charged; and 10) the verdict returned. State v. Hebard, 50 Wis. 2d 408, 184 N.W.2d 156 (1971).

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 Wis. 2d 110, 197 N.W.2d 813 (1972).

The timing, specificity, inflammatory nature, and degree of permeation of publicity are extremely important in determining the likelihood of prejudice in the community. State ex rel. Hussong v. Froelich, 62 Wis. 2d 577, 215 N.W.2d 390 (1974).

When news stories concerning the crime were accurate informational articles of a nature that would not cause prejudice and four months had elapsed between the publication of the news stories and the trial, it tended to indicate little or no prejudice against the defendant. Jones v. State, 66 Wis. 2d 105, 223 N.W.2d 889 (1974).

There was no abuse of discretion in not changing the venue of a prosecution for first–degree murder when the transcript of the hearing on the issuance of the arrest warrant was sealed, the preliminary examination and other hearings were closed to the public and press, the police and prosecutor refused to divulge any facts to the public and press, and press reports were generally free from the details of incriminating evidence, straightforward, and not incendiary. State v. Dean, 67 Wis. 2d 513, 227 N.W.2d 712 (1975).

Only the defendant may waive the right to venue where the crime was committed. State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977).

The right to venue where the crime occurred is not a fundamental right of a criminal defendant. The decision to move for a change of venue is a tactical judgment delegated to counsel that does not require the defendant's personal concurrence. State v. Hereford, 224 Wis. 2d 605, 592 N.W.2d 247 (Ct. App. 1999), 98–1270.

971.223 Change of place of trial for certain violations. (1) In an action for a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, or for a violation of any other law arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, a defendant who is a resident of this state may move to change the place of trial to the county where the offense was committed. The motion shall be in writing.

(2) The court shall grant a motion under this section if the court determines that the county where the offense was committed is different than the county where the defendant resides. If there is more than one county where the offense was committed, the court shall determine which of the counties where the offense was committed will be the place of trial. The judge who orders the change in the place of trial shall preside at the trial and the jury shall be chosen from the county where the trial will be held. Preliminary matters prior to trial may be conducted in either county at the discretion of the court. The judge shall determine where the record shall be kept and, if the defendant is in custody, where the defendant shall be held.

(3) This section does not affect which prosecutor has responsibility under s. 978.05 (1) to prosecute criminal actions arising from violations under sub. (1).

(4) This section does not affect the application of s. 971.22. In actions under sub. (1), the court may enter an order under s. 971.225 only if the order is agreed to by the defendant.

History: 2007 a. 1.

971.225 Jury from another county. (1) In lieu of changing the place of trial under s. 971.22 (3) or 971.223, 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; 2007 a. 1.

971.23 Discovery and inspection. (1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the dis-

trict attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:

(a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.

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

(bm) Evidence obtained in the manner described under s. 968.31 (2) (b), if the district attorney intends to use the evidence at trial.

(c) A copy of the defendant's criminal record.

(d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

(e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any audiovisual recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

(f) The criminal record of a prosecution witness which is known to the district attorney.

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

(h) Any exculpatory evidence.

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

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

(am) Any relevant written or recorded statements of a witness named on a list under par. (a), including any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial.

(b) The criminal record of a defense witness, other than the defendant, which is known to the defense attorney.

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

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

(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.

(5c) PSYCHIATRIC TESTING OF VICTIMS OR WITNESSES. In a prosecution of s. 940.225, 948.02, or 948.025 or of any other crime if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01 (5), the court may not order any witness or victim, as a condition of allowing testimony, to submit to a psychiatric or psychological examination to assess his or her credibility.

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

(6c) INTERVIEWS OF VICTIMS BY DEFENSE. Except as provided in s. 967.04, the defendant or his or her attorney may not compel a victim of a crime to submit to a pretrial interview or deposition.

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

(7) CONTINUING DUTY TO DISCLOSE. 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 under this section, the party shall promptly notify the other party of the existence of the additional material or names.

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

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

(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 30 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 20 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.

(e) A witness list required under par. (a) or (d) shall be provided in addition to a witness list required under sub. (1) (d) or (2m) (a),

and a witness disclosed on a list under sub. (1) (d) or (2m) (a) shall be included on a list under par. (a) or (d) if the witness is required to be disclosed under par. (a) or (d).

(9) DEOXYRIBONUCLEIC ACID EVIDENCE. (a) In this subsection "deoxyribonucleic acid profile" has the meaning given in s. 939.74 (2d) (a).

(b) Notwithstanding sub. (1) (e) or (2m) (am), if either party intends to submit deoxyribonucleic acid profile evidence at a trial to prove or disprove the identity of a person, the party seeking to introduce the evidence shall notify the other party of the intent to introduce the evidence in writing by mail at least 45 days before the date set for trial; and shall provide the other party, within 15 days of request, the material identified under sub. (1) (e) or (2m) (am), whichever is appropriate, that relates to the evidence.

(c) The court shall exclude deoxyribonucleic acid profile evidence at trial, if the notice and production deadlines under par. (b) are not met, except the court may waive the 45 day notice requirement or may extend the 15 day production requirement upon stipulation of the parties, or for good cause, if the court finds that no party will be prejudiced by the waiver or extension. The court may in appropriate cases grant the opposing party a recess or continuance.

(10) PAYMENT OF COPYING COSTS IN CASES INVOLVING INDIGENT DEFENDANTS. When the state public defender or a private attorney appointed under s. 977.08 requests copies, in any format, of any item that is discoverable under this section, the state public defender shall pay any fee charged for the copies from the appropriation account under s. 20.550 (1) (a). If the person providing copies under this section charges the state public defender a fee for the copies, the fee may not exceed the applicable maximum fee for copies of discoverable materials that is established by rule under s. 977.02 (9).

(11) CHILD PORNOGRAPHY RECORDINGS. (a) In this subsection:

1. "Defense" means the defendant, his or her attorney, and any individual retained by the defendant or his or her attorney for the purpose of providing testimony if the testimony is expert testimony that relates to an item or material included under par. (b).

2. "Reasonably available" means sufficient opportunity for inspection, viewing, and examination at a law enforcement or government facility.

3. "Sexually explicit conduct" has the meaning given in s. 948.01 (7).

(b) Any undeveloped film, photographic negative, photograph, motion picture, videotape, or recording, which includes any item or material that would be included under s. 948.01 (3r), or any copy of the foregoing, that is of a person who has not attained the age of 18 and who is engaged in sexually explicit conduct and that is in the possession, custody, and control of the state shall remain in the possession, custody, and control of a law enforcement agency or a court but shall be made reasonably available to the defense.

(c) 1. Notwithstanding sub. (1) (e) and (g), a court shall deny any request by the defense to provide, and a district attorney or law enforcement agency may not provide to the defense, any item or material required in par. (b) to remain in the possession, custody, and control of a law enforcement agency or court, except that a court may order that a copy of an item or material included under par. (b) be provided to the defense if that court finds that a copy of the item or material has not been made reasonably available to the defense. The defense shall have the burden to establish that the item or material has not been made reasonably available.

2. If a court orders under subd. 1. a copy of an item or material included under par. (b) to be provided to the defense, the court shall enter a protective order under sub. (6) that includes an order that the copy provided to the defense may not be copied, printed, or disseminated by the defense and shall be returned to the court or law enforcement agency, whichever is appropriate, at the completion of the trial.

(d) Any item or material that is required under par. (b) to remain in possession, custody, and control of a law enforcement agency or court is not subject to the right of inspection or copying under s. 19.35 (1).

History: 1973 c. 196; 1975 c. 378, 421; 1989 a. 121; 1991 a. 223; 1993 a. 16, 486; 1995 a. 27, 387; 2001 a. 16; 2005 a. 42, 279; 2007 a. 20; 2009 a. 28, 138, 276; 2011 a. 284; 2017 a. 59.

Inadequate preparation for trial that results 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 Wis. 2d 344, 204 N.W.2d 482 (1973).

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 Wis. 2d 311, 210 N.W.2d 755 (1973).

When a party successfully moves 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 appellate review. State v. Van Ark, 62 Wis. 2d 155, 215 N.W.2d 41 (1974).

Under both the provisions of this section and the constitutional duty of the state to disclose to a criminal defendant evidence that is exculpatory in nature, there is no requirement to provide exculpatory evidence that is not within the exclusive possession of the state and does not surprise or prejudice the defendant. State v. Calhoun, 67 Wis. 2d 204, 226 N.W.2d 504 (1975).

Although substantial evidence indicates that the state had subpoenaed its "rebuttal" witness at least two 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's testimony was waived. Caccitolo v. State, 69 Wis. 2d 102, 230 N.W.2d 139 (1975).

The prosecutor's duty to disclose does not ordinarily extend to discovery of criminal records from other jurisdictions. The prosecutor must make good faith efforts to obtain records from other jurisdictions specifically requested by the defense. Jones v. State, 69 Wis. 2d 337, 230 N.W.2d 677 (1975).

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 Wis. 2d 481, 230 N.W.2d 745 (1975).

When the state calls a witness not included in its list of witnesses, 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 Wis. 2d 534, 230 N.W.2d 750 (1975).

The written summary, under sub. (1), of all oral statements made by the defendant that the state intends to introduce at trial is not limited to statements to the police. Incriminating statements made by the defendant to two witnesses were within the scope of the disclosure statute. Kutchera v. State, 69 Wis. 2d 534, 230 N.W.2d 750 (1975).

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 Wis. 2d 425, 247 N.W.2d 80 (1976).

When the defendant relied solely on an alibi defense and on the day of trial the complaining witness changed her mind as to the date of the occurrence, a request for a continuance based on surprise was properly denied because the defendant failed to show prejudice from the unexpected testimony. Angus v. State, 76 Wis. 2d 191, 251 N.W.2d 28 (1977).

A generalized inspection of prosecution files by defense counsel prior to a preliminary hearing is so inherently harmful to the orderly administration of justice that the trial court may not confer such a right. Cleveland v. Circuit Court, 82 Wis. 2d 454, 262 N.W.2d 773 (1978).

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

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

The prosecutor's repeated failure to disclose prior statements of witnesses was not prosecutorial overreaching that would bar reprosecution after the defendant moved for a mistrial. State v. Copening, 100 Wis. 2d 700, 303 N.W.2d 821 (1981).

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

When the defendant was not relying on an alibi defense and did not file a notice of alibi, the court did not abuse its discretion in barring alibi testimony. State v. Burroughs, 117 Wis. 2d 293, 344 N.W.2d 149 (1984).

There are three different situations of prosecutorial nondisclosure, each with a different standard: 1) when the undisclosed evidence shows the prosecutor's case included perjury; 2) when the defense made a pretrial request for specific evidence; and 3) when the defense made no request or a general request for exculpatory evidence. State v. Ruiz, 118 Wis. 2d 177, 347 N.W.2d 352 (1984).

A defendant charged as a "party to a crime" for conspiratorial planning of a robbery was not required to give an alibi notice regarding testimony concerning the defendant's whereabouts during planning sessions, as an alibi is a denial of being present at the scene of the crime when it was committed. State v. Horenberger, 119 Wis. 2d 237, 349 N.W.2d 692 (1984).

When blood alcohol content is tested under statutory procedures, results of the test are mandatorily admissible. The physical sample tested is not evidence intended, required, or even susceptible of being produced by the state under sub. (4) [now sub. (1) (g)] or (5). State v. Ehlen, 119 Wis. 2d 451, 351 N.W.2d 503 (1984).

When the state impounded a vehicle but released it to a scrap dealer before the defendant's expert could examine it, the charge was properly dismissed for destruc-

tion of exculpatory evidence. State v. Hahn, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986).

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

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

When the state inferred that a complainant sought psychological treatment as the result of a sexual assault by the defendant but did not offer the psychological records or opinions of the therapist as evidence, it was not improper to deny the defendant access to the records when the court determined that the records contained nothing that was material to the fairness of the trial. State v. Mainiero, 189 Wis. 2d 80, 525 N.W.2d 304 (Ct. App. 1994).

Although of public record, it is an intolerable burden on a defendant to be required to continually comb criminal records to determine if any of the state's witnesses are subject to criminal penalty. The burden is on the state to provide this information, particularly in light of a discovery request for the criminal records of the state's witnesses. State v. Randall, 197 Wis. 2d 29, 539 N.W.2d 708 (Ct. App. 1995).

Sub. (2m) requires disclosure of relevant substantive information that a defense expert is expected to present at trial whether as to findings, test results, or a description of proposed testimony. The privilege against self–incrimination and the right to present a defense are not violated by the requirement. State v. Revels, 221 Wis. 2d 315, 585 N.W.2d 602 (Ct. App. 1998), 97–3148.

This section does not provide for postconviction discovery, but a defendant has a right to postconviction discovery when the sought–after evidence is relevant to an issue of consequence. State v. O'Brien, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), 96–3028.

The state's failure to disclose that it took samples but failed to have them analyzed affected the defendant's right to a fair trial because it prevented the defendant from raising the issue of the reliability of the investigation and from challenging the credibility of a witness who testified that the test had not been performed. State v. DelReal, 225 Wis. 2d 565, 593 N.W.2d 461 (Ct. App. 1999), 97–1480.

When an indigent defendant requests the state to furnish a free transcript of a separate trial of a codefendant, the defendant must show that the transcript will be valuable to the defendant. State v. Oswald, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238, 97–1219.

Sub. (2m) (am) requires that any statement made by a witness named in a list under sub. (2m) (a) must be disclosed. Once a party is included on the list of witnesses under sub. (2m) (a), statements by the witness must be disclosed. State v. Gribble, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488, 00–1821.

"Plans to use" in sub. (1) (b) embodies an objective standard—what a reasonable prosecutor should have known and would have done under the circumstances of the case. The issue is whether a reasonable prosecutor, exercising due diligence, should have known of the defendant's statements before trial and, if so, would have planned to use them in the course of trial. The knowledge of law enforcement officers may in some cases be imputed to the prosecutor. Good faith alone does not constitute good cause for failing to disclose under sub. (7m). State v. DeLao, 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480, 00–1638.

A prosecutor has no duty to list a rebuttal witness if it is anticipated before trial that the witness will be called. The defense takes its chances when offering a theory of defense, and the state can keep knowledge of its legitimate rebuttal witnesses from the defendant without violating sub. (1) (d). State v. Konkol, 2002 WI App 174, 256 Wis. 2d 725, 649 N.W.2d 300, 01–2126.

A witness's probationary status was relevant and should have been disclosed by the prosecution under sub. (7). That the defendant disclosed to the jury that the witness had been convicted of a crime did not obviate the requirement that the status be disclosed. A witness's probationary status is relevant because it and the fear of possible revocation are pertinent to the material issue of whether the witness has ulterior motives to shape the witness's testimony. State v. White, 2004 WI App 78, 271 Wis. 2d 742, 680 N.W.2d 362, 03–1132.

Due process does not require the disclosure of material exculpatory impeachment information before a defendant enters into a plea bargain. However, a defendant making a statutory discovery demand may be entitled to material exculpatory impeachment evidence before entering into a plea bargain if the plea bargain is entered into within the time frame when the prosecutor would have been statutorily required to disclose the information. A defendant may withdraw a guilty plea on nonconstitutional grounds after demonstrating that withdrawal is necessary to avoid a manifest injustice. State v. Harris, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737, 02–2433.

Sub. (7m) (a) does not prevent the prosecution, whose evidence was excluded for violation of this section, from moving for dismissal without prejudice and refiling the charges and introducing the same evidence in a subsequent proceeding if there was no violation of this section in the subsequent proceeding. State v. Miller, 2004 WI App 117, 274 Wis. 2d 471, 683 N.W.2d 485, 03–1747.

Of necessity, the defense of alibi involves presence of the defendant at a place other than the scene of the crime, at the time the crime was committed. Since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi that leaves it possible for the accused to be the guilty person is no alibi at all. In this case, testimony did not constitute an alibi because it placed the defendant in the same hallway as the crime scene and did not indicate that it was physically impossible for the defendant to have committed the offense, but placed the defendant in the immediate vicinity of the crime. Therefore, notice of an alibi witness under sub. (8) was not required. State v. Harp, 2005 WI App 250, 288 Wis. 2d 441, 707 N.W.2d 304, 04–3240.

The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence the prosecutor should have discovered it. State v. Harris, 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397, 06–0882.

The circuit court erroneously exercised its discretion in failing to advise the jury that the state had failed to make timely disclosure of reports to the defendant under the criminal discovery statute, even though the state's failure to abide by the criminal discovery statute was not prejudicial error. However, this error was also subject to the harmless error test and was also not prejudicial. State v. Harris, 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397, 06–0882.

The defendant has no statutory subpoena right to obtain and copy police investigation reports and nonprivileged materials prior to a preliminary examination. Section 972.11 does not allow a criminal defendant access to the civil subpoena duces tecum power embodied in s. 805.07 (2). State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 06–1826.

Whether evidence could have been admitted in the state's case is not the test of admissibility of rebuttal evidence. The evidence may well have been admissible or "appropriate" in the plaintiff/state's case–in–chief, but only became necessary at rebuttal. State v. Sandoval, 2009 WI App 61, 318 Wis. 2d 126, 767 N.W.2d 291, 08–0482.

The circuit court properly exercised its discretion under sub. (6) in granting the state's motion for a protective order allowing the defense access at a state facility to a computer hard drive allegedly containing child pornography evidence, but prohibiting the defense from obtaining a copy of the hard drive. In light of the serious harms associated with child pornography and the ease with which electronically–stored files are widely disseminated, the court reasonably exercised its direction in granting the motion. State v. Bowser, 2009 WI App 114, 321 Wis. 2d 221, 772 N.W.2d 666, 08–0206.

Sub. (8) (a), by its plain language, only bars a prosecutor from commenting on missing alibi witnesses whom the defendant has named in the notice of alibi. State v. Saunders, 2011 WI App 156, 338 Wis. 2d 160, 807 N.W.2d 679, 10–2393.

Fingerprint evidence excluded from the case–in–chief due to a discovery sanction under sub. (7m) may later be used to challenge the defendant's testimony in rebuttal. Under *Konkol*, 2002 WI App 174, bona fide rebuttal evidence is admissible despite the absence of any disclosure by the state. The test for excluding testimony for impeachment purposes when the defendant takes the stand is untrustworthiness. Here, expert witness and fingerprint evidence were excluded by the trial court due to a statutory discovery violation, not due to the untrustworthiness or unreliability of the evidence. State v. Novy, 2012 WI App 10, 338 Wis. 2d 439, 809 N.W.2d 889, 11–0407.

While sub. (5) gives a defendant the right to inspect reports of the results of blood tests, it does not provide for inspection or testing if the blood itself is not going to be introduced into evidence. No statute or case law requires production of the sample, and consequently, no duty devolves upon the district attorney to preserve or maintain a quantity of a blood sample in order that a defendant may retest the blood. State v. Weissinger, 2014 WI App 73, 355 Wis. 2d 546, 851 N.W.2d 780, 13–0218. Affirmed on other grounds. 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592, 13–0218.

A witness list was not provided within a reasonable time when submission by the district attorney violated two court orders setting the time for submitting the list. Those court orders established a "reasonable time before trial" for the parties to list their witnesses. The burden was on the district attorney's office to show that it had good cause for this violation, not on the defendant to show that the defendant was prejudiced. There is no exception for a district attorney's discovery violation so that the significant consequences of the court's order will not be borne by the "blameless public." State v. Prieto, 2016 WI App 15, 366 Wis. 2d 794, 876 N.W.2d 154, 15–0279.

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

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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 was not prejudicial when the complaint stated the correct date and there was no evidence that the defendant was misled. A charge of the violation of s. "946.42 (2) (a) (c)" was a technical defect of language when both paragraphs applied. Burkhalter v. State, 52 Wis. 2d 413, 190 N.W.2d 502 (1971).

The failure to cite in the information and certificate of conviction the correct statutory subsections violated was immaterial when the defendant could not show that he was misled. Craig v. State, 55 Wis. 2d 489, 198 N.W.2d 609 (1972).

A lack of prejudice to the defendant, notwithstanding technical defects in the information, was made patent by defense 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 Wis. 2d 194, 214 N.W.2d 450 (1974).

Failure to allege lack of consent was not a fatal jurisdictional defect of an information charging burglary. Schleiss v. State, 71 Wis. 2d 733, 239 N.W.2d 68 (1976).

No statute authorizes a clerk of court's office to correct a clerical error in the sentence portion of a judgment of conviction. The circuit court, and not the clerk's office, must determine the merits of a request for a change in the sentence portion of a written judgment because of an alleged clerical error. State v. Prihoda, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857, 98–2263.

Section 971.08 (2), requiring vacation of judgment and permission to withdraw a plea in the event of improper notice of the consequences of the plea on immigration and naturalization is subject to harmless error analysis under this section and s. 805.18. *Douangmala*, 2002 WI 62, was objectively wrong because it failed to properly consider this section and s. 805.18 and is thus overruled. The mandatory "shall" in s. 971.08 (2) did not control when both of the harmless error savings statutes also use the mandatory "shall" language. This section and ss. 805.18 and 971.08 (2) are most comprehensibly harmonized by applying harmless error analysis. All of the relevant statutes use "shall," and, accordingly, none is "more mandatory" than any other. State v. Reyes Fuerte, 2017 WI 104, 378 Wis. 2d 504, 904 N.W.2d 773, 15–2041.

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 pro-

ceed 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.

When there is evidence that 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 Wis. 2d 720, 177 N.W.2d 881 (1970).

Since theft is an included crime of robbery, the amendment of the information from robbery to theft did not materially prejudice the defendant. All of the elements of theft are included in the elements of robbery. Of necessity, then, the defendant had notice and opportunity to prepare a defense to the elements of theft as well as to the additional elements that comprise the crime of robbery. Moore v. State, 55 Wis. 2d 1, 197 N.W.2d 820 (1972).

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 Wis. 2d 431, 210 N.W.2d 763 (1973).

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 Wis. 2d 722, 211 N.W.2d 449 (1973).

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

Notice of the nature and cause of the accusations is a key factor in determining whether an amendment at trial has prejudiced a defendant. The inquiry is whether the new charge is so related to the transaction and facts adduced at the preliminary hearing that a defendant cannot be surprised by the new charge since the preparation for the new charge would be no different than the preparation for the old charge. State v. Neudorff, 170 Wis. 2d 608, 489 N.W.2d 689 (Ct. App. 1992).

Failure of the state to obtain court permission to file a post−arraignment amended information did not deprive the court of subject matter jurisdiction. State v. Webster, 196 Wis. 2d 308, 538 N.W.2d 810 (Ct. App. 1995), 93−3217.

That the court's jurisdiction is invoked by the commencement of a case and that the legislature has granted prosecutors sole discretion to amend a charge only prior to arraignment means that the prosecutor's unchecked discretion stops at the point of arraignment. State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341, 08−0755.

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 the defendant is entitled to notice of the charge against him. LaFond v. Quatsoe, 325 F. Supp. 1010 (1971).

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 Wis. 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 s. 971.23 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 final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.

(11) In actions under s. 940.225, 948.02, 948.025, 948.051, 948.085, or 948.095, or under s. 940.302 (2), if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), 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.

(13) (a) A juvenile over whom the court has jurisdiction under s. 938.183 (1) (b) or (c) on a misdemeanor action may make a motion before trial to transfer jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938. The motion may allege that the juvenile did not commit the violation under the circumstances described in s. 938.183 (1) (b) or (c), whichever is applicable, or that transfer of jurisdiction would be appropriate because of all of the following:

1. If convicted, the juvenile could not receive adequate treatment in the criminal justice system.

2. Transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

3. Retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (b) or (c), whichever is applicable.

(b) The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence that he or she did not commit the violation under the circumstances described in s. 938.183 (1) (b) or (c), whichever is applicable, or that transfer would be appropriate because all of the factors specified in par. (a) 1., 2. and 3. are met.

History: 1975 c. 184; 1985 a. 275; 1987 a. 332 s. 64; 1993 a. 227, 486; 1995 a. 352, 387, 456; 1997 a. 205; 2005 a. 277; 2007 a. 116; 2009 a. 27.

When defense counsel refused, for strategic reasons, to pursue a motion made pro se by the defendant before trial to suppress evidence of identification at a lineup, there was a waiver of the motion. State v. McDonald, 50 Wis. 2d 534, 184 N.W.2d 886 (1971).

A claim of illegal arrest for lack of probable cause must be raised by motion before trial. Lampkins v. State, 51 Wis. 2d 564, 187 N.W.2d 164 (1971).

The waiver provision in sub. (2) is constitutional. Day v. State, 52 Wis. 2d 122, 187 N.W.2d 790 (1971).

A defendant is not required to make a motion to withdraw the defendant's plea to preserve the right to a review of an alleged error of refusal to suppress evidence. State v. Meier, 60 Wis. 2d 452, 210 N.W.2d 685 (1973).

A motion to suppress statements on the ground that they were products of an allegedly improper arrest was timely, notwithstanding failure to assert that challenge prior to arraignment, since it was made after the information was filed and prior to trial. Rinehart v. State, 63 Wis. 2d 760, 218 N.W.2d 323 (1974).

A request for a *Goodchild* hearing after direct testimony is concluded is not timely under sub. (2). Coleman v. State, 64 Wis. 2d 124, 218 N.W.2d 744 (1974).

The rule in sub. (2) does not apply to confessions, because sub. (2) is qualified by subs. (3) and (4). Upchurch v. State, 64 Wis. 2d 553, 219 N.W.2d 363 (1974).

A challenge to the search of one's person cannot be raised for the first time on appeal. Madison v. State, 64 Wis. 2d 564, 219 N.W.2d 259 (1974).

A defendant's right to testify at a *Goodchild*, 27 Wis. 2d 244 (1965), hearing may be curtailed only for the most compelling reasons. Franklin v. State, 74 Wis. 2d 717, 247 N.W.2d 721 (1976).

When the state used a traffic citation to initiate legal proceedings and subsequently decided to prosecute the action as a crime, the trial court erred in not giving the defendant ten days from the date of the amended charge to object to the sufficiency of the complaint. State v. Mudgett, 99 Wis. 2d 525, 299 N.W.2d 621 (Ct. App. 1980).

Sub. (6) authorizes the court to hold a defendant in custody or on bail for 72 hours pending new proceedings. State ex rel. Brockway v. Milwaukee County Circuit Court, 105 Wis. 2d 341, 313 N.W.2d 845 (Ct. App. 1981).

Factors that a court should consider when a defendant requests to be tried after a codefendant in order to secure the testimony of the codefendant are: 1) the likelihood that the codefendant will testify; 2) the likelihood that the testimony will be significant and beneficial to the defendant; 3) whether the defendant diligently attempted to secure the evidence in time for trial; 4) the length of delay requested; and 5) the burden on the trial court and prosecution. State v. Anastas, 107 Wis. 2d 270, 320 N.W.2d 15 (Ct. App. 1982).

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

A finding of not guilty by reason of mental disease or defect is a judgment of conviction under s. 972.13 (1) and thus sub. (10) is applicable. State v. Smith, 113 Wis. 2d 497, 335 N.W.2d 376 (1983).

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

To admit evidence of prior untruthful allegations of sexual assault under sub. (11) and s. 972.11 (2) (b) 3., the court must be able to conclude from an offer of proof that a reasonable person could infer that the complainant made a prior untruthful allegation. "Allegation" is not restricted to allegations reported to the police. State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (1990).

Sub. (10) is inapplicable when the statement sought to be suppressed has no possible relevance to the charge to which the defendant pled guilty. State v. Pozo, 198 Wis. 2d 706, 544 N.W.2d 228 (Ct. App. 1995).

An evidentiary hearing need not be granted as a matter of course when requested prior to trial. The *Nelson*, 54 Wis. 2d 489 (1972), standards for granting an evidentiary hearing, coupled with the safeguards provided by *Garner*, 207 Wis. 2d 520 (1996), are applicable to a circuit court's consideration of a pretrial motion. State v. Velez, 224 Wis. 2d 1, 589 N.W.2d 9 (1999), 96–2430.

The harmless error approach in appeals under sub. (10) is not precluded in any way. State v. Armstrong, 225 Wis. 2d 121, 591 N.W.2d 604 (1999), 97–0925.

A *Miranda*, 384 U.S. 436 (1966)–*Goodchild*, 27 Wis. 2d 244 (1965), hearing to determine voluntariness of confessions is an evidentiary hearing for the parties. It is not a soliloquy for the court. The court must not permit itself to become a witness or an advocate for one party. A defendant does not receive a full and fair evidentiary hearing when the role of the prosecutor is played by the judge and the prosecutor is reduced to a bystander. State v. Jiles, 2003 WI 66, 262 Wis. 2d 457, 663 N.W.2d 798, 02–0153.

The defendant has no statutory subpoena right to obtain and copy police investigation reports and nonprivileged materials prior to a preliminary examination. Section 972.11 does not allow a criminal defendant access to the civil subpoena duces tecum power embodied in s. 805.07 (2). State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 06–1826.

In order to admit evidence of alleged prior untruthful allegations of sexual assault under sub. (11) and s. 972.11 (2) (b) 3., the circuit court must first conclude from the proffered evidence that a jury could reasonably find that the complainant made prior untruthful allegations of sexual assault. The judge must determine whether a jury, acting reasonably, could find that it is more likely than not that the complainant made prior untruthful allegations of sexual assault. State v. Ringer, 2010 WI 69, 326 Wis. 2d 351, 785 N.W.2d 448, 08–0652.

Under sub. (11) and s. 972.11 (2) (b) 1., evidence of the complainant's alleged past sexual conduct with the defendant is admissible only if the defendant makes a three–part showing that: 1) the proffered evidence relates to sexual activities between the complainant and the defendant; 2) the evidence is material to a fact at issue; and 3) the evidence of sexual contact with the complainant is of sufficient probative value to outweigh its inflammatory and prejudicial nature. In determining that evidence of prior sexual conduct has a highly prejudicial effect, the legislature crafted into the rape shield law a balancing test that assumes, absent an evidentiary showing to the contrary, that the proffered evidence is more prejudicial than probative. State v. Sarfraz, 2014 WI 78, 356 Wis. 2d 460, 851 N.W.2d 235, 12–0337.

The court is under no obligation to hold an evidentiary hearing if a defendant's motion presents nothing more than conclusory allegations and fails to show that there are any factual disputes that require a hearing. State v. Radder, 2018 WI App 36, 382 Wis. 2d 749, 915 N.W.2d 180, 16–1954.

The purpose of sub. (10) is to promote judicial economy by offering defendants an incentive to plead guilty in cases in which a crucial issue is whether the order denying a motion to suppress was proper. The statute serves this purpose because defendants are more likely to plead guilty when they know that, if it is determined on appeal that the circuit court erroneously failed to suppress evidence, their convictions will be reversed and they will be entitled to trials unless the state proves that the error was harmless. State v. Abbott, 2020 WI App 25, 392 Wis. 2d 232, 944 N.W.2d 8, 19–0021.

Under *Armstrong*, 223 Wis. 2d 331 (1999), sub. (10) appeals are subject to a harmless error test. Although the manifest injustice standard applies when a defendant seeks to withdraw a guilty plea based on an error in the plea colloquy, a plea colloquy error is not governed by sub. (10). State v. Abbott, 2020 WI App 25, 392 Wis. 2d 232, 944 N.W.2d 8, 19–0021.

The press and public have no constitutional right to attend a pretrial suppression hearing when the defendant demands closed hearing to avoid prejudicial publicity. Gannett Co. v. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

971.315 Inquiry upon dismissal. Before a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s. 971.095 (2).

History: 1997 a. 181.

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 co–owners, 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 one of the following applies:

(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.

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

(d) If the property is mail, as defined in s. 943.204 (1) (d), the property was stolen from one or more owners during a course of conduct, as defined in s. 947.013 (1) (a).

(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; 2019 a. 144.

The legislature in sub. (3) (a) has explicitly provided prosecutors with discretion to charge multiple thefts as a single crime when 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. State v. Jacobsen, 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365, 13–0830.

Subs. (3) (a) and (4) allow for aggregation of the value of property alleged stolen where multiple acts of theft are prosecuted as one count. Reading s. 943.20 (1) (a) and subs. (3) (a) and (4) together, multiple acts of theft occurring over a period of time may, in certain circumstances, constitute one continuous offense that is not complete until the last act is completed. State v. Elverman, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528, 14–0354.

"Theft" under this section includes retail theft under s. 943.50. State v. Lopez, 2019 WI 101, 389 Wis. 2d 156, 936 N.W.2d 125, 17–0913.

971.365 Crimes involving certain controlled substances. (1) (a) In any case under s. 961.41 (1) (em), 1999 stats., or s. 961.41 (1) (cm), (d), (dm), (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. 961.41 (1m) (em), 1999 stats., or s. 961.41 (1m) (cm), (d), (dm), (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. 961.41 (3g) (a) 2., 1999 stats., or s. 961.41 (3g) (dm), 1999 stats., or s. 961.41 (3g) (am), (c), (d), (e), or (g) 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. 961.41 (1) (em), 1999 stats., s. 961.41 (1m) (em), 1999 stats., s. 961.41 (3g) (a) 2., 1999 stats., or s. 961.41 (3g) (dm), 1999 stats., or s. 961.41 (1) (cm), (d), (dm), (e), (f), (g), or (h), (1m) (cm), (d), (dm), (e), (f), (g), or (h) or (3g) (am), (c), (d), (e), or (g) 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; 1995 a. 448; 1999 a. 48; 2001 a. 109; 2003 a. 49; 2021 a. 179.

971.366 Use of another's personal identifying information: charges. In any case under s. 943.201 or 943.203 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.

History: 2003 a. 36.

971.367 False statements to financial institutions: charges. In any case under s. 946.79 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.

History: 2003 a. 36.

971.37 Deferred prosecution programs; domestic abuse and child sexual abuse. (1) In this section, "child sexual abuse" means an alleged violation of s. 940.225, 948.02, 948.025, 948.05, 948.06, 948.085, or 948.095 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 (1m), 940.201, 940.225, 940.23, 940.285, 940.30, 940.42, 940.43, 940.44, 940.45, 940.48, 941.20, 941.30, 943.01, 943.011, 943.14, 943.15, 946.49, 947.01 (1), 947.012 or 947.0125 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 an adult covered under par. (a) 2. or 3. pay the domestic abuse surcharge under s. 973.055 and, if applicable, the global positioning system tracking surcharge under s. 973.057. If the agreement requires the person to pay the global positioning system tracking surcharge under s. 973.057, the agreement shall also require the person to pay the domestic abuse surcharge under s. 973.055. Payments and collections of the domestic abuse surcharge and the global positioning system tracking surcharge under this subdivision are subject to s. 973.055 (2) to (4) or to s. 973.057 (2) and (3), respectively, except as follows:

a. The district attorney shall determine the amount due. The district attorney may authorize less than a full surcharge 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 and, if applicable, s. 973.057 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; 1995 a. 343, 353, 456; 1997 a. 35, 143; 2003 a. 139; 2005 a. 277; 2011 a. 35, 266; 2015 a. 172.

The provision of sub. (4) that consent to a deferred prosecution is not an admission of guilt and the consent may not be admitted in evidence in a trial for the crime is not rendered meaningless if an agreement may require an admission of guilt. Sub. (4) means that, should a deferred prosecution agreement be revoked, the defendant's willingness to enter the agreement may not be admitted at trial as evidence of guilt. When a deferred prosecution agreement requires a defendant to enter a plea as a condition, it is the plea itself and not the agreement that constitutes the acknowledgement of guilt. Indeed, if the agreement is dissolved, the plea remains. State v. Daley, 2006 WI App 81, 292 Wis. 2d 517, 716 N.W.2d 146, 05–0048.

971.375 Deferred prosecution agreements; sanctions. The district attorney may subject a defendant to sanctions as provided in the system developed under s. 301.03 (3) (a) if the defendant violates a condition of a deferred prosecution agreement.

History: 2013 a. 196.

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.

A judgment entered pursuant to a plea agreement withholding sentence and placing the defendant on probation for certain counts while entry of judgment on other counts was deferred provided the defendant committed no additional crimes and abided by the terms of probation was not a deferred prosecution agreement subject to this section. State v. Wollenberg, 2004 WI App 20, 268 Wis. 2d 810, 674 N.W.2d 916, 03–1706.

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.

971.41 Deferred prosecution program; worthless checks. (1) DEFINITION. In this section, "offender" means a person charged with, or for whom probable cause exists to charge the person with, a violation of s. 943.24.

(2) ESTABLISHMENT OF PROGRAM; ELIGIBILITY CRITERIA. A district attorney may create within his or her office a worthless check deferred prosecution program for offenders who agree to participate in it as an alternative to prosecution. The district attorney may establish criteria for determining an offender's eligibility for the program. Among the factors that the program may use in determining eligibility are the following:

(a) The face value of any check or order that was involved in the offense.

(b) If applicable, the reason why the check or order was dishonored by a financial institution.

(c) Other evidence presented to the district attorney regarding the facts and circumstances of the offense.

(d) The offender's criminal history.

(e) Prior referrals of the offender to the program.

(f) Whether other charges under s. 943.24 are pending against the offender.

(3) CONDITIONS OF PROGRAM. A deferred prosecution agreement to which this section applies may require an offender to do any of the following:

(a) Pay money owed for the worthless check or other order issued in violation of s. 943.24 to the district attorney for remittance to the payee of the worthless check or order.

(b) Make other payments for restitution for the offense, including payments to reimburse any person for fees assessed by a financial institution in connection with the person attempting to present the worthless check or other order.

(c) Pay administrative fees assessed under sub. (7).

(d) Pay for and successfully complete a class or counseling regarding financial management.

(4) OFFENSES COVERED. The deferred prosecution agreement shall specify the offenses for which prosecution is being deferred and shall describe the checks involved in the transactions. The district attorney shall agree not to prosecute those offenses while the agreement remains in effect or afterward if the offender successfully completes the deferred prosecution program.

(5) PRIVATE CONTRACTOR OPERATION OF PROGRAM. (a) A district attorney who establishes a deferred prosecution program under this section may contract with a private entity to operate or administer all or part of the program under the supervision, direction, and control the district attorney.

(b) A private entity acting under this subsection shall maintain insurance, financial accounting controls, and fund disbursement procedures as required by the district attorney. The district attorney shall audit the accounts of the private entity, but only after providing written notice.

(c) If an offender who is the subject of a deferred prosecution agreement under this section is represented by an attorney, a private entity acting under this subsection may communicate directly with the offender if any of the following apply:

1. The attorney has not informed the private entity of his or her representation in writing.

2. The attorney has authorized the communication.

3. The private entity has requested authorization for the communication from the attorney, but the attorney has failed to respond to that request within a reasonable period of time.

(d) A district attorney may cancel a contract entered into with a private entity under this subsection if any of the following occur:

1. The private entity or a principal of the private entity is convicted of any of the following:

a. A felony under any state or federal law.

b. A misdemeanor under any state or federal law if proof of the defendant's dishonesty is an essential element of the offense or if the offense relates to debt collection.

2. The private entity uses or threatens to use force or violence against an offender, a member of his or her family, or his or her property.

3. The private entity threatens the seizure, attachment, or sale of an offender's property without disclosing that prior court proceedings are required.

4. The private entity, with knowledge that the statement is false, makes or threatens to make a statement to a 3rd party that adversely affects an offender's reputation for creditworthiness.

5. The private entity initiates or threatens to initiate communication with an offender's employer. This subdivision does not apply if the communication is authorized under a court order or federal law or if all of the following apply:

a. An offender's payment is 30 or more days past due.

b. The private entity has provided written notice to the offender at his or her last known address, at least 5 days beforehand, of its intent to communicate with the employer.

6. The private entity harasses an offender, including by doing any of the following:

a. Communicating with the offender or a member of his or her family at any unusual time or place or at a time or place that the private entity knows or has reason to know is inconvenient to the offender or the family member. In the absence of evidence to the contrary, the private entity shall be presumed to know that communicating with an offender or a member of his or her family at his or her residence before 8:00 a.m. or after 9:00 p.m. is inconvenient to the offender or the family member.

b. Publishing or threatening to publish the offender's name on a list of offenders who allegedly refuse to pay restitution. This subd. 6. b. does not apply if the district attorney authorizes the publication of the offender's name in such a manner.

c. Advertising or threatening to advertise the sale of financial information regarding the offender in order to coerce the offender to pay restitution.

d. Disclosing or threatening to disclose information concerning the alleged violation of s. 943.24 without disclosing or agreeing to disclose the fact that the offender disputes the allegations. This subd. 6. d. applies only if the private entity knows that the offender reasonably disputes the allegations.

e. Disclosing or threatening to disclose information relating to an offender's case to any person other than the victim, the district attorney, or persons to whom the district attorney has properly authorized disclosure.

f. Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the number called.

g. Using profane, obscene, or abusive language in communicating with an offender, a member of his or her family, or others.

h. Engaging in any conduct which the district attorney finds was intended to cause and did cause mental or physical illness to the offender or a member of his or her family.

i. Attempting or threatening to enforce a claimed right or remedy with knowledge or reason to know that the claimed right or remedy does not exist.

j. Except as authorized by the district attorney, engaging in any form of communication that simulates legal or judicial process or that conveys the impression that the communication is being made, is authorized, or is approved by a governmental agency or official or by an attorney when it is not.

k. Using any badge, uniform, or other thing to indicate that the person is a government employee or official, except as authorized by law or by the district attorney.

L. Conducting business under a particular name or implying that the business has a particular name if the use of the name has not been authorized by the district attorney.

m. Misrepresenting the amount of restitution alleged to be owed by an offender.

n. Except as authorized by the district attorney, representing that an existing restitution amount may be increased by the addition of attorney fees, investigation fees, or any other fees or charges when those fees or charges may not legally be added.

o. Except as authorized by the district attorney, representing that the private entity is an attorney or an agent for an attorney if the entity is not.

p. Recovering or attempting to recover any interest or other charge or fee in excess of the actual restitution or claim unless the interest or other charge or fee is expressly authorized under the contract with the district attorney.

q. Communicating or threatening to communicate directly with an offender who is represented by an attorney. This subd. 6. q. does not apply to communications permitted under par. (c).

r. Engaging in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public.

s. Communicating with an offender or a member of his or her family at a time of day or night, with such frequency, or in such a manner as to constitute harassment of the offender or his or her family member.

(6) CONFIDENTIALITY. Records relating to programs established under this section are not subject to inspection or copying under s. 19.35. A district attorney may disclose information relating to persons participating in the program only to a private entity operating or administering such a program, to another district attorney, to a court, or to a law enforcement agency. A private entity operating or administering such a program may disclose information relating to such persons only as permitted under sub. (5) (d) 6. or to the district attorney or, with the district attorney's consent, to another district attorney or to a law enforcement agency.

(7) FEES. Notwithstanding s. 978.06 (1), a district attorney or a private entity acting under sub. (5) may charge a defendant who is a party to a deferred prosecution agreement under this section a fee to cover his, her, or its costs under the agreement. The district attorney may require that the fee be paid directly to the district attorney's office or to the private entity. The district attorney, or the district attorney and the private entity, may establish guidelines on when fees may be waived for an offender due to hardship and may authorize extended payment plans of not more than 6 months in length.

History: 2005 a. 462; 2007 a. 96.