97-0642

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 97-0642

COUNTY OF KENOSHA,

Plaintiff-Respondent,

v.

C & S MANAGEMENT, INC.
d/b/a CROSSROADS NEWS AGENCY,

Defendant-Appellant.

Appeal From The Final Judgment Entered In The Circuit Court For Kenosha County, The Honorable Bruce E. Schroeder, Circuit Judge, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the definition of "obscene material" in Kenosha County Ordinance No. 9.10.2 is unconstitutionally overbroad, penalizing protected speech in violation of U.S. Const. amends. I & XIV and Wis. Const. Art. I, §§1 & 3.

The circuit court held that the ordinance complied with *Miller v. California*, 413 U.S. 15 (1973), and that the free speech provisions of the Wisconsin Constitution provide no greater protections.

2. Whether the definition of "obscene material" in Kenosha County Ordinance No. 9.10.2 is unconstitutionally vague in violation of U.S. Const. amends. I & XIV and Wis. Const. Art. I, §§1 & 3.

The circuit court held that the ordinance is not unconstitutionally vague under the federal or state constitutions.

3. Whether this prosecution should have been dismissed on grounds of discriminatory prosecution, the prosecutor having selected for prosecution only Crossroads and two other "adult bookstores" located on Interstate 94 while not even investigating other, "mainstream" video outlets offering material indistinguishable from that charged here.

The circuit court denied a hearing on this issue, holding that the county constitutionally may discriminate on the basis of the content of the stores' non-obscene inventory.

4. Whether this prosecution should have been dismissed because its express purpose was to put the defendant out of business in order to censor its protected speech in violation of U.S. Const. amends. I & XIV and Wis. Const. Art. I, §§1 & 3.

The circuit court denied a hearing on this issue, holding that the county's intent to suppress the defendant's non-obscene speech is irrelevant.

5. Whether the circuit court misused its discretion and violated the defendant's rights to due process and a fair trial by excluding admissible and exculpatory evidence concerning the applicable "community standards."

The court below excluded evidence proffered by Crossroads concerning (1) a survey reflecting the relevant community standards regarding sexually explicit materials of the type at issue here, (2) expert testimony regarding those survey results, and (3) the ready availability and acceptance of materials comparable to that alleged here to be "obscene."

6. Whether the conviction can stand in the absence of any evidence that the videotape lacks serious value.

The circuit court denied Crossroads' motion for a directed verdict on this ground.

7. Whether the circuit court's jury instructions misstated the applicable standards for "obscenity."

Over defense objection, the circuit court rejected Crossroads' proffered instructions and instead instructed the jury in a manner which, Crossroads believes, misstated the applicable legal standards for "obscenity" and instead permitted conviction for constitutionally protected speech.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Crossroads requests both oral argument and publication in this case. Every one of the questions presents an important issue of first impression in this state.

The constitutional challenges apply equally to the state obscenity statute, Wis. Stat. §944.21, as well as to any other county ordinance enacted in compliance with that statute pursuant to Wis. Stat. §59.07(64m). The trial issues likewise apply equally to prosecutions under the state statute and any parallel county ordinances. The proper resolution of these issues thus is important not only to Crossroads, but to every other legitimate business in this state which provides sexually explicit materials to consenting adults, as well as to those, like Kenosha County, who seek to censor what others read, watch or think.

Even if these issues were relevant only to Kenosha's obscenity ordinance, however, publication would be appropriate. To date, Kenosha County has filed 17 separate citations alleging violation of the ordinance, all against three defendants: Crossroads, Satellite News & Video and Suburban Video. Seven citations resulted in jury acquittals or were dismissed on summary judgment. The nine remaining cases are yet to be tried and will be effected directly by the decision in this case if it is published.

Crossroads understands that publication would require convening a three-judge panel, *see* Wis. Stat. (Rule) 809.23(b)4, and that the Chief Judge on March 21, 1997, denied Crossroads' request for such a panel. That denial, however, was without prejudice. *See*

Wis. Stat. (Rule) 809.41(2) (chief judge may change decision on motion for three-judge panel at any time prior to decision on merits).

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STATEMENT OF THE CASE

Crossroads is an "adult bookstore" located on Interstate 94 in Kenosha County. It was charged in this and three other cases with violation of Kenosha County Ordinance No. 9.10.2 for having sold videotapes alleged to be "obscene" to undercover officers on four separate dates. Crossroads sold the videotape at issue here, entitled "Anal Vision #5," on May 27, 1993 (R51:41-42).[1] Two other "adult bookstores" along the Interstate, Satellite News & Video and

[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the separate Appendix, it will be further identified by Appendix page number as App. __.

Suburban Video, each similarly were charged in four separate complaints with such sales.

Crossroads moved to dismiss the prosecutions against it on the grounds raised here (R76-R77; R81-R82; R99-R103), as well as others. The other bookstores adopted Crossroads' motions (R14A:22-23), and the circuit court, Hon. Bruce E. Schroeder, Circuit Judge, presiding, heard the motions in all 12 cases together on May 26, 1995, and August 9, 1995 (R14A; R104). The court denied certain of the motions orally during those hearings and denied the remainder by written decision filed October 9, 1995 (R30). This Court denied Crossroads' petition for leave to appeal on November 3, 1995.

After jury trials involving the other stores resulted in two acquittals, and the other three cases against Crossroads were dismissed on summary judgment, this case proceeded to jury trial on January 27 to 29, 1997 (R47-R53). Crossroads stipulated to the fact that the videotape was sold for commercial purposes and that it knew the tape was sexually explicit (R51:56), so the only contested issue was whether the tape was "obscene material."

The officer testified that he purchased the tape (R51:41-42), and it was played for the jury (R51:56; R54:Exh.1). The county presented no evidence regarding either the tape's value or the relevant community standards.

Dr. Robert Alvarez, a licensed psychologist with an extensive background in sexual issues and the treatment of sexual dysfunction (R51:66-74; R54:Exh.2), testified on behalf of Crossroads. He testified that "Anal Vision #5" is not materially different from the types of sexually explicit materials he has used in such treatment and

in the training of health professionals (R51:78-80), and that the tape would be useful in such treatment (*id.*:85) and has serious educational value (*id.*:94).

Crossroads also sought introduction of exculpatory evidence concerning the relevant community standards: expert testimony concerning the results of a community standards survey showing widespread acceptance of materials of this kind in Wisconsin (R34; R48:28-43; R51:2-19; *see* R54:Exhs.A&B), and the actual availability and acceptance of comparable materials (R46; R48:2-14; R51:48, 59-64; *see* R54:Exhs.C&D; R54A:Exh.E). The court excluded that evidence (R51:19-24, 60-64; App. 78-83, 86-90).

That court also denied Crossroads' motion for a directed verdict, on the grounds that the county presented no evidence the tape lacked serious value (R51:113-15, 117-20; *see* R51:111-13; App. 91-100), as well as Crossroads' motion for a mistrial based upon the court's exclusion of evidence and erroneous jury instructions (R53:98-99; App. 111-12).

On January 29, 1997, the jury returned a non-unanimous verdict of guilty (R53:107; R59). The Court imposed a $4,000 fine and costs (R53:111-15) and entered judgment (R61; App. 1) the same day. Crossroads filed its notice of appeal on February 18, 1997 (R62).

ARGUMENT

I.

KENOSHA COUNTY ORDINANCE NO. 9.10.2'S BAN ON ALL "OBSCENE MATERIALS" IS CONSTITUTIONALLY OVERBROAD

Because the Kenosha ordinance is overbroad, banning protected as well as unprotected speech, this prosecution must be dismissed (R76-77; R7:17-20; R14A:29-34; App. 3-8). The circuit court, however, held to the contrary (R14A:34-37; App. 8-11).[2]

A. Standard of Review

An impermissibly overbroad statute

> is one that is designed to burden or punish activities which are not constitutionally protected, but the statute sweeps too broadly and includes within its compass activities protected by the First Amendment. Even if the individual defendant could have been convicted under a narrowly drawn statute, the defendant can raise the question of overbreadth in the First Amendment area. ...

State v. Princess Cinema of Milwaukee, 96 Wis.2d 646, 292 N.W.2d 807, 812 (1980) (citations omitted). "'In the area of freedom of expression . . . one has standing to challenge a statute whether or not his conduct could be proscribed by a properly drawn statute.'" *Id.* at 812-13 (citation omitted).

The constitutionality of a statute is reviewed *de novo* on appeal. *E.g.*, *State v. McManus*, 152 Wis.2d 113, 447 N.W.2d 654,

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[2] Kenosha County Ordinance No. 9.10.2 is in the Appendix (App. 130-33).

660 (1989).

B. Overbreadth Under the Federal Constitution

As explained by the United States Supreme Court,

> The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid....

R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (citations omitted). The Court has held, however, that certain categories of expression are not so protected because of "traditional limitations." *See id.* at 383.

Until recently, that Court adhered to the view, first expressed in *dictum*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and later elevated to a holding, *Roth v. United States*, 354 U.S. 476, 485 (1957), that "obscene material" was one such excluded category. *See Miller v. California*, 413 U.S. 15, 23 (1973). It was upon this assumption that the majority in *Miller* based its holding that materials meeting the three-pronged test for "obscenity" now incorporated into the Kenosha ordinance may be censored. More recently, however, the Court has pulled back from the categorical exclusion approach. *See R.A.V.*, 505 U.S. at 383-84.

The Court never has explained how the content-based proscription of obscenity jibes with its standard First Amendment analysis. Content-based proscription of libel and "fighting words," like the prohibition against falsely shouting "fire" in a crowded theater, plainly is justified under that analysis by the compelling state interest in preventing actual harm to someone else. *E.g.*, *id.* at 395-96 (content-based discrimination valid when necessary to further

compelling state interest). The sale or possession of "obscenity," on the other hand, causes no one any cognizable harm in the absence of distribution to juveniles or obtrusive exposure to juveniles or unconsenting adults, or where juveniles or non-consenting adults are used in the production of such materials.

While the thought that someone, somewhere might be enjoying sexually explicit materials may be offensive to some, a desire to "control the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment." *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson v. Texas*, 491 U.S. 397, 414 (1989). *See also* Tribe, *American Constitutional Law* at 904-19 (2d Ed. 1988).

While the United States Supreme Court has started to move in the right direction, it has not yet taken that next step of admitting the mistake it made in *Roth* and *Miller*. For purposes of analysis under the First and Fourteenth Amendment, therefore, those cases control this Court. The issue is raised here solely to preserve it for later review by the appropriate court.

C. Overbreadth Under the Wisconsin Constitution

This Court is not so bound, however, under the Wisconsin Constitution. While the Wisconsin Supreme Court has noted and applied *Miller* and prior federal standards when addressing the validity of Wisconsin's obscenity statute under the *federal* constitu-

tion, *see, e.g., Princess Cinema, supra*, it has not addressed the sufficiency of those standards under the Free Speech Clause of the Wisconsin Constitution. *See* Wis. Const. Art. I, §3.[3] This Court should do so here.

When interpreting provisions of the Wisconsin Constitution, the Court first must examine the plain meaning of the constitutional language in the context used. *Jacobs v. Major*, 139 Wis.2d 492, 407 N.W.2d 832, 836-37 (1987). If the meaning is not plain, the Court then examines

> The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution . . . and . . . [t]he earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution... .

Id. at 836 (citations and internal quotation marks omitted). The Court may also look to "'the nineteenth century plain meaning of the phrase'" at issue, as well as "'the objectives the framers sought to achieve.'" *Id.* (quoting *State v. Beno*, 116 Wis.2d 122, 139, 141, 341 N.W.2d 668 (1984)).

The plain meaning of the Wisconsin Constitution permits no categorical exclusion for "obscene" speech:

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[3] Only *McCauley v. Tropic of Cancer*, 20 Wis.2d 134, 121 N.W.2d 545 (1963), directly relies upon Article I, section 3. That decision did not, however, resolve the question whether the Wisconsin Constitution provides greater protection than does the First Amendment. *Id.*, 121 N.W.2d at 548. It did not have to, finding the book at issue not obscene even under the federal cases.

In the earlier decision in *State v. Chobot*, 12 Wis.2d 110, 106 N.W.2d 286, *appeal dismissed*, 368 U.S. 15 (1961), the Court quoted Article I, section 3, along with the First and Fourteenth Amendments to the federal constitution, and then wholly ignored the state provision.

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.

Wis. Const., Art. I, §3.

The Wisconsin Constitution expressly protects one's right to express his or her "sentiments on *all* subjects." *Compare* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press...."). That language is all encompassing--"all subjects" means "all subjects," not "any subject that most people do not find offensive." Similarly, the express protection of "sentiments" encompasses emotions and feelings, not just ideas. The language is plain on its face and does not exclude protection for offensive, sexually explicit speech, nor does it permit the state to pick and choose which subjects are worthy of protection. *Cf. Milwaukee County v. Carter*, 258 Wis. 139, 45 N.W.2d 90, 93 (1950) ("When, in Art. I, sec. 3, the Wisconsin Constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion... .").

There likewise is no evidence that the framers of the Wisconsin Constitution intended to exclude protection of "offensive" speech *sub silento*. The state constitutional convention considered a provision very similar to the First Amendment, but rejected it as too indefinite. *The Convention of 1846*, at 365 (M. Quaife ed. 1919); *see Jacobs v. Major,* 132 Wis.2d 82, 390 N.W.2d 86, 109 (Ct. App. 1986) (Gartzke, P.J., concurring), *rev'd on other grounds*, 139 Wis.2d 492, 407 N.W.2d 832 (1987). Instead, the convention chose to frame the state constitutional right of free speech more broadly

and more definitely than the first amendment.

The historical context likewise does not support the conclusion that the framers in 1848 intended an implicit "obscenity" exclusion from constitutional protection. The history of obscenity regulation in this country leading up to Wisconsin's 1848 convention is exhaustively reviewed by the Oregon Supreme Court in *State v. Henry*, 732 P.2d 9, 11-15 (Or. 1987).[4] *See also United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 132-33 (1973) (Douglas, J., dissenting). Analysis of that history reflects that "early American laws made blasphemy or heresy a crime, but sexual materials not having an antireligious aspect were left generally untouched." *Henry*, 732 P.2d at 14 (citation omitted).

The history of obscenity regulation in Wisconsin likewise fails to support an inference that Article I, section 3 implicitly permits censorship of all "obscenity." Wisconsin's first "obscenity" statute, enacted in 1848, was directed toward materials "manifestly tending to the corruption of the morals of youth." 1848 Wis. Rev. Stat. ch. 139, §11. This statute "certainly does not constitute any well-established historical exception to freedom of expression." *Henry*, 732 P.2d at 16 (addressing nearly identical statute).

The "obscenity" statute remained virtually unchanged for 50 years until the legislature amended the statute to bar "obscene or indecent" graffiti and the public display of pictures "representing the human form in a nude or semi-nude condition." 1899 Wis. Laws ch. 128. Two years later, the legislature acted to bar distribution of

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[4] The Court of Appeals and Supreme Court decisions in *Henry* are reproduced in the Appendix (App. 134-51).

books or papers "devoted principally to the publication of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime." *See* 1901 Wis. Laws ch. 256.[5] Not until 1941 did the legislature attempt to ban consensual adult pornography by criminalizing simple possession and defining obscenity in terms of "corruption of morals" rather than by reference to the morals of youth. *See* 1941 Wis. Laws ch. 322.

Given almost identical circumstances, the Oregon Supreme Court held that its state constitutional provision barring any law "restricting the right to speak, write, or print freely on any subject whatever," Or. Const. Art. I, §8, protects "obscenity" as well as any other type of speech. *Henry*, 732 P.2d at 17 (App. 138). The Court noted that the state's founders "were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others," *id.* at 16, and concluded that

> [t]he very fact that "obscenity" originally was pursued and repressed for its "anti-establishment" irreverence rather than for its bawdiness elsewhere and only to protect the morals of youth in this state leads us to conclude that no broad or all-encompassing historical exception from the guarantees of free expression was ever intended.

732 P.2d at 16 (App. 138). That court also noted the obvious difficulty in seeing "how language or material dealing with love, lust and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language or depiction of violence

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[5] The United States Supreme Court declared a similar provision unconstitutional in *Winters v. New York*, 333 U.S. 507 (1948).

and revolution." 732 P.2d at 16 (footnote omitted) (App. 138).

While the plain meaning of Article I, Section 3 of the Wisconsin Constitution thus must be given effect, this does not mean absolute freedom. Like all other types of protected speech, sexually explicit speech may be subjected to reasonable time, place and manner restrictions, *e.g. Kovacs v. Cooper,* 336 U.S. 77, 87-89 (1949), and may be regulated in the interests of unwilling viewers, *Erznoznik v. Jacksonville*, 422 U.S. 205, 211, 215 n.13 (1975), captive audiences, *see, e.g., Frisby v. Schultz,* 487 U.S. 474, 484-85 (1988), children, both as participants in the production of the material, *New York v. Ferber,* 458 U.S. 747 (1982), and as recipients of it, *e.g., Ginsberg v. New York*, 390 U.S. 629 (1968) (state may prohibit distribution of materials to minors which may not be barred from adults), and beleaguered neighborhoods, *e.g. Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 (1976) (zoning).

In other words, erotic speech, like all other speech, may be regulated to the extent necessary to prevent actual harm to others. *See* Wis. Const. Art. I, §3 (speaker may be held "responsible for the abuse of that right").[6] Constitutional protection for "offensive" erotic speech requires only that "it may not be punished in the interest of a uniform vision on how human sexuality should be regarded or portrayed." *Henry*, 732 P.2d at 18(App. 139); *see* Tribe, *American Constitutional Law* at 910 (2d Ed. 1988).

Kenosha Ordinance No. 9.10.2 is constitutionally overbroad

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[6] Being responsible for the "abuse" of one's right to free speech means being subject to a proper action for damages at law when one's exercise of that right harms someone else. *See State ex. rel. Attorney General v. Circuit Court of Eau Claire*, 97 Wis. 1, 12, 72 N.W. 193 (1897).

under the Wisconsin Constitution because its prohibitions go far beyond those permitted in the area of free speech and instead simply attempt to impose a particular, accepted view of human sexuality. The ordinance, and this prosecution, thus violate Article I, section 3 of the Wisconsin Constitution.

II.

THE STANDARDS FOR DISTINGUISHING CONSTITUTIONALLY PROTECTED SPEECH FROM THAT BARRED UNDER KENOSHA COUNTY ORDINANCE NO. 9.10.2 ARE UNCONSTITUTIONALLY VAGUE

Contrary to the court's holding below (R14A:38; App. 12), the definition of "obscene material" in Kenosha Ordinance No. 9.10.2 is unconstitutionally vague in violation of U.S. Const., amends. I & XIV and Wis. Const., Art. I, §§1 & 3 (R80-R81). A criminal statute is void for vagueness when it is "so obscure that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its application." *City of Milwaukee v. Wilson*, 96 Wis.2d 11, 291 N.W.2d 452, 456 (1980). *See also State v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750, 754 (1983).

To overcome a vagueness challenge, a statute first "must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited." *Id.* Second, the statute must "provide standards for those who enforce the laws and those who adjudicate guilt." *Id.* Where, as here, the provision allows enforcing officers "to create and apply their own standards," the statute is invalid. *Id.* at 754 (citation omitted).

Once again, review of this issue is *de novo*. *McManus*, *supra*.

A. Vagueness Under the Federal Constitution

Kenosha Ordinance No. 9.10.2, like the state statute upon which it is patterned, *see* Wis. Stat. §944.21, defines "obscene material" as meaning

> a writing, picture, sound recording or film which:
>
> 1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;
>
> 2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and
>
> 3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

Kenosha Ordinance No. 9.10.2(2)(c); *see* Wis. Stat. §944.21(2)(c).

This definition of "obscene materials" was first enunciated in *Miller v. California*, 413 U.S. 15, 24 (1973), and was later applied to consensual adult pornography in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The slim, 5-4 majority in *Miller* concluded, without much discussion, that the "specific prerequisites [of the *Miller* test] will provide fair notice to a dealer in such material that his public and commercial activities may bring prosecution." 413 U.S. at 27 (citations omitted).

The unconstitutional vagueness of that standard, however, has been amply demonstrated on the federal level. Indeed, the Supreme Court has candidly admitted that the *Miller* standard's "community"

approach "may well result in material being proscribed as obscene in one community but not in another." *Hamling v. United States*, 418 U.S. 87, 107 (1974). The "current" community standard approach also may result in material being proscribed as obscene at one time, even though the same material was not deemed obscene in the same community at an earlier time. As a result, materials deemed constitutionally protected in one community or at one time may nonetheless be banned criminally as "obscenity" in another.

The results, in terms of denying fair notice, are obvious. As Justice Brennan explained,

> even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing.

Paris Adult Theatre, 413 U.S. at 87-88 (Brennan, J, dissenting). Obscenity under the *Miller* standard "is a fact only in the sense that the jury must decide it. It is not independently or objectively verifiable as is the factual question as to whether an actress is 18 years old." *United States v. Levinson*, 790 F. Supp. 1483, 1487 (D. Nev. 1992). Accordingly,

> "it is *impossible* for a distributor of erotic materials to ascertain in advance whether a prosecutor, judge, or jury may in the future deem those materials offensive under the amorphous notion of 'community standards.'"

Id. (emphasis in original; quoting defendant's motion with approval).[7]

The "patently offensive" language of the *Miller* standard is, if anything, even more vague. The Supreme Court has recognized that

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[7] *Levinson* addressed not the unconstitutionality of the *Miller* standards, but whether the defendants could assert a defense that they believed in good faith that the materials were not obscene. The court said "no."

it is

> often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."

Cohen v. California, 403 U.S. 15, 25 (1971).

In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Supreme Court similarly found that a city ordinance barring groups of three or more persons from acting "in a manner annoying to persons passing by ..." was unconstitutionally vague "because it subjects the exercise of the right of assembly to an unascertainable standard." *Id.* at 614.

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather, in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

Id. (citation omitted). If "annoying" is inherently vague, how can a standard based upon the "offensiveness" of a certain expression provide fair notice?

Nonetheless, a slim majority of the United States Supreme Court clings to *Miller's* conclusory assertion that its standard somehow provides sufficient notice to those who wish both to exercise fully their constitutional rights and to avoid committing a criminal offense or ordinance violation. *See Pope v. Illinois*, 481 U.S. 497 (1987).[8] Even though that position is directly contrary to

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[8] Significantly, at least one member of that majority has suggested the (continued...)

the Court's application of the vagueness doctrine in other cases and should be abandoned, this Court is bound by those decisions on the federal question. The issue thus is raised here solely to preserve it for later review by the appropriate court.

B. Vagueness Under the State Constitution

Once again, this Court is not so bound under the state Constitution, as the Wisconsin Supreme Court has not addressed the sufficiency of the *Miller* standards under the "fair notice" requirements of the Due Process Clauses of the Wisconsin Constitution. This Court should do so here.

The Wisconsin Supreme Court has long recognized the vagueness doctrine under our own constitution. Nearly 70 years ago, the Court noted the "basic rule that a criminal statute should be so definite and certain that a defendant can know absolutely in advance whether or not a certain act will constitute a violation of the law." *Day-Bergwall Co. v. State*, 190 Wis. 8, 18, 207 N.W. 959 (1926) (quoting defendant's brief as "a proper exposition of the legal principle contended for"). More recently, the Court has held that

> [a] vague statute ... is one which operates to hinder free speech through the use of language which is so vague as to allow the inclusion of protected speech in the prohibition or to leave the individual with no clear guidance as to the nature of the acts which are subject to punishment.

Princess Cinema, 292 N.W.2d at 813.

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[8](...continued)
need to reexamine *Miller* because of the inherent impossibility of applying that standard. *Pope*, 481 U.S. at 504-05 (Scalia, J., concurring).

The *Miller* standards for determining obscenity fail to provide such guidance. *See* Section II,B, *supra*. As the Oregon Court of Appeals held in finding the *Miller* standards to be unconstitutionally vague under that state's constitution,

> When the material depicts "sexual conduct," the critical distinction between protected and criminal expression must be made on the basis of offensiveness, appeal to prurient interest and lack of serious literary, artistic, political and scientific value. Each of those determinations is necessarily subjective.
>
> * * *
>
> Because ORS 167.087(2) must be used by judges, juries and potential defendants to assess the criminality of particular conduct, we hold that its definitions are not sufficiently precise to determine whether particular sexually explicit material is legally obscene. It is not acceptable, as a matter of state constitutional law, that the precise course of the line dividing obscene expression be uncertain and that a person who chooses to disseminate sexually explicit materials must bear the risk of that uncertainty. The constitutional right to communicate freely on "any subject whatever" guaranteed by Article I, section 8 [of the Oregon Constitution,] requires more than the statute provides by way of guidance. A person who trades in sexually explicit materials cannot discern that his wares are legally obscene under the statute; a trial judge is left with no legal standard to apply; and jurors are required to determine what is or is not obscene on the basis of their personal ideas of contemporary state standards. ORS 167.087(2) is unconstitutional.

State v. Henry, 717 P.2d 189, 195-97 (Or. App. 1986) (App. 143-44), *aff'd*, 732 P.2d 9 (Or. 1987). *See also State v. Henry*, 732 P.2d 9, 10 (Or. 1987):

> The indeterminacy of the crime created by ORS 167.087 does not lie in the phrase "sexual conduct".... It lies in tying the criminality of a publication to "contemporary state standards." Even in ordinary criminal law, we doubt that the legislature can make it a crime to conduct oneself in a manner that falls short of "contemporary state standards." In a law censoring speech, writing or publications, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably "obscene" words or pictures does so at the peril of punishment for making a wrong guess about a future jury's estimate of "contemporary state standards" of prurience.

(App. 135).

Our Supreme Court reached a similar conclusion in *Princess Cinema* in discussing why the third *Miller* standard necessarily was an objective one rather than one based upon "contemporary community standards." The individual, the Court explained, "cannot be expected to anticipate whether a particular community will consider an allegedly obscene item to have serious merit under the categories enumerated in *Miller*." 292 N.W.2d at 811. Of course, the same lack of notice infects the "community standards" element of the first two *Miller* tests as well.

The Oregon Court of Appeals in *Henry* also emphasized a point wholly overlooked by the majority in *Miller,* that the test for obscenity does more than simply distinguish "conduct the legislature chooses to prohibit from conduct which it does not; it must separate prohibited expression from expression that *cannot be prohibited.*" 717 P.2d at 196 (emphasis in original) (App. 144). It is not sufficient, therefore, simply to provide notice that one's activities "may bring prosecution," *Miller*, 413 U.S. at 27, as such scant notice

violates what the Wisconsin Supreme Court has recognized to be one of the core purposes of the vagueness doctrine in speech-related cases: to avoid causing citizens to "'forsake activity protected by the First Amendment for fear it may be prohibited.'" *State v. Thiel,* 183 Wis.2d 505, 515 N.W.2d 847, 853 n.9 (1994) (*quoting M.S. News Co. v. Casado*, 721 F.2d 1281, 1290 (10th Cir. 1983)), *cert. denied,* 503 U.S. 878 (1994).

Even where protected expression is not involved, the Wisconsin Supreme Court has recognized the dangers of vague laws. In *Popanz*, *supra*, the Court struck down the compulsory school attendance law in the absence of "some objective standards to guide them in their attempts to "steer between lawful and unlawful conduct." 332 N.W.2d at 756 (citation omitted).

As in *Popanz*, the *Miller* standard incorporated into Kenosha Ordinance No. 9.10.2 "fails to provide fair notice to those who would seek to obey it and also lacks sufficient standards for proper enforcement." 332 N.W.2d at 756. Accordingly, that ordinance and this prosecution violate Wisconsin's Due Process Clause.

III.

BECAUSE CROSSROADS MADE OUT A PRIMA FACIE CASE FOR RELIEF, THE CIRCUIT COURT ERRED IN DENYING ITS DISCRIMINATORY PROSECUTION MOTIONS WITHOUT A HEARING

Crossroads filed two related motions seeking dismissal on the grounds (1) that the county had impermissibly singled out Crossroads and the other stores on Interstate 94 for prosecution based upon the

location of their businesses and the sexually explicit nature of their non-obscene merchandise, while allowing numerous other stores to sell tapes virtually identical to that alleged here to be obscene, and (2) that the express purpose of these prosecutions was not simply to weed out actual obscenity, but to close down the stores completely due to the sexually explicit nature of their non-obscene inventory and their proximity to the Interstate (R99-R103; R104:37-52; App. 13-29). Although supported by specific factual allegations (R100; App. 119-29), the motion was denied without a hearing (R104:43-45, 49-52; App. 20-22, 26-29).

A. Standard of Review

A defendant is entitled to an evidentiary hearing on a motion if it "alleges facts which, if true, would entitle the defendant to relief . . .." *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629, 633 (1972) (motion to withdraw guilty plea). Whether a motion raises a sufficient question of fact to require an evidentiary hearing is reviewed *de novo*. *E.g.*, *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50, 53 (1996). Where, as here, the motion alleged sufficient facts to support the claimed entitlement for relief, this Court must remand for an evidentiary hearing on the issue. *Zuehl v. State*, 69 Wis.2d 355, 230 N.W.2d 673, 677 (1975) (reversing and remanding for evidentiary hearing).

B. Discriminatory Prosecution

Both the express purpose and the effect of this and the related prosecutions was to discriminate against Crossroads for the exercise

of its right to free speech under the First Amendment to the United States Constitution and Article 1, §3 of the Wisconsin Constitution. Accordingly, these prosecutions violate the defendant's rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, §1 of the Wisconsin Constitution. *See, e.g., State v. McCollum*, 159 Wis.2d 184, 464 N.W.2d 44 (Ct. App. 1990).

The Supreme Court has held that

> the decision to prosecute may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," ..., including the exercise of protected statutory and constitutional rights.

Wayte v. United States, 470 U.S. 598, 608 (1985) (citations omitted).

A selective or discriminatory prosecution claim should be judged "according to ordinary equal protection standards." *Id.* (citation omitted). Accordingly, a prosecution must be dismissed when the defendant shows both that prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* (citations omitted). *See also McCollum*, 464 N.W.2d at 48-49. If a defendant establishes a prima facie case of discriminatory prosecution, the burden shifts to the state to show an exercise of valid prosecutorial discretion. *State v. Barman*, 183 Wis.2d 180, 515 N.W.2d 493, 497 (Ct. App. 1994) (citation omitted).

The "discriminatory effect" prong is satisfied where, as here, "similarly situated persons 'are generally not prosecuted for the same conduct.'" *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989) (citation omitted), *cert. denied,* 498 U.S. 1046 (1991), quoted

in *McCollum*, 464 N.W.2d at 49. "If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination." *Aguilar*, 883 F.2d at 706 (emphasis added), quoted in *McCollum*, 464 N.W.2d at 49.

Crossroads offered to prove that at least nine other video stores in Kenosha County sell or rent videotapes comparable to those alleged to be obscene in these cases, yet the *only* entities charged with violating Ordinance No. 9.10.2 are those "adult bookstores" along Interstate 94 specializing in sexually explicit materials: Crossroads, Satellite, and Suburban (R104:37-39, 45-46; R100; App. 14-16, 22-23, 119-29). The discrimination thus is squarely based upon the defendant's exercise of its First Amendment rights to sell sexually explicit materials which are, after all, "presumptively protected by the First Amendment," *New York v. P.J. Video, Inc.*, 475 U.S. 868, 869 (1978), and to advertise along a public freeway, in manner which is neither obscene, sexually explicit nor illegal, the sexually explicit nature of their businesses, which likewise is protected, *In re R.M.J.*, 455 U.S. 191 (1982). Video stores which do not exercise those rights, and instead specialize in materials which are not sexually explicit, are not prosecuted, despite the fact that they distribute materials indistinguishable from those alleged to be obscene in this and the related cases (R100:3-4; App. 121-22).

Discriminatory purpose is equally clear. The county is pursuing these actions not "in spite of" Crossroads' exercise of its right to advertise and to distribute constitutionally protected, albeit sexually explicit materials, but rather because of it. *See McCollum*, 464 N.W.2d at 49 (stating standard). The county's express purpose

in the cases against Crossroads, and the related cases against Suburban and Satellite, is to prevent them from conducting *any* business by closing them down, simply because it disagrees with the sexual nature of their inventory and the fact that they exercise their right to advertise their businesses in a plainly non-obscene manner along a well-traveled freeway. *See Aguilar*, 883 F.2d at 706 ("the prosecution of only those exercising their constitutional rights gives rise to an inference of discrimination"); *cf. United States v. P.H.E. Inc.*, 965 F.2d 848 (10th Cir. 1992) (coordinated effort of bringing multiple prosecutions in effort to drive obscenity defendants out of business violated First Amendment).

Indeed, the prosecution has refused to take readily available steps to ensure that it targeted only true obscenity and did not suppress or chill protected speech. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965) (noting that a prosecution itself can have a chilling effect on free speech). The county could have asked the defendant voluntarily to remove certain items alleged to be obscene from its inventory. It did not. Indeed, Crossroads specifically asked the prosecutor to identify those items in its inventory he believed might be obscene so it could avoid violating the statute while exercising its free speech rights. He declined to do so. The county could have requested a declaratory judgment concerning those specific items from Crossroads' inventory which it believed to be obscene. Wis. Stat. §806.05. It did not. The county could have submitted any videotapes believed to be obscene to the Attorney General for review as an independent third party. *See* Wis. Stat. §165.25(3m). Again, it refused to do so. The county could have filed the first claim in a

timely manner, thus giving the defendant notice of the kind of materials the prosecution believed might be obscene and an opportunity to purge its own inventory. It did not, waiting instead for over a year and three additional alleged violations before filing any citations at all. (R100; App. 119-29).

Crossroads having demonstrated a prima facie case of discriminatory prosecution, the burden should have shifted to the prosecution to show an exercise of valid prosecutorial discretion. *Barman,* 515 N.W.2d at 498. Because these prosecutions were brought to squelch Crossroads' speech, more than just some rational justification of the classification system should have been required. *Id.* at 498 n.5; *see McCollum*, 464 N.W.2d at 51 (analyzing governmental policy of arresting only women for prostitution under intermediate level of scrutiny to determine whether challenged classification is substantially related to important government interest). Rather, the state must demonstrate that the classification between those exercising their right to sexually explicit speech and to legally advertise their businesses along a public freeway and those who are not is necessary to further a compelling state interest. *See, e.g., R.A.V.,* 505 U.S. at 395-96.

The circuit court required neither, and received nothing but a bald assertion that the county could prosecute anyone it wants to and for whatever reason it deems appropriate. These discriminatory prosecutions should be dismissed.

C. Intent to Prevent Protected Speech

Dismissal also was required on the related grounds that this

prosecution was brought to suppress Crossroads' non-obscene, constitutionally protected speech in violation of U.S. Const., amends. I & XIV and Wis. Const., Art. I, §§1 & 3 (R102-R103). It is well-settled that "a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful." *United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir. 1992); *see, e.g., Wayte*, 470 U.S. at 608 ("[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard' ... including the exercise of protected statutory and constitutional rights"); *Dombrowski, supra*; *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). "The government may not regulate [speech] based on hostility--or favoritism--towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386.

> A defendant raising such a challenge must show either
>
> (1) actual vindictiveness or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness. Thereafter, the burden shifts to the prosecution to justify its decision with legitimate, articulable, objective reasons.

P.H.E., Inc., 965 F.2d at 860, quoting *United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991). If the prosecution's improper purpose to suppress constitutionally protected conduct was "a major motivating factor and played a prominent role in the decision to prosecute," the prosecution must be enjoined or dismissed. *Council for Periodical Distr. Ass'n v. Evans*, 642 F. Supp. 552, 566 (M.D. Ala. 1986), *aff'd in relevant part*, 827 F.2d 1483 (11th Cir. 1987).

Crossroads' offer of proof to the circuit court demonstrated

that Crossroads, Satellite and Suburban were singled out from the numerous Kenosha County video outlets selling or renting videos indistinguishable from those charged here, solely because those three specialize in constitutionally protected, adult entertainment and advertise that fact along the interstate. The prosecutor's express purpose was to shut them down. (R100; R104:37-39, 45-46; App. 14-16, 22-23, 119-29).

Crossroads having provided ample reason to believe that the major if not only reason for this and the related prosecutions was the prosecution's improper purpose to punish Crossroads' exercise of its free speech rights by closing down its business, the burden should have been on the county to prove that the prosecutions were not motivated by such a purpose. *P.H.E., Inc.*, 965 F.2d at 860. Once again, however, it failed to do so and the circuit court refused even to hold an evidentiary hearing. At the very least, therefore, this Court should remand for such a hearing.

IV.

THE CIRCUIT COURT ERRED BY EXCLUDING RELEVANT, ADMISSIBLE DEFENSE EVIDENCE CONCERNING THE APPLICABLE COMMUNITY STANDARD

Both the "prurient interest" and the "patently offensive" prongs of the test for "obscenity" require application of "contemporary community standards" of adult persons in Wisconsin. Kenosha Ordinance No. 9.10.2(2)(a)&(c). At trial, however, the court excluded evidence proffered by Crossroads concerning the relevant statewide community standards, instead requiring the jury to rely on

its own, necessarily limited knowledge of what others might think. Specifically, Crossroads sought admission of a survey concerning community standards in Wisconsin (R54:Exh.B), the expert testimony of Dr. Joseph Scott concerning that survey, and evidence of comparable materials accepted in the community.

While admission of evidence generally falls within the circuit court's sound exercise of discretion, that discretion is misused where, as here, exclusion is based upon an erroneous legal standard or an unreasonable application of law to the facts. *State v. Mainiero*, 189 Wis.2d 80, 101, 525 N.W.2d 304 (Ct. App. 1994). A defendant charged with obscenity is entitled to "enlighten the tribunal" regarding the prevailing community standards. *Smith v. California*, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring). Accordingly, the exclusion of relevant, exculpatory evidence violates the defendant's rights to due process and a fair trial as well. *Cf. Washington v. Texas*, 388 U.S. 14 (1967).

A. Admissibility of Community Standards Survey and Expert Testimony

1. Expert Evidence Concerning Community Standards, Including Survey Evidence, Is Admissible Under Wisconsin's Rules Of Evidence

The basis for the circuit court's rejection of the survey evidence is far from clear. Through several colloquys on the issue, the court expressed surprise at the survey's exculpatory results and questioned the manner in which it was conducted (*see* R65:30-42; R48:34-38; R51:19-24; App. 50-54, 78-83). Defense counsel's

proffer regarding Dr. Scott's testimony addressed each of the concerns expressed by the court (R48:28-43; R51:2-19; App. 44-78). The court's ultimate ruling essentially was that survey evidence is inherently unreliable, and thus not helpful to the jury, despite the expert's proffer to the contrary (*see* R51:19-24; App. 78-83).

In Wisconsin, however, "[t]he rules governing expert evidence are liberally weighed in favor of admitting any evidence that might assist the trier of fact." D. Blinka, 7 *Wisconsin Practice - Evidence* 352 (1991). *See, e.g. State v. Donner*, 192 Wis.2d 305, 531 N.W.2d 369, 374 (Ct. App. 1995) ("[E]xpert testimony is admissible in Wisconsin if relevant and will be excluded only if the testimony is superfluous or a waste of time"); *State v. Peters*, 192 Wis.2d 674, 534 N.W.2d 867, 873 (Ct. App. 1995) ("Once the relevancy of the evidence [statistical] is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment," citing *State v. Walstad*, 119 Wis.2d 483, 351 N.W.2d 469, 486 (1984)). Expert testimony thus will be permitted so long as (1) it is relevant, (2) the witness is qualified as an expert, and (3) the evidence will assist the trier of fact in determining an issue of fact. *Peters*, 534 N.W.2d at 872.

Expert evidence is, of course, relevant and admissible in an obscenity case. *See, e.g., Kaplan v. California*, 413 U.S. 115, 121 (1973) ("The defense should be free to introduce appropriate expert testimony"); *see also Model Penal Code* §251.4 ("Expert testimony ... relating to factors entering into the determination of the issue of

obscenity, shall be admissible."). Indeed, because of the special First Amendment interests involved in obscenity cases, courts should be extremely cautious about excluding expert testimony offered by the defense in such cases. *See Commonwealth v. United Books, Inc.*, 453 N.E.2d 406, 412 (Mass. 1983); *cf. People v. Hanserd*, 483 N.E.2d 1321, 1322 (Ill. App. 1985).

There likewise can be no doubt but that Dr. Scott was fully qualified as an expert. He was a research associate at the Kinsey Institute, had researched and presented papers dealing with social science data in obscenity trials for nearly 25 years, and had testified (for the state as well as for the defense) in at least 20 different cases and in at least 12 different states on the exact issue presented here (R51:2-5; R54:Exh.A; App. 61-64).

"The *sine qua non* of the admissibility of an expert opinion is whether it will be helpful to the jury in deciding the issue to which it is addressed." *Lievrouw v. Roth*, 157 Wis.2d 332, 459 N.W.2d 850, 859 (Ct. App. 1990); *see also James v. Heintz*, 165 Wis.2d 572, 478 N.W.2d 31, 34 (Ct. App. 1991) ("Opinion evidence is admissible if it can help the jury decide a contested issue of fact").

Under Kenosha's obscenity ordinance, the jury must determine and apply the statewide "contemporary community standards." The proffered expert testimony and public opinion survey, which explored the attitudes of a representative sample of the statewide community about sexually explicit videotapes, would have provided necessary assistance to the jury in that determination. Indeed, "to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitu-

tional safeguards of due process." *Smith*, 361 U.S. at 165 (Frankfurter, J., concurring).

Jurors are not to apply their own personal opinions in determining whether a video appeals to the prurient interest or describes sexual conduct in a patently offensive way. *See Hamling v. United States*, 418 U.S. 87, 107 (1974). There is a substantial risk, however, that some jurors will do just that in the absence of evidence reflecting the views of a representative sample of the relevant community. *See* F. Schauer, *The Law of Obscenity* 286 (1976). Few, if any, jurors will have practical experience that would enable them to assess the community standards for a large and diverse state like our own about a relatively personal topic like sexually explicit material. *Cf. People v. Nelson*, 410 N.E.2d 476, 479 (Ill. App. 1980) (emphasizing probative value of survey results where "the jury *voir dire* showed that most of the jurors had lived all of their lives in the community of Rockford, did not read a paper from any other community within the State of Illinois and read few national magazines"). Even within their own circle of friends, family, and acquaintances, jurors might have difficulty in determining what is acceptable to that group inasmuch as persons in our culture tend to be reluctant to discuss openly their private views and practices regarding sexually explicit materials.

Contrary to the circuit court's belief, a community standards survey is the most accurate and efficient means of presenting evidence concerning community standards. *Cf. Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis.2d 226, 552 N.W.2d 440, 445 (Ct. App. 1996) (consumer surveys are "direct

evidence" of public knowledge or sentiments). Numerous courts have recognized the utility and admissibility of these surveys in obscenity cases. *See, e.g., Saliba v. State*, 475 N.E.2d 1181 (Ind. App. 1985) (reversing conviction based on trial court's exclusion of community standards survey); *Asaff v. State*, 799 S.W.2d 329 (Tex. App. 1990) (same); *Carlock v. State*, 609 S.W.2d 787 (Tex. Cr. App. 1981) (same); *State v. Williams*, 598 N.E.2d 1250, 1257 (Ohio App. 1991) (holding that "a properly conducted opinion poll may be relevant to a determination of whether the particular film in question is obscene" and remanding for determination as to whether particular survey was conducted in accordance with generally accepted methodology; if so, then survey admissible); *see also* Attorney General's Commission on Pornography 1280 (1986) ("Contemporary community standards may be proven by expert testimony based upon properly conducted public opinion polls taken in the relevant area").

As the Indiana Court of Appeals stressed in reversing a conviction based on the trial court's exclusion of a public opinion survey:

> [E]xpert evidence on this issue may be highly relevant. The jurors are not instructed to evaluate obscenity based on their personal opinions but are charged with applying contemporary community standards. ... In the absence of expert testimony, the jury's determination of contemporary community standards runs the risk of incorporating the individual juror's "necessarily limited, hit-or-miss subjective view" "on the basis of his personal upbringing or restricted reflection or particular experience of life." *Smith v. California*, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring). Consequently, the defendant in an obscenity prosecution is entitled to introduce relevant and appropriate expert testimony on the issue of contemporary community standards.

> Expert testimony based on a public opinion poll is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise: "A properly conducted public opinion survey itself adequately ensures a good measure of trustworthiness, and its admission may be necessary in the sense that no other evidence would be as good as the survey evidence or perhaps even obtainable as a practical matter." *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216, 1221 (1978).

Saliba, 475 N.E.2d at 1185.

Community standards surveys are not inadmissible on the grounds that the survey respondents did not view the specific materials alleged to be obscene. *See, e.g., Carlock*, 609 S.W.2d at 789-90; *Saliba*, 475 N.E.2d at 1187. After all, the jury first must determine the governing community standards before it can determine whether the tape at issue is obscene. *Carlock*, 609 S.W.2d at 788. Community standards thus must be determined without regard to the content of the specific video at issue. *See Berg v. State*, 599 S.W.2d 802, 804 (Tex. Cr. App. 1980) ("[I]t goes without saying that before members of a jury can decide whether given material is in fact obscene ... they must first determine what are the governing 'contemporary community standards'"). At most, the fact that the survey respondents did not view the tape at issue goes to the weight, not admissibility, of the evidence. *Carlock*, 609 S.W.2d at 789-90. Dr. Scott would have testified, moreover, regarding studies establishing that there is no statistically significant difference between results of surveys in which explicit materials actually were displayed and those in which they were merely described (R51:15-16; App. 74-75).

Public opinion survey results likewise are not excludable

hearsay. *See, e.g., Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir. 1976) (survey results fall under the existing state of mind hearsay exception); J. Weinstein and M. Berger, 4 *Weinstein's Evidence* 803-364 (1994) (survey results admissible under Fed. R. Evid. 703 or 1006).

The hypothetical technical inadequacies cited by the court below, including the format of the questions or the manner in which it was taken, bear only on the weight of the evidence, not its admissibility. *E.g., Jacobs v. Major*, 132 Wis.2d 82, 390 N.W.2d 86, 97 (Ct. App. 1986) ("[F]aults and limitations of public opinion research ... go only to weight and credibility"), *modified in part, rev'd in part on other grounds*, 130 Wis.2d 492, 407 N.W.2d 832 (1987).

Dr. Scott's testimony likewise was admissible. His testimony concerning the manner in which the survey was conducted, the scientific validity of the methodology employed, the reliability of the methodology, and the acceptability of the methodology within the scientific community was necessary not only to establish the admissibility of the survey, but also to aid the jury in determining the weight to be given to the survey results. *See, e.g., Zippo Manufacturing Co. v. Rogers Import, Inc.*, 216 F. Supp. 670, 681 (S.D.N.Y. 1963).

Even if this Court were to conclude that the community standards survey was not independently admissible, however, the lower court erred in excluding Dr. Scott's testimony concerning his use of the survey results in reaching an opinion on community standards. Such testimony is admissible, regardless of whether the

survey itself is considered admissible or reliable, so long as the survey results are a type of data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Wis. Stat. §907.03. *See, e.g., Brain v. Mann*, 129 Wis.2d 447, 385 N.W.2d 227 (Ct. App. 1986).

B. Admission of Comparable Materials Accepted in the Community

Crossroads also proffered evidence of two categories of materials comparable to "Anal Vision #5" which were available and accepted in the relevant community (R48:2-14; R51:59-64; R46; R54A:Exh.E; App. 31-43, 85-90). The first, consisting of the videotapes "Anal Madness" and "Spanner Piss," were the subject of prior trials before the circuit court and resulted in jury verdicts of acquittal. In each case, the sole disputed issue before the jury was whether the tape at issue was obscene. The second category of comparable materials consisted of videotapes which were readily available in the area, six of which were offered into evidence (R54A:Exh.E), and testimony of an investigator concerning the ready availability of those and similar videotapes (R48:3-4; R54:Exhs.C&D).

Both categories of materials were admissible to aid the jury in determining the prevailing contemporary community standards applicable in this case. After all, "[a] key issue in any obscenity case is the degree of community acceptance or toleration of materials similar to those at issue." *United States v. Petrov*, 747 F.2d 824, 831 (2d Cir. 1984) (citations omitted), *cert. denied,* 471 U.S. 1025 (1985). Moreover, "[t]he defendant in an obscenity prosecution, just

as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried." *Hamling*, 418 U.S. at 125. "[C]omparison evidence clarifies matters for the jury by providing concrete illustration of contemporary community standards with respect to sexually explicit materials -- standards that the jury must evaluate under the *Miller* definition of obscenity." Lentz, *Comparison Evidence in Obscenity Trials*, 15 U. Mich. J.L. Ref. 45, 74 (1981).

The circuit court nonetheless excluded the evidence on the grounds that the acquitted tapes were not exactly the same as that charged, and because "the mere availability of the [other] material is not indicative of community standards" (R51:60-64; App. 86-90). The court was wrong as a matter of law.

The traditional standard for admission of comparable materials in obscenity cases, set forth in *United States v. Womack*, 509 F.2d 368 (D.C. 1974), *cert. denied,* 422 U.S. 1022 (1975),

> requires an adequate foundation to be laid for the introduction of comparison evidence. Since the issue at hand is the nature of contemporary community standards with respect to "works like his own," in order for there to be a rational basis for its admission there must be a showing that the proffered evidence (1) is similar to his own, and (2) enjoys a reasonable degree of community acceptance.

Id. at 377, citing *Womack v. United States*, 294 F.2d 204, *cert. denied,* 365 U.S. 859 (1961).

Contrary to the circuit court's suggestion, the "similarity" prong of this standard does not require that the materials be exactly the same. All that is required is that there be "a reasonable resem-

blance between the proffered comparables and the allegedly obscene materials." *United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir.), *cert. denied,* 439 U.S. 999 (1978); *see United States v. Jacobs*, 433 F.2d 932, 933 (9th Cir. 1970). "[T]he function served by comparison of evidence presupposes the materials presented depict the same or similar sexual acts with explicitness of a comparable degree." *Saliba*, 475 N.E.2d at 1190 n.14.

All of the proffered materials easily met this standard of similarity to "Anal Vision #5." All of the videotapes present highly explicit depictions of oral, anal and vaginal intercourse and masturbation and little else (*see* R54A:Exh.E).

The second prong of the *Womack* test asks whether the comparable material "enjoys a reasonable degree of community acceptance." *Womack*, 509 F.2d at 377. While "[a]cceptability is not a self-defining concept," *Lentz*, 15 U. Mich. J.L. Ref. at 66, the courts have provided some guidance.

Regarding "Anal Madness" and "Spanner Piss," the jury already had spoken on the issue of acceptance. The only issue in each of those cases was the obscenity *vel non* of the videotapes and the jury found that the tapes were not obscene, and thus that they were constitutionally protected. The county having received a full and fair hearing on the issue, it was collaterally estopped from arguing to the contrary here. *Michelle T. by Sumpter v. Crozier*, 173 Wis.2d 681, 495 N.W.2d 327 (1993); *Crowall v. Heritage Mutual Insurance*, 118 Wis.2d 120, 346 N.W.2d 327 (Ct. App. 1984). The community must, after all, accept that which it cannot constitutionally prohibit. *E.g.*, *Lentz*, 15 U. Mich. J. L. Ref. at 87.

The more difficult issue involves comparable materials available in the community but not yet held to be non-obscene. The Supreme Court observed in *Hamling*, 418 U.S. at 126, that the mere availability of comparable materials does not *necessarily* demonstrate their acceptability. Rather, the mere availability of such materials may show "nothing more than that other persons are engaged in similar activities." *Id.* (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied,* 404 U.S. 947 (1971).

Hamling does not end the matter, however, as it does not address the situation where, as here, the proponent of comparable materials demonstrates more than "mere availability." The courts have recognized that "[a]t some point a work widely available must be considered inferentially acceptable." *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 137 (2d Cir. 1983), citing *Lentz*, 15 U. Mich. J.L. Ref. at 67; *Petrov*, 747 F.2d at 832 ("Comparable material that is available in the community can be viewed as relevant under Rule 401," the federal equivalent of Wis. Stat. §904.01, subject to exclusion of cumulative evidence of minimal additional probative value under Fed. R. Evid. 403, the equivalent of Wis. Stat. §904.03).

"The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Smith v. California*, 361 U.S. 147, 171 (1959) (Harlan, J., concurring in part and dissenting in part). Thus, "[e]vidence of availability ... of similar material can also be used [to demonstrate community standards], although availability and non-availability do not translate inexorably into acceptability and unacceptability." *United States v. Various*

Articles of Merchandise, 750 F.2d 596, 599 (7th Cir. 1984) (citation omitted); *see* 2 Attorney General's Commission on Pornography, *Final Report* at 1280-81 (July, 1986) ("Evidence of the availability or lack of availability of comparable materials may also be used to show that the material in question enjoys a reasonable degree of community acceptance or that it does not" (citations omitted)).

The trier of fact is entitled to infer that the challenged materials enjoy a "reasonable degree of community acceptance" where, as here, the same or comparable materials are widely available in the relevant community, even though the same could not be said where such materials are available, but only in "enclaves of tolerated obscenity." *Various Articles*, 709 F.2d at 137. *Compare id.* ("[W]idespread community availability and patronage of such works may be accepted as circumstantial evidence of contemporary community standards"), and *United States v. Miscellaneous Pornographic Magazines*, 400 F. Supp. 353 (N.D. Ill. 1975) (admitting comparable materials available nearby federal courthouse), *with Womack*, 509 F.2d at 380 ("[E]soteric materials purchased from a few vendors known only to those in the trade with no general circulation are not probative on the issue of contemporary community standards").

See also Asaff v. State, 799 S.W.2d 329, 334 (Tex. App. 1990) (reversible error to exclude evidence of comparable magazines purchased in relevant community); *Berg v. State*, 599 S.W.2d 802 (Tex. Crim. App. 1980) (same); *State v. Short*, 368 So.2d 1078, 1082 (La.) ("That evidence of availability does not itself prove acceptance or toleration is an argument addressed to the weight, not the

admissibility, of such evidence"), *cert. denied,* 444 U.S. 884 (1979).

Finally, the admissibility of the comparable materials is essentially an issue of conditional relevancy under Wis. Stat. §901.04(2). Accordingly, the question is not, as the court below apparently believed whether the Court itself deems the comparable materials to be "similar" and "reasonably accepted" or the proponent's supporting witnesses to be credible, but whether, in light of all of the evidence, the *jury* reasonably could find similarity and reasonable acceptance. *See State v. Schindler*, 146 Wis.2d 47, 429 N.W.2d 110, 113 (Ct. App. 1988) (adopting federal standard for conditional relevancy set forth in *Huddleston v. United States*, 485 U.S. 681, 688-90 (1988)). *See also State v. DeSantis*, 155 Wis.2d 774, 456 N.W.2d 600, 606 (1990) (applying conditional relevance analysis to evidence of prior untruthful allegations of sexual assault under rape shield law). Accordingly, it was for the jury, not the trial court, to decide what if any weight to give this evidence. *See Berg*, 599 S.W.2d at 805.

A reasonable jury easily could have found that the comparable materials proffered by Crossroads both were similar to the charged videotape and enjoyed reasonable acceptance in the community. Accordingly, such materials were relevant to the issue of the applicable community standards and admissible, and the court below misused its discretion in holding otherwise.

V.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT

In order for a videotape to be "obscene material," the county must prove, *inter alia*, that it "lacks serious literary, artistic, political, educational or scientific value, if taken as a whole." Kenosha County Ordinance No. 9.10.2(2)(c)3. The county, however, made no effort to meet this burden. Indeed, the *only* evidence regarding value was Dr. Alvarez's testimony that the tape in fact had serious educational value (R51:85, 94). Accordingly, the county's case was insufficient as a matter of law and the trial court erred in denying Crossroads' motion for a directed verdict (R51:113-15, 117-20; *see* R51:111-13; App. 91-100).

Directly on point is *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.), *cert. denied,* 506 U.S. 1022 (1992), in which the court reversed for insufficiency a finding that the tape "Nasty as they Wanna Be" was obscene. There, as here, the plaintiff merely played the tape and failed to present any evidence controverting defense evidence of serious value. Noting that the value prong of the obscenity test is objective and not based on contemporary community standards, the court held that the fact-finder is not competent to find lack of value in the absence of evidence on the point. Merely listening to the tape was insufficient. 960 F.2d at 138-39.

This reasoning parallels that of the Wisconsin Supreme Court which requires expert testimony to assist a jury in cases where the issues are "so complex or technical that a jury without the assistance of expert testimony would be speculating. . . ." *Cramer v. Theda*

Clark Memorial Hospital, 45 Wis.2d 147, 172 N.W.2d 427, 429 (1969). In such cases, the lack of expert testimony constitutes an insufficiency of proof. *Cedarburg Light and Water Commission v. Allis Chalmers Mfg. Co.*, 33 Wis.2d 560, 148 N.W.2d 13 (1967). Whether or not sexually explicit videotapes have serious educational value falls squarely within the type of issue which is outside the realm of the ordinary experience of jurors, so that expert testimony is required in the plaintiff's case in chief.

While a few cases hold that expert testimony is not always necessary to prove obscenity, those cases are confined to discussion of the two "community standards" elements, *see, e.g.*, *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 131 (2d Cir. 1983), the theory being that, as members of the community, jurors can determine and apply community standards without expert testimony. The serious value element, however, must be judged on an objective rather than subjective, community standard. *E.g.*, *Princess Cinema*, 292 N.W.2d at 811. Membership in the community does not equal competency to determine that issue without evidence, *Luke Records*, 960 F.2d at 138-39, and the circuit court instructed the jury not to rely on its own assessment of the material's value (R53:54; R57:4).

Because there was no evidence that the tape lacked serious value, the county failed to meet its burden as a matter of law and the conviction must be reversed.

VI.

THE JURY INSTRUCTIONS MISSTATED THE APPLICABLE LAW AND PERMITTED CONVICTION FOR CONSTITUTIONALLY PROTECTED SPEECH

Much of the trial transcript covers arguments regarding jury instructions on "obscenity" (R51:115-85; R53:2-46). While Cross-roads was forced to object to many of the instructions given and to the circuit court's rejection of others, it need address only the most obvious and prejudicial misstatements and omissions here. The legal accuracy of jury instructions is reviewed *de novo*. *E.g.*, *State v. Neumann*, 179 Wis.2d 687, 508 N.W.2d 54, 59 (Ct. App. 1993).

The test for obscenity asks whether the work, taken as a whole, "appeals to the prurient interest," "describes or shows sexual conduct in a patently offensive way," and "lacks serious literary, artistic, political, educational or scientific value." Kenosha Ordinance No. 9.10.2(2)(c); *see United States v. X-Citement Video*, 513 U.S. 64, 74 n.4 (1994). While the trial court stated these required elements (R53:50), it subsequently defined them to permit conviction for non-obscene, and therefore constitutionally protected, speech.

Regarding "prurient interest," for instance, the Supreme Court has equated that term with "'a shameful or morbid interest in nudity, sex, or excretion.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985). The circuit court's instructions, however, expanded the definition, and accordingly the sphere of prohibited materials:

> "Appealing to the prurient interest" does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, *unhealthy, unwholesome, degrading* or morbid interest in sex,

nudity, or excretion.

(R53:51; R57:2; App. 114 (emphasis added)). The court overruled Crossroads' objections that this definition expanded the concept of prurience beyond that which is shameful or morbid and thus was constitutionally overbroad (R51:134-37; R53:97; App. 101-04).

The court similarly expanded the ordinance beyond its permissible reach by redefining the "value" prong. While the *Miller* Court set the constitutional limits of the government's power to regulate at those materials which have "serious literary, artistic, political, or scientific value," 413 U.S. at 24-25, the instructions here permitted conviction unless the material met a higher standard and possessed "*genuinely* serious value" (R53:54; R57:5; App. 117 (emphasis added)). Once again, the court overruled Crossroads' objections that the adverb was confusing and impermissibly reduced what the county was required to prove (R51:179-83; R53:97; App. 105-09), and likewise denied its mistrial motion (R53:98-99; App. 111-12).

The obscenity definitions set by the Supreme Court establish not just the permissible realm of government regulation, but the constitutional limits on that power. *Miller* defines not just what the government can prohibit, but also that which it cannot. When a court expands the scope of the prohibition, it permits conviction for speech which cannot constitutionally be banned. That is exactly what happened here.

These errors were not harmless beyond a reasonable doubt. *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222 (1986). The verdict was not unanimous. Moreover, all three prongs of the

obscenity standard were sharply in issue. A jury easily could have determined that the tape was "degrading," but not shameful or morbid. Also, Dr. Alvarez testified in terms of "serious educational value," the legal standard, but not the more restrictive, "genuinely serious value" standard of the instructions. Finally, two other Kenosha County juries previously acquitted in cases involving tapes which the District Attorney himself deemed more obscene than this one (*see* R44). The instructional errors were not harmless.

CONCLUSION

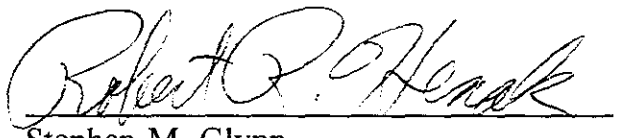
For these reasons, the judgment should be reversed. In addition, the citation must be dismissed for the reasons stated in Sections I, II and V. Alternatively, the case should be remanded for a hearing, *see* Section III, or for a new trial for the reasons stated in Sections IV and VI.

Dated at Milwaukee, Wisconsin, September 5, 1997.

Respectfully submitted,

C & S MANAGEMENT, INC. d/b/a CROSSROADS NEWS AGENCY, Defendant-Appellant

SHELLOW, SHELLOW & GLYNN, S.C.



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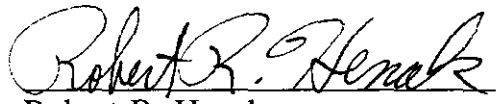
RULE 809.18(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the includable portions of this brief is 10,980 words.



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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-3188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS NEWS AGENCY,

Defendant-Appellant,

APPENDIX OF DEFENDANT-APPELLANT

COPY

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 94-CF-539

C & S MANAGEMENT, INC. d/b/a CROSSROADS NEWS AGENCY and YANCY G. BOCK,

Defendants.

FILED

NOV 28 1994

GAIL GENTZ
Clerk of Circuit Court

ORDER

For the reasons stated on the record on November 10, 1994, the defendant's Motion to Hold Preliminary Examination is DENIED.

DATED: November 28, 1994

BY THE COURT:

/s/ David M. Bastianelli

Hon. David M. Bastianelli
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY
BRANCH 1

STATE OF WISCONSIN,

MOTION HEARING

Plaintiff,

-vs-

Case No. 94-CF-539

C & S MANAGEMENT, INC.,
d/b/a CROSSROADS NEWS
AGENCY,

Defendant.

HONORABLE DAVID M. BASTIANELLI, Circuit Judge, Presiding.

APPEARANCES:

MR. BRIAN AUSTIN, Assistant District Attorney for Kenosha County, appeared on behalf of the plaintiff.

MR. CRAIG ALBEE, Attorney at Law, appeared on behalf of the defendant.

Date of Proceedings: November 10, 1994

CYNTHIA M. FLAHIVE
Court Reporter

THE COURT: Next matter before the Court is State vs. C & S Management, File 94-CF-539. Appearances.

MR. AUSTIN: Good afternoon, your Honor. State appears by Assistant District Attorney Brian Austin.

MR. ALBEE: C & S Management appears by Craig Albee, A-L-B-E-E, Shellow, Shellow & Glynn.

THE COURT: This matter's before the Court at the request of the defendant per motion, essentially arguing that the defendant, C & S Management, Inc., is entitled to a preliminary examination on the basis that the statute is unconstitutional in selecting a corporate entity to be treated differently than an individual who's charged with a felony.

Both parties have submitted briefs. I've read them both. I'm turning my attention to Mr. Austin first. Mr. Austin, I read your brief but the one issue you didn't even discuss is what's the distinguishing feature or the legislative basis for distinguishing between a corporate entity versus a cooperative partnership, etc? You didn't address that at all in your brief and I think that's the determinative issue.

MR. AUSTIN: Well, I believe there are other features of a corporation that may set it apart from other such entities, one being liability for acts of the corporation. I believe in partnership law each individual

partner is liable for acts of other partners in the partnership and a corporation is a distinct entity from its officers, shareholders, etc. So I believe the statutes for the corporation, how liability is distributed through the corporation, sets it apart from associations and partnerships and other such entities.

THE COURT: Okay. Thank you. Mr. Glynn.

MR. ALBEE: Mr. Albee.

THE COURT: I'm sorry.

MR. ALBEE: That's okay.

THE COURT: I was looking at the file name. So go on.

MR. ALBEE: That answer's not satisfactory for the reason that there's still a possibility of punishing an organization whether you are punishing a corporation, a partnership, an association. There's still no possibility of imprisonment. It's still an organization that is subject to criminal punishment. And there's no reason for giving these other organizations a preliminary hearing when you are not doing the same for corporations.

THE COURT: Okay. Do you want to expand anymore on your brief first, counsel; otherwise, we'll just proceed? Either counsel want to give additional information?

MR. ALBEE: I'm satisfied on the basis of the briefs, your Honor. If you have any other questions, I'd be

happy to address them but there's no point in me reiterating what I think is clearly spelled out in the briefs.

THE COURT: Okay.

MR. AUSTIN: The State feels the same way, your Honor.

THE COURT: Well, in looking at it, I think, since this is not a suspect class, the legislature can distinguish between a corporate entity because you can't go to prison although there's other penalties could be imposed on a felony.

Where my problem lies is the rationale of distinguishing, again, on that as a class where other classes which are fairly similar, whether it's partnerships, cooperative associations, etc., which are all subject, based on what I saw in the brief, to criminal penalties and being charged, if there's some basis for distinguishing between the two. And that I hadn't saw, as I indicated, Counsel, in your brief, and I think that may be the determining feature.

Because I think if the legislature said, hey, all non-persons, so to speak, who are not subject to criminal penalties are entitled to a preliminary hearing, including corporations, partnerships, associations, I don't think there would be any problem with that. I think the legislature has legitimate reasons for doing that and you could easily distinguish, primarily because there's no incarceration

involved, why the legislature could carve out that niche.

Again, where I have some difficulty is why they carve out the niche for a corporate entity as opposed to a partnership or certain associations.

MR. AUSTIN: Your Honor, if I may.

THE COURT: Yes.

MR. AUSTIN: For what -- I think maybe part of the reason is the legislature has singled out corporations for favorable treatment in other areas such as the imprisonment. The legislature's explicitly stated, or at least in case law has specifically stated, corporations are not subject to imprisonment. The legislature has specifically provided that corporations are to be notified of a criminal case by summons. So they are treated differently from other areas of criminal procedure and they warrant different treatment as to the preliminary examination.

THE COURT: That's not my question, Counsel. My question is -- I think they can do that. My question is why do they do it to corporations but not partnerships. That's the question.

MR. AUSTIN: Okay.

THE COURT: I think they can do that to corporations but I think they have to say what the distinguishing feature is between a corporate entity; if not, why, for example, a partnership or cooperative might be

entitled to a preliminary hearing but the corporation isn't. That's the point I'm making.

MR. AUSTIN: Right.

THE COURT: I think they can do it. The question is can they do it by just singling out one entity which is created by law as opposed to another. And that's where I have a little bit of a hang-up. Otherwise, I don't have a problem with what the legislature's doing. And there hasn't been a great deal -- Although defendants did submit some history of how things came about a little bit, there hasn't been a great deal, I guess, in the last hundred and some years to say why the legislature may or may not have decided to single out other types of entities, assuming they were in existence at that point in time.

MR. AUSTIN: And I honestly don't know what the legislature intended. I know they did revisit the statutes, as cited in my brief, and decided for some reason limited liability companies were similar to corporations where other entities may not be.

THE COURT: Mm-hm.

MR. AUSTIN: So instead of -- It shows that they at least took a look at what they had done and it wasn't a blind action and that they had decided they're satisfied with what they had done with corporations and their treatment in the statutes and even decided to extend that to another entity.

THE COURT: Well, there are some distinctions, I guess, between a cooperative partnership and a corporate entity because a corporate entity has always been classified as an individual in various areas of law, as a person, for service of process, for a variety of things. And both parties had pointed out the law correctly in terms of the burden and the going forward.

As the defendant in his brief points out, page five:

Equal protection requires that there exist reasonable and practical grounds for the classifications drawn by the legislature. A party challenging a statute on equal protection grounds must show that the legislative classification lacks a rational relationship to a proper statutory objective. And the basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification.

The burden, obviously, is on the person to show beyond a reasonable doubt that the statute would be unconstitutional on that and other bases.

In this particular case, I do believe there is a rational basis for delineating between corporate entities and persons as relates to the right to a preliminary hearing and that's simply that with a corporate entity, unlike an individual, without the possibility of incarceration,

although other preliminary hearing objectives could be met, it's still on notice and due process considerations. And, in that regard, albeit the partnership and the cooperative concern I did have, I'm not satisfied that defendant has demonstrated to me, since it's not a suspect classification case, that there isn't a legitimate basis for distinguishing between a corporate entity and an individual. And my concern as to a partnership or a cooperative is not that it hasn't been demonstrated to me that somehow because those are not considered persons under various cases and classifications, the difference of allowing them, if they could be allowed, a preliminary hearing is not met.

Consequently, I'm going to find that the arguments raised by the defendant to me for the right of a corporate entity to have a preliminary examination is not demonstrated to this Court that the statute is unconstitutional on either due process or equal protection grounds. Legitimate reason can be found for distinguishing between a corporate entity and individuals and, consequently, the Court will deny the motion requesting that the corporate entity be allowed a preliminary hearing in this case and, therefore, the Court is willing and ready to proceed, if the parties want, to the setting of -- I don't know if it was done before the court commissioner, the not guilty being entered. Probably not, since you were challenging the right to a preliminary hearing.

MR. ALBEE: Mr. Glynn handled that appearance and I --

THE COURT: Let me see if I can find something.

MR. ALBEE: I do not recall.

THE COURT: My thoughts, in looking at this, basically since the -- I haven't thought about it procedurally, outside of not having the right to a preliminary hearing, but whether or not the State still files an Information or not --

MR. AUSTIN: I have one prepared. I believe the proper way of charging a corporation formally is through an Information so I --

THE COURT: Okay. Well, why don't we proceed, if you want, or do you want us to send notice since you are not trial -- Are you not trial counsel or is the other one trial counsel?

MR. ALBEE: I work with Mr. Glynn. We're in the same firm.

THE COURT: Yeah.

MR. ALBEE: Mr. Glynn will be trial counsel. Under State vs. Webb, we need to challenge the sufficiency of a preliminary examination so I imagine we'd need to challenge our right to a preliminary examination pre-trial, and that's what we intend to do, is seek an interlocutory appeal. It's a novel issue. It hasn't been before the appellate court.

THE COURT: That's fine with me.

MR. ALBEE: And what I was going to suggest is if I could get a transcript prepared of this -- of the Court's reasoning for denying the motion, have an order prepared, have the Court sign the order after we've prepared it, then it will have our ten days run for filing the interlocutory appeal and then see where things go.

Arguably, right now, with no Information prepared, it's kind of a strange situation because perhaps there's no jurisdiction.

We also would intend to challenge the complaint. But based on the Court's ruling here on the preliminary examination, I would also imagine the Court would rule that we don't have the right to challenge the complaint or the factual bases in the complaint as it stands -- stands now.

THE COURT: Well, that's an interesting question and I haven't been asked to decide whether or not there's jurisdiction because they brought this by way of criminal complaint as opposed to Information.

MR. AUSTIN: We -- I can tell you -- It was my impression under the statute we're not required to charge via complaint but I figured it would provide more of a notice, quite frankly. I do have an Information prepared. I had not filed it previously because I did not want to, given this motion hearing. To do so would be premature.

THE COURT: Well, the only determination I made was I believe a corporate entity's not entitled to a preliminary hearing so you can take it from there.

MR. ALBEE: What I would suggest is I'd like to prepare the order on this basis; we'll appeal this case; and then after -- I suggest after that's resolved one way or another, whether they accept it or don't accept it, interlocutory review, we come back here and perhaps we can set a status for two months from now or something like that.

THE COURT: Only if -- I won't set it that long because you do have some time limits to file that interlocutory appeal and get a stay because, if not, we'll argue the stay but I doubt if I'll grant a stay. I'll proceed unless the Court of Appeals tells me to hold it.

MR. ALBEE: Okay.

THE COURT: So I'm not taking your Information now.

MR. AUSTIN: Okay.

THE COURT: I'm going to see what they are doing on the interlocutory appeal. Because if the Court of Appeals says they are entitled to a preliminary hearing, your filing an Information is moot. And I haven't been asked to decide whether or not I have jurisdiction because the matter was brought by way of criminal complaint.

In any event, at this point in time, transcript ordered. File come up on my desk in ten days. I want the file to come

up on my desk, Marlys, let's say, December 16. At that point I'll look at the file and see what you are doing in terms of the Court of Appeals, okay, just make sure everything's going forward.

MR. ALBEE: I want to be correct. I understood -- The ten days is for the transcript and for us to get you the order? I guess I want to know how long the transcript is likely to be.

THE COURT: She can get you a transcript in a couple days.

MR. ALBEE: All right. That's no problem then.

THE COURT: Yeah. Right? That way I can check the file on that date, make sure you are either appealing it and what have you and asking for a decision on whether they are going to grant a stay and interlocutory appeal and all that other stuff and see what the status of the Court of Appeals -- what they're going to do. Because they are going to say yes or no and I just want to be able to trail the file and see what they want. If they say no, we're not going to grant you a stay, they may even hear the appeal. I don't know. But that's up to them. I think you may have to petition, if they accept it, for a stay in this court first. I'm not sure I'll grant that but we'll take that up when the time comes.

MR. ALBEE: Okay.

THE COURT: Okay?

MR. AUSTIN: Thank you, your Honor. Notice can be sent to our office for the next date then?

THE COURT: I'm going to monitor it. If I don't see anything in the file, I'll be setting it on.

MR. AUSTIN: I'm just saying notice will be sent to us?

THE COURT: Yes.

MR. ALBEE: There's no status conference the 16th?

THE COURT: It's just for me to look at the file, see what's happening. And if I have questions, I'll write you a letter.

(Whereupon, these proceedings were concluded)

STATE OF WISCONSIN)
) ss
COUNTY OF KENOSHA)

I, Cynthia M. Flahive, Official Court Reporter, in and for the Circuit Court, Branch I, Kenosha County, Wisconsin, do hereby certify that the foregoing pages of proceedings have been carefully compared by me with my original stenographic notes and that the same is a true and correct transcript of the proceedings held on the 10th day of November, 1994, before HONORABLE DAVID M. BASTIANELLI, judge presiding.

Dated this 11th day of November, 1994.

Cynthia M. Flahive

Cynthia M. Flahive, Court Reporter, Br. I

CHAPTER 970

CRIMINAL PROCEDURE — PRELIMINARY PROCEEDINGS

Cross–reference: See definitions in s. 967.02.

970.01 Initial appearance before a judge. (1) Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed. The person may waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audiovisual means under s. 967.08. Waiver of physical appearance shall be placed on the record of the initial appearance and does not waive other grounds for challenging the court's personal jurisdiction.

(2) When a person is arrested without a warrant and brought before a judge, a complaint shall be filed forthwith.

History: Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 403.

Judicial Council Note, 1988: Sub. (1) is amended to authorize the arrested person to waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audio–visual means. [Re Order effective Jan. 1, 1988]

It is not unreasonable to detain a person arrested on Saturday after the courthouse is closed until his arraignment Monday morning. Kain v. State, 48 W (2d) 212, 179 NW (2d) 777.

Where defendant confessed to 8 robberies within one half hour after arrest in the early morning and was not taken before a judge until the next day, the period of detention was not unreasonable. Quinn v. State, 50 W (2d) 101, 183 NW (2d) 64.

The fact that a defendant confesses between the time of arrest and appearance before a magistrate does not prove that the delay was unreasonable. Pinczkowski v. State, 51 W (2d) 249, 186 NW (2d) 203.

Where defendant was taken to jail in the evening on suspicion of murder, and questioning resumed at 8:30 the next morning and continued at intervals until 9:50 that evening, after defendant was given the warning and said he did not want an attorney, a delay until the following morning in taking him to court was not unreasonable, since the police needed time to check out various information supplied by defendant and others. State v. Hunt, 53 W (2d) 734, 193 NW (2d) 858.

A delay in taking defendant before a magistrate from Saturday noon to Monday afternoon was justified when caused by attempts to locate witnesses and giving a lie detector test requested by defendant. State v. Wallace, 59 W (2d) 66, 207 NW (2d) 855.

See note to 971.04, citing State v. Neave, 117 W (2d) 359, 344 NW (2d) 181 (1984).

The interval between an arrest and an initial appearance is never unreasonable where the arrested suspect is already in the lawful physical custody of the state. State v. Harris, 174 W (2d) 367, 497 NW (2d) 742 (Ct. App. 1993).

Rule that a judicial determination of probable cause must be made within 48 hours of a warrantless arrest applies to Wisconsin; failure to comply did not require suppression of evidence not obtained because of the delay where probable cause for arrest was present. State v. Koch, 175 W (2d) 684, 499 NW (2d) 153 (1993).

Failure to conduct a probable cause hearing within 48 hours of arrest is not a jurisdictional defect and not grounds for dismissal with prejudice or voiding of a subsequent conviction unless the delay prejudiced the defendant's right to present a defense. State v. Golden, 185 W (2d) 763, 519 NW (2d) 659 (Ct. App. 1994).

Determination of probable cause made within 48 hours of warrantless arrest generally meets promptness requirement; if hearing is held more than 48 hours following arrest the burden shifts to the government to demonstrate emergency or extraordinary circumstances. County of Riverside v. McLaughlin, 500 US 44, 114 LEd 2d 49 (1991).

970.02 Duty of a judge at the initial appearance. (1) At the initial appearance the judge shall inform the defendant:

(a) Of the charge against the defendant and shall furnish the defendant with a copy of the complaint which shall contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged.

(b) Of his or her right to counsel and, in any case required by the U.S. or Wisconsin constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel.

(c) That the defendant is entitled to a preliminary examination if 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, unless waived in writing or in open court, or unless the defendant is a corporation or limited liability company.

(2) The judge shall admit the defendant to bail in accordance with ch. 969.

(3) Upon request of a defendant charged with a misdemeanor, the judge shall immediately set a date for the trial.

(4) A defendant charged with a felony may waive preliminary examination, and upon the waiver, the judge shall bind the defendant over for trial.

(5) If the defendant does not waive preliminary examination, the judge shall forthwith set the action for a preliminary examination under s. 970.03.

(6) In all cases in which the defendant is entitled to legal representation under the constitution or laws of the United States or this state, the judge or magistrate shall inform the defendant of his or her right to counsel and, if the defendant claims or appears to be indigent, shall refer the person to the authority for indigency determinations specified under s. 977.07 (1).

(7) If the offense charged is one specified under s. 165.83 (2) (a), the judge shall determine if the defendant's fingerprints, photographs and other identifying data have been taken and, if not, the judge shall direct that this information be obtained.

History: 1973 c. 45; 1975 c. 39; 1977 c. 29, 449; 1979 c. 356; 1981 c. 144; 1987 a. 151; 1993 a. 112, 486.

There is no need to appoint both a guardian ad litem and defense counsel unless it appears that prejudice would result from dual representation. Gibson v. State, 47 W (2d) 810, 177 NW (2d) 912.

970.03 Preliminary examination. (1) A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant. A preliminary examination may be held in conjunction with a bail revocation hearing under s. 969.08 (5) (b), but separate findings shall be made by the judge relating to the preliminary examination and to the bail revocation.

(2) The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of $500. On stipulation of the parties or on motion and for cause, the court may extend such time.

(3) A plea shall not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof.

(4) (a) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05 or 948.06, the court may exclude from the hearing all persons who are not officers of the court, members of the complainant's or defendant's families or others considered by the court to be supportive of the complainant or defendant, the service representative, as defined in s. 895.73 (1) (c), or other persons required to attend, if the court finds that the state or the

CHAPTER 971

CRIMINAL PROCEDURE — PROCEEDINGS BEFORE AND AT TRIAL

Cross-reference: See definitions in s. 967.02.

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

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

History: 1993 a. 486.

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

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

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

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

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

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

(a) The preliminary examination was waived; and

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

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

(d) Defendant intends to plead not guilty.

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

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

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

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

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

Preliminary examination potential. 58 MLR 159.

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

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

STATE OF WISCONSIN,

.... County,

In .... Court.

The State of Wisconsin

vs.

.... (Name of defendant).

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

Dated ...., 19..,

.... District Attorney

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

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

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

(a) At the arraignment;

(b) At trial;

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

(d) At any evidentiary hearing;

statement of the condition of each of the char and correctional institutions supported by the st receiving aid from the state treasury, togethe their opinion of the appropriations proper to be for each for the following year. It shall also co the results of their investigations during the y regard to the support of the poor and the treatm criminals, and shall also contain any information gestions or recommendations which they may to present upon the matters by this act assigned to supervision and examination. Three thousand copies of this report shall be printed by the printer, in the same manner as those of the state o are printed, for the use of the board and of the leg ture.

Not to be interested in contract.

SECTION 10. All members of the board and secretary of the board are hereby prohibited from be interested, directly or indirectly, in any contract or rangement for building, repairing, furnishing or viding any supplies of either of the institutions place under their supervision.

Not to receive compensation, except expenses.

SECTION 11. The members of the board shall ceive no compensation for their services rendered un this act. Upon filing with the secretary of state s statements of the amount of expenses actually necessarily incurred by them in carrying out the provisions of this act, they shall have the amount said expenses refunded to them from the state treas and the secretary of state is hereby authorized and quired to draw his warrant upon the state treasury the amount of expenses so incurred and proven.

Salary of secretary.

secretary of the board shall receive for all services dered by him under this act, $1,200 per annum, able upon the warrant of the board, quarterly, fro state treasury; his actual and necessary traveling penses incurred in performing his duties shall funded in the same manner as those of the memb the board. And there is hereby appropriated o any money in the treasury not otherwise appropri a sum sufficient to comply with the provisions o act.

Number of trustees of state institutions fixed.

SECTION 12. Hereafter the board of trustees o Soldiers' Orphans' Home, of the Institution for the ucation of the Blind, and of the Institution for the cation of the Deaf and Dumb, and the board of

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agers of the Industrial School for Boys, shall consist of five members each, who shall be appointed by the governor for terms of three years each, except that his first appointments under the authority of this section shall be so arranged that in each board two members shall be appointed for one year, two for two years and one for three years. So much of previous acts relating to the aforesaid institutions as authorizes their present trustees or managers to hold their offices, is hereby so far repealed that said trustees and managers shall go out of office so soon as their successors are appointed and qualified; and the persons appointed under authority of this section are hereby declared to be the legal successors to their respective offices, and entitled to receive from their predecessors all funds, books and papers belonging to the aforesaid institutions respectively.

SECTION 13. This act shall take effect and be in force from and after its passage.

Approved March 23, 1871.

CHAPTER 137.

[*Published March 31, 1871.*]

AN ACT to provide for the trial of offenses upon information, and to make the general laws of the state applicable thereto.

REFERENCES TO AMENDMENTS. References.

Sections 7, 8, 9, 10, 11, of chapter 118, revised statutes.
All of chapter 177, revised statutes.
Sections 1, 2, 3, chapter 178, revised statutes.
Sections 1, 3, 7, 9, 10, 11, 13, chapter 179, revised statutes.
Section 6, chapter 180, revised statutes.
Section 2, chapter 181, revised statutes.
Sections 1, 3, 4, 5, 6, chapter 163, revised statutes.
Section 7, chapter 164, revised statutes.
Sections 5, 7, chapter 170, revised statutes.

Sections 2, 3, 5, 7, 10, 12, chapter 172, revised
utes.
Sections 15 and 21, chapter 176, revised statute
Sections 1, 2, chapter 222, general laws, 1862.

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

Shall have jurisdiction upon information.

SECTION 1. The several courts of this state
possess and may exercise the same power and jur
tion to hear, try and determine prosecutions upon
formation for crimes, misdemeanors and offense
issue writs and process and do all other acts the
as they possess and may exercise in cases of like p
ecution upon indictment.

Information to be filed.

SECTION 2. All informations shall be filed du
term in the court having jurisdiction of the offen
specified therein, except as hereinafter provided,
the district attorney of the proper county as informa
and he shall subscribe his name thereto.

How offense stated.

SECTION 3. The offense charged in any informa
tion shall be stated in plain, concise language, without
prolixity or unnecessary repetition. Different offen
and different degrees of the same offenses, may
joined in one information, in all cases where the sa
might be joined by different counts in one indictment,
and in all cases a defendant or defendants shall hav
the same rights as to all proceedings therein, as he
they would have if prosecuted for the same offen
upon indictment.

All provisions of law apply to information.

SECTION 4. All provisions of law applying
prosecutions upon indictments, to writs and proce
therein, and the issuing and service thereof, to motion
pleadings, trials and punishments, or the passing
execution of any sentence, and to all other proceedi
in cases of indictment, whether in the court of origi
or appellate jurisdiction, shall, to the same extent
in the same manner as near as may be, apply to inf
mations and all prosecutions and proceedings there

May be committed or held bail.

SECTION 5. Any person who may, according
law, be committed to jail, or become recognized
held to bail, with sureties for his appearance in co
to answer to any indictment, may, in like manner
so committed to jail or become recognized and held

bail for his appearance to answer to any information or indictment, as the case may be.

Duty of district attorney.

SECTION 6. It shall be the duty of the district attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense whereon the offender shall be committed to jail, or become recognised or held to bail; and if the district attorney shall determine in any such case that an information ought not to be filed, he shall make, subscribe and file with the clerk of the court a statement in writing, containing his reasons, in fact and in law, for not filing an information in such case; such statement shall be filed at and during the term of the court at which the offender shall be held for appearance: *provided*, that in such case the court may examine such statement, together with the evidence filed in the case; and if, upon such examination, the court shall not be satisfied with such statement, the district attorney shall be directed by the court to file the proper information and bring the case to trial.

Examination must precede information.

SECTION 7. No information shall be filed against any person for any offense until such person shall have had a preliminary examination, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: *provided*, that informations may be filed without such examination against fugitives from justice, within the meaning of the constitution and laws of the United States.

Court to inquire if information was filed in good faith.

SECTION 8. Whenever any information shall be filed by any district attorney, under the provisions of this act, without a preliminary examination, and the defendant in such information shall be acquitted or discharged without trial thereof, it shall be the duty of the court in which the defendant shall be so acquitted or otherwise discharged, to determine whether such information was filed upon probable cause and in good faith, and when found to be so filed, to file a duplicate of such determination that such information was filed for probable cause and in good faith. And when such court shall not file such duplicate, the defendant in such information may maintain an action against such district attorney for malicious prosecution.

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Second arrest and examination may be had.

SECTION 9. In case any preliminary examina has been had, as provided by law, and the pe complainod of has been discharged for want sufficient evidence to raise a probability of his g and the district attorney shall afterwards disc admissable evidence sufficient, in his judgmen convict the person discharged, he may notwithsta ing such discharge, cause another complaint to made before any officer authorized by law to m such examination, and thereupon a second arrest examination shall be had.

OF THE FORM OF INFORMATIONS.

Form of information.

SECTION 10. The information may be in the f lowing form:

STATE OF WISCONSIN, —— county.

In ——— Court.

The State of Wisconsin, }
against }
(Name of Accused.) }

I, —— ———, district attorney for said count hereby inform the court, that, on the —— day of — in the year ——, at said county, A. B. (name or ali of accused) did (state the offense), against the pea and dignity of the state of Wisconsin.

Dated, ———, ——.

———,
District Attorney.

Sufficiency of information.

SECTION 11. The information shall be sufficient it can be understood therefrom—

First. That it is presented by the person authori by law to prosecute the offense.

Second. That the defendant is named therein, described as a person whose name is unknown to t informant.

Third. That the offense was committed within t jurisdiction of the court, or is triable therein.

Fourth. That the offense charged is set forth wi such degree of certainty that the court may pronoun judgment upon a conviction according to the right the case.

OF THE STATEMENT OF OFFENSES.

Of statement of offenses.

SECTION 12. In indictments or information for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder, to charge that the accused did wilfully, feloniously, and of his malice aforethought, kill and murder the deceased; and in any indictment or information for manslaughter, it shall be sufficient to charge that the accused did feloniously kill and slay the deceased.

Of informations for perjury.

SECTION 13. In indictments or informations for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged, and in what court or before whom, the oath or affirmation was taken, averring such court, person or body to have competent authority to administer the same, together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the indictment, information, complaint, affidavit, declaration or part of any records or proceedings, other than as aforesaid, and without setting forth the commission or authority of the court, person or body before whom the perjury was committed. In indictments or informations for subornation of perjury, or for endeavoring to incite or procure any person to commit the crime of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the indictment, information, complaint, affidavit, declaration or part of any record or proceedings, and without setting forth the commission or authority of the court, person or body before whom the perjury was committed, agreed, promised or incited to be committed.

For forgery, etc.

SECTION 14. In any indictment or information for falsely making, uttering, forging, printing, photographing, disposing of or putting off any instrument, it shall be sufficient to set forth the purport thereof.

For counterfeiting.

SECTION 15. In any indictment or information for engraving, making or mending, or beginning so to do, any instrument, matter or thing, or for providing, using or having the unlawful custody or possession of any instrument or other material, matter or thing, it shall be sufficient to describe such instrument, material, mat-

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ter or thing by any name or designation by which same may be usually known.

How instrument may be described.

SECTION 16. In all other cases, whenever it s be necessary to make any averment in any indict or information, as to any instrument, whether the consists wholly or in part of writing, print or fig it shall be sufficient to describe such instrument by name or designation by which the same may be usua known, or by the purport thereof.

Offenses in relation to election—what shall be alleged

SECTION 17. When an offense shall be commi in relation to any election, an indictment or infor tion for such offense shall be deemed sufficient i allege that such election was authorized by law, wi out stating the names of the inspectors or officers hol ing such elections, or the offices to be filled thereat, the names of the persons voted for.

Averments as to money, bills, notes, etc.

SECTION 18. In every indictment or information which it shall be necessary to make any averment to any money, or bank bill, or note, United State treasury notes, postal or fractional currency or othe bills, bonds or notes, issued by lawful authority and intended to pass and circulate as money, or any United States bonds, it shall be sufficient to describe such money or bills, notes, currency or bonds, simply money, without specifying any particular coin, not bill or bond, and such allegation shall be sustained by proof of any amount of coin, or of any such note, bill currency or bond, although the particular species of coin of which such amount was composed, or the par ticular nature of such note, bill, currency or bond shall not be proven.

For larceny.

SECTION 19. An indictment or information for lar ceny may contain also a count for obtaining the same property by false tokens or pretenses, or a count for embezzlement thereof, and for receiving or concealing the same property, knowing it to have been stolen, and the jury may convict of either offense, and may find all or any of the persons indicted or informed against guilty of either of the offenses charged in the indictment or information.

Of offenses created by any statute.

SECTION 20. When the offense charged has been created by any statute, or the punishment of such offense has been declared by any statute, the indictment or information shall after verdict, be held sufficient to warrant the punishment prescribed by the stat-

ute, if it describe the offense in the words of the statute, or in words of substantially the same meaning; and words used in the statutes to define a public offense need not be strictly pursued in charging an offense under such statutes, but other words conveying the same meaning may be used.

Facts conferring jurisdiction need not be stated.

SECTION 21. In pleading a judgment or other determination of, or proceedings before any court or officer, the facts conferring jurisdiction need not be stated; but it shall be sufficient to state that the judgment or determination was duly rendered or made, or the proceedings duly had before such court or officer, but the facts conferring jurisdiction must be established on the trial.

Of private statute.

SECTION 22. In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to the statute by its title and the date of its approval.

In case of loss of information or indictment.

SECTION 23. In case of the loss or destruction of an information, the district attorney may file in court another information, and the prosecution shall proceed and trial be had without delay from that cause. In case of the loss or destruction of an indictment, the court, upon suggestion of the fact, may order another to be found, or an information to be filed, as it deems proper.

In case of wrong charge, defendant and witnesses may be recognized.

SECTION 24. When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged if there appears to be good cause to detain him in custody, but the court may recognize him to answer to the offense, and, if necessary, recognize the witnesses to appear and testify.

Larceny of animals.

SECTION 25. In an indictment or information for the larceny of any animal, or for any other public offense committed in reference to any animal, it shall be sufficient to describe the animal by such name as, in the common understanding, embraces it, without designating its sex.

Offenses in relation to property.

SECTION 26. In an indictment or information for an offense committed in relation to property, it shall be sufficient to state the name of any one, or the names of several joint owners.

OF AMENDMENTS.

Amendment of indictment or information.

SECTION 27. Any court of record in which the trial of an indictment or information is had, may forthwith

allow amendment in case of variance between statement in the indictment or information, and proof in the following cases: In the name or description of any person place or premises, or of any thing, writing or record, or the ownership of any property described in the indictment or information, and in all cases where the variance between the indictment or information and the proof are not material to the merits of the case.

Court may direct amendment.

SECTION 28. Upon allowing such amendment the court may direct such amendment of other parts of the indictment as may thereby be rendered necessary, and may in its discretion proceed in or postpone the trial.

How plea of misnomer to be treated.

SECTION 29. Whenever the plea of misnomer is pleaded to an indictment or information, the court shall forthwith cause the indictment or information to be amended in that respect, and call upon the parties to plead thereto as though no such plea had been pleaded.

Not to be quashed for error.

SECTION 30. No indictment, information, process, return or other proceeding in a criminal case in the courts or course of justice shall be abated, quashed or reversed for any error or mistake where the person and the case may be rightly understood by the court, and the court may, on motion, order an amendment curing such defect.

OF GRAND JURIES.

Of grand juries.

SECTION 31. Grand juries shall not hereafter be drawn, summoned or required to attend at the sitting of any court within this state, as provided by law, unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court. Such order shall specify the time at which such grand jury shall appear before the court, and the number of days' notice or summons which shall be given them.

OF PLEAS OF GUILTY.

Of pleas of guilty.

SECTION 32. Whenever any person committed for trial and in actual confinement for an offense for which the highest penalty provided by law shall not exceed five years imprisonment, shall request of the district attorney and county judge of the county in which the offense was committed to be arraigned upon such charge before the county court, before the sitting of the court having jurisdiction to try the same, it shall be the duty

of the district attorney, upon the receipt of such request, to file an information against the prisoner upon such charge, within five days thereafter, in the office of the clerk of the court having trial jurisdiction and deliver a copy thereof to the prisoner. Such request shall be in writing, subscribed by the prisoner in the presence of the sheriff, under-sheriff or jailor, who shall sign the same as attesting witness, and shall forthwith be delivered to the clerk of the proper court. Immediately upon receiving and filing the same, the clerk shall make two certified copies thereof, one of which the sheriff shall forthwith serve upon the district attorney and the other upon the county judge.

County judge to order arraignment.

SECTION 33. The county judge upon receiving such request shall at once issue an order fixing a time for such arraignment, and stating the place where the same will be had, which time shall be not less than six days after the receipt by him of such request. The sheriff shall serve a copy of such order upon the district attorney, the prisoner's counsel if he have any, and if the prisoner is a minor, on the nearest relative of the prisoner, if any there be known to the sheriff residing in the county, at least three days before the time fixed for such arraignment.

Proceedings for arraignment.

SECTION 34. At the time fixed for such arraignment, the sheriff or jailor shall produce the prisoner before the county judge at the usual court room of the county court. It shall be the duty of the sheriff, district attorney and clerk of the court, having trial jurisdiction, to attend upon such arraignment. The clerk shall act as clerk of the county court in the proceeding, and shall exhibit the information and the evidence taken before the examining magistrate, if such examination has been had, to the county judge, who shall examine the same. If preliminary examination has been waived by the prisoner, the county judge shall inquire into the nature of the case, and may examine witnesses if necessary, to enable him to judge of the proper amount of punishment to be inflicted. The county judge shall cause due proof to be filed with the clerk, of the proper service of such request and his order as herein required. The prisoner shall then, in open court, be arraigned. The county judge or district attorney shall fully explain to him the exact nature of the

offense charged in the information, and the p
provided therefor by law.

If prisoner plead not guilty, shall be remanded for trial; if guilty, county judge to pass sentence.

SECTION 35. If upon such explanation the p
refuses to plead, or plead not guilty, such ref
plea shall be entered on the minutes and the p
remanded to jail to await his trial. If he plead
to the information, the county judge shall recei
plea, shall pass sentence and render judgment th
in the same manner and with like effect as if suc
had been made in the court having trial jurisd
and shall inflict such punishment, either by fine
prisonment, or both, as the nature of the case m
quire; but such punishment shall in no case b
nor greater than the penalty fixed by law for the o
charged. Such request, information, plea, sent
judgment, and the minutes of all the proceedings
be entered and recorded in a book to be kept for
purpose in the county court, in the same manner
substantially the same form as if the arraignment
been had in the court having trial jurisdiction;
the clerk shall also keep a similar record thereof,
the same form, in his office, in a book to be ke
for that purpose.

Sentence to be certified.

SECTION 36. Such sentence shall be certified by
clerk from his record thereof, delivered and exec
in the same manner as if passed by the court ha
trial jurisdiction.

Person committed for trial, may plead guilty.

SECTION 37. When any person shall be comm
for trial, and in actual confinement, or in jail by v
of any indictment or information pending against
the court having trial jurisdiction may, at any l
special term thereof, upon the application of the
oner in writing, stating that he desires to plead
to the charge made against him by the complain
dictment or information, direct an information t
filed, if indictment or information has not been
and upon the filing thereof and of such appli
may receive and record a plea of guilty, and a
sentence thereon.

Amendments to statutes.

AMENDMENTS TO STATUTES.

Sec. 7, chap. 138 amended.

SECTION 38. Section seven of chapter one hun
and eighteen of the revised statutes is hereby am
so as to read as follows: "Section 7. On re
such lists, the clerk of the circuit court shall wri

mes of the persons contained in the petit jury list
separate pieces of paper, each in the same manner
near as may be, so that the name written thereon
all not be visible, and shall deposit such pieces of
per in a box, from which they shall be drawn as here-
after provided. And when ordered by the judge, as
ovided by law, to draw a grand jury, he shall in like
nner write the names of the persons contained on
e grand jury list on separate pieces, and deposit such
ces in a box, to be drawn as hereinafter provided."

Sec. 8 amended.

SECTION 39. Section eight of said chapter one hun-
ed and eighteen is hereby amended so as to read as
llows: "Section 8. At least fifteen days before the
ing of any court, the clerk of the court, in the pres-
ce of the sheriff or under sheriff and a justice of the
ace, shall proceed to draw the names of thirty-six
ersons from the box containing the names of petit
rors, to serve as petit jurors at such court. And
hen ordered by the court to draw a grand jury, he
all in like manner and before like witnesses, proceed
draw the names of seventeen persons from the box
ntaining the names of the grand jurors, to serve as
rand jurors of said court."

Sec. 9 amended.

SECTION 40. Section nine of said chapter one hun-
ed and eighteen is hereby so amended as to read as
llows: "Section 9. The clerk of the circuit court
all, twelve days at least before the first day of the
ourt, issue and deliver to the sheriff or under sheriff
f said county a venire for the petit jury, under the
al of the court, commanding him to summon the
ersons so drawn as jurors to appear before the said
ourt, at or before the hour of eleven o'clock A. M.,
the first day of the term thereof, to serve as petit
rors. And when ordered to draw a grand jury, as
rovided by law, he shall in like manner issue and de-
ver a venire, commanding the sheriff or under sheriff
summon the persons so drawn as grand jurors to ap-
ear before the said court at the time specified in the
rder of the judge."

Sec. 10 amended.

SECTION 41. Section ten of said chapter one
undred and eighteen is hereby so amended as to
ead as follows: "Section 10. At least twelve days'
otice of such drawing of the petit jury shall be given
y such clerk, by publishing the same in a newspaper
f the county, if there be any, and if not by affixing

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such notice on the outer door of the house wher court for which such jury is drawn is about held."

Sec. 11 amended.

SECTION 42. Section eleven of said chapt hundred and eighteen is hereby so amended read as follows: "Section 11. The sheriff or sheriff shall summon the persons named in venires to attend such court as grand or petit j as the case may be, by giving personal notice to person, or by leaving a written notice at his pl residence, with some person of proper age. He return such venires to the court at the opening the specifying those who were summoned, and the ner in which such person was notified. Petit j shall be summoned at least four days before the si of the court; grand jurors shall have such notic the judge in his order calling such jury shall req to be given."

Chapter 177 amended.

SECTION 43. Chapter one hundred and seve seven of the revised statutes is hereby so amended to read as follows:

"CHAPTER 177.

"OF INDICTMENTS, AND PROCEEDINGS BEFORE TRI

Discharge of prisoner.

"Section 1. Any person held in prison on charge of having committed a crime shall be charged, if he be not indicted or an information against him before the end of the second term of court at which he is held to answer, unless it appear to the satisfaction of the court that the nesses on the part of the state have been entice kept away, or are detained and prevented from atte ing the court by sickness or some inevitable accident

Limitation of time for finding indictment.

"Section 2. An indictment or information crime punishable by imprisonment for life, may found or filed at any period. All indictments informations for other crimes shall be found and within six years after the commission of the offens where the offenders shall be known; but any pe during which the party charged was not actually publicly a resident within this state, or in which party committing the offense was unknown a offender to the sheriff or prosecuting attorney of county where the offense was committed, shall not reckoned as part of the six years.

If person accused is not in custody, process shall be issued.

"Section 3. If the grand jury shall find and return to the court an indictment, or the proper officer shall file an information against any person who is not already in custody, process shall forthwith be issued to arrest the person charged with the offense.

Copy of indictment to be served.

"Section 4. As soon as may be after the finding of an indictment or the filing of an information for a crime punishable by imprisonment for life, the party charged shall be served with a copy thereof, by the sheriff or his deputy, at least twenty-four hours before trial.

To be tried before circuit court.

"Section 5. All persons indicted or against whom an information is filed shall be tried before the circuit court, unless they request to be arraigned in the county court, and plead guilty therein as hereinbefore provided, and any prisoner indicted or against whom an information is filed for a crime punishable by imprisonment in the state prison for life, shall, on demand upon the clerk, by himself or his counsel, have a list of the jurors returned, delivered to him at least twenty-four hours before trial, and shall also have process to summon such witnesses as are necessary to his defense, at the expense of the state.

Accused entitled to copy of indictment.

"Section 6. Every person indicted or against whom an information is filed for an offense for which he may be imprisoned in the state prison, shall, if he be under recognizance or in custody to answer for such offense, be entitled to a copy of the indictment or information, and of all indorsements thereon, without paying any fees therefor.

District attorney may issue subpœnas.

"Section 7. The district attorney and all other prosecuting officers may in all cases issue subpœnas for witnesses to appear and testify in behalf of the state, and the subpœnas, under the hand of such officer, shall have the same form, and be obeyed in the same manner, and under the same penalties in case of default, as if issued by the clerk.

Tender of witness' fees not necessary.

"Section 8. It shall not be necessary to pay or tender any fees to any witness who is subpœnaed in any criminal prosecution, but every such witness shall be bound to attend, and be punishable for non-attendance, in the same manner as if the fees allowed by law had been paid to him.

Stay of proceedings. If injured party no-

"Section 9. Whenever an indictment is found or information filed against any person for any misdemean-

Knowledge satisfaction.

or, for which the party injured may have a r
by civil action, except where the offense was com
by or upon any sheriff or other officer of jus
riotously, or with intent to commit a felony, if t
ty injured shall appear in court where such indi
or information is pending and acknowledge satisf
for the injury sustained, the court may, on paym
the costs accrued, order all further proceedings
stayed, and discharge the defendant from the
ment or information, which shall forever bar all
dy for such injury by civil action.

Mode of trial not to be questioned.

"Section 10. When any person is arraigned
an indictment or information, it shall not be nece
in any case, to ask him how he will be tried.

If accused refuse to plead, court may enter plea.

"Section 11. If on the arraignment of any p
who is indicted, or against whom any informati
filed, he shall refuse to plead or answer, or shall
confess the indictment or information to be true,
court shall order a plea of not guilty to be entered, and
thereupon the proceedings shall be the same as if he
had pleaded not guilty to the indictment or information,
as the case may be.

Person held in prison may demand trial at next term.

"Section 12. Every person held in prison upo
indictment or information, shall, if he require
tried as soon as the next term of the court after the
piration of six months from the time when he was
prisoned, or shall be bailed upon his own recogniz
unless it shall appear to the satisfaction of the c
that the witnesses on behalf of the state have bee
ticed or kept away, or are detained and preve
from attending the court by sickness or some inevi
accident.

Plea in abatement may be refused.

"Section 13. When a plea in abatement, or o
dilatory plea to an indictment or information shal
offered, the court may refuse to receive it until
truth thereof shall be proved by affidavit or other
dence.

Chap. 178, R. S., amended.

SECTION 44. Section one of chapter one hund
and seventy-eight of the revised statutes is he
amended by adding after the word, "indictment
the sixth line thereof, the words, "or informa
Section two of said chapter is hereby amended by
ding thereto after the word, "found," in the first
thereof, the words, "or information filed." Sec
three of said chapter is hereby amended by adding

thereto, after the word, "found," where it occurs in
the third and fifth lines, the words, "or information
filed."

Chap. 222, laws of 1862, amended.

SECTION 45. Section one of chapter two hundred
and twenty-two of the general laws of 1862 is hereby
amended by adding thereto, after the word, "indict-
ment," where it occurs in the third, fifth, ninth and
fourteenth lines thereof, the words, "or information."
Section two of said chapter is hereby amended by ad-
ding thereto, after the word, "indictment," in the
fourth line thereof, the words, "or information."

Chap. 179, R. S., amended.

SECTION 46. Section one of chapter one hundred
and seventy-nine of the revised statutes is hereby
amended by adding thereto, after the word, "indict-
ment," in the first line thereof, the words, "or infor-
mation." Section three of said chapter is hereby
amended by adding thereto, after the word, "indicted,"
in the first line thereof, the words, "or against whom
an information is filed." Section seven of said chapter
is hereby amended by adding thereto, after the word,
"indicted," in the first and second lines thereof, the
words, "or against whom an information is filed."
Section nine of said chapter is hereby amended by
adding thereto, after the word, "indicted," in the first
line thereof, the words "or informed against;" and by
adding after the word, "indictment," in the third and
seventh lines, the words, "or information." Section
ten of said chapter is hereby amended by adding
thereto, after the word, "indictment," in the first line,
the words, "or information." Section eleven of said
chapter is hereby amended by adding thereto, after the
word, "indicted," in the first line thereof, the words,
"or informed against." Section thirteen of said chap-
ter is hereby amended by adding thereto, after the
word, "indictment," in the first line, the words, "or
information."

Chap. 180 amended.

SECTION 47. Section six of chapter one hundred
and eighty of the revised statutes is hereby amended
by adding thereto, after the word, "indictment," in
the second line, the words, "or information."

Chap. 181 amended.

SECTION 48. Section two of chapter one hundred
and eighty-one of the revised statutes is hereby
amended by adding thereto, after the word, "indict-
ment," in the second line, the words, "or information."

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Chap. 163 amended.

SECTION 49. Section one of chapter one hu and sixty-three of the revised statutes is hereby am so as to read as follows: "Section 1. No pers be held to answer for a criminal offense unless presentment or indictment of a grand jury, or upo formation duly filed against him in the manner ed by law, except in cases of impeachment, or in cognizable by justices of the peace, or arising army or militia, when in actual service, in time of public danger."

Ibid.

SECTION 50. Section three of said chapter one dred and sixty-three is hereby amended by a thereto after the word, "indicted," in the first lin words, "or informed against." Section four of said c ter is hereby amended by adding after the word, "in ment," where it occurs, in the second and sixth l thereof, the words, "or information." Section fi said chapter is hereby amended by adding after the w "indicted," in the first line thereof, the word, "o formed against," and by adding after the word, "in dictment," where it occurs in the third, fourth and fifth lines thereof, the words, "or information." Sec six of said chapter is hereby amended by ad thereto after the word, "person," at the end of said tion, the words, "or jurisdiction to award sentenc on a plea of guilty."

Chap. 164 amended.

SECTION 51. Section seven of chapter one h and sixty four of the revised statutes is hereby am ed, by adding thereto, after the word, "indict where it occurs in the second line, the words, "o formed against."

Chap. 170 amended.

SECTION 52. Section five of chapter one hund and seventy of the revised statutes is hereby amen by adding thereto, after the word, "found," in the t line, the words, "or information filed." Section s of said chapter is hereby amended by adding the after the word, "indicted," in the first line, the wo "or informed against," and after the word "ind ment," in the third line, the words, "or informa

Chap. 172 amended.

SECTION 53. Section two of chapter one hundr and seventy-two of the revised statutes is he amended by adding after the word, "indicted," in third and fifth lines, the words, "or informed against Section three of said chapter, is also amended by ing thereto after the word, "indicted," in the sec

and fourth lines, the words, "or informed against." Section five of said chapter is hereby amended by adding thereto, after the word, "indicted," in the third line, the words, "or informed against." Section seven of said chapter is amended by adding thereto, after the word, indictment," in the third line, the words, "or information." Section ten of said chapter is hereby amended by adding thereto, after the word, "indictment," in the fifth, ninth and tenth lines the words, "or information." Section twelve of said chapter is amended by adding after the word, "indictment," in the fourth line the words, "or information."

Chap. 176 amended.

SECTION 54. Section fifteen of chapter one hundred and seventy-six of the revised statutes is hereby so amended as to read as follows: "Section 15. All the testimony of the witnesses examined shall be reduced to writing by the magistrate or under his direction, and shall be signed by the witnesses."

Ibid.

SECTION 55. Section twenty-six of said chapter one hundred and seventy-six is hereby amended so as to read as follows: "Section 26. All examinations, evidence and recognizances taken by any magistrate in pursuance of the provisions of this chapter, shall be certified and returned by him to the clerk of the court before which the party charged is bound to appear, within ten days after the close of such examination; and if such magistrate shall neglect or refuse to return the same, he may be compelled forthwith to do so by rule of the circuit or county court, and in case of disobedience may be proceeded against by attachment, as for contempt, and for such neglect shall also be liable to a penalty of twenty dollars, to be collected in an action against him as other fines are collected."

Not to affect jurisdiction of municipal court of Milwaukee.

SECTION 56. Nothing in this act contained shall be so construed or have the effect to direct [divest] or deprive the municipal court (which was established by the provisions of chapter 199 of the laws of Wisconsin, published in the volume of laws styled private and local laws of 1859 on pages 886 to 894 inclusive, entitled "an act to establish a municipal court in the city and county of Milwaukee," approved March 18, 1859,) of any of the jurisdiction, power or authority now by law vested in said municipal court; and all the provisions of this act are hereby declared to apply to said municipal court.

SECTION 57. All acts and parts of acts c
vening the provisions of this act are hereby repe
SECTION 58. This act shall take effect and be in
from and after the first day of July, A. D. 1871.
Approved March 23, 1871.

CHAPTER 138.

[*Published April* 1, 187

AN ACT to amend section three of chapter 102 of the general l
of 1868, entitled "an act to encourage the planting and g
of trees, and for the protection thereof."

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

Amended.

SECTION 1. Section three (3) of chapter 102 of the general laws of 1868 is hereby amended so as to r
as follows: Tree belts to be entitled to the benefi
this act, for each five acres of land, must be at l
thirty feet wide; for each ten acres of land, at l
sixty feet wide; and for forty square acres, at least
hundred feet wide, and must be on two sides of e
square tract of land, and all tree belts owned by
same land owner must be planted to not exceed
fourth of a mile apart, or on the west and south
of every forty square acres of land; and the tree
may be divided and planted or reserved on any ot
lines within each forty square acres by the permiss
of the assessor.

Width of tree-belts prescribed.

SECTION 2. This act shall take effect and be in fo
from and after its passage and publication.
Approved March 24, 1871.

CHAPTER 139.

[*Published March* 29, 1871.]

AN ACT to amend section two of chapter 104 of the general laws of 1870, entitled an act to aid the West Wisconsin Railway Company.

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

Amended.

SECTION 1. Section two of chapter 104 of the general laws of 1870 is hereby amended by striking out the word, "county," at the end of the last line, and adding thereto the words, "and Trempealeau counties."

SECTION 2. This act shall take effect and be in force from and after its passage.
Approved March 24, 1871.

CHAPTER 140.

[*Published March* 30, 1871.]

AN ACT relating to the settlement of the estates of deceased persons, and amendatory of section 9, chapter 98 of the revised statutes.

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

Amended.

SECTION 1. Section nine of chapter 98 of the revised statutes is hereby amended so as to read as follows: If an executor shall neglect, after due notice given by the judge of the county court, to render his account and settle the estate according to law, or to perform any judgment of the court, or shall abscond or become insane or otherwise incapable or unsuitable to discharge the trust, the county court may remove such executor.

Executors may be removed for cause.

SECTION 2. Said chapter 98 is further amended by adding thereto an additional section to read as follows:

Further amended.

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stated in plain, concise language, without prolixity or unnecessary repetition. Different offenses, and different degrees of the same offenses, may be joined in one information, in all cases where the same might be joined by different counts in one indictment; and in all cases the defendant shall have the same rights as to all proceedings therein, as he would have if prosecuted for the same offense upon indictment.

1 Pin. 89, 194. 2 Pin. 204, 513. 6 Wis. 726. 14 Wis. 383.

17 Wis. 145; 21 id. 204, 274; 28 id. 441; 28 id. 501, 632; 34 id. 64; 25 id. 364, 384; 36 Wis. 423; 37 id. 402; 39 id. 327, 435, 596; 40 id. 129, 423; 31 id. 383.

Provisions of law relating to trials, on indictment, apply to informations.

SECTION 4651. All provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the passing or execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall, to the same extent and in the same manner, as near as may be, apply to informations and all prosecutions and proceedings thereon.

Same.

SECTION 4652. Any person who may, according to law, be committed to jail or become recognized or held to bail, with sureties for his appearance in court, to answer to any indictment, may, in like manner, be so committed to jail or become recognized and held to bail for his appearance to answer to any information or indictment, as the case may be.

District attorney to determine whether to file information: if he refuses to give reasons, the court may order the same filed.

SECTION 4653. The district attorney of the proper county shall inquire into and make full examination of all facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense whereon the offender shall have been committed to jail, or become recognized or held to bail, and to file an information setting forth the crime committed, according to the facts ascertained on such examination, and from the written testimony taken thereon, whether it be the offense charged in the complaint on which the examination was had or not; but if the district attorney shall determine in any such case that an information ought not to be filed, he shall make, subscribe and file with the clerk of the court, a statement in writing, containing his reasons, in fact and in law, for not filing an information in such case; such statement shall be filed at and during the term of the court at which the offender shall be held for appearance for trial; and in such case the court shall examine such statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with such statement, the district attorney shall be directed by the court to file the proper information and bring the case to trial.

No information to be filed without preliminary examination, except in certain cases.

SECTION 4654. No information shall be filed against any person for any offense until such person shall have had a preliminary examination, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: provided, that information may be filed without such examination, against fugitives from justice, within the meaning of the constitution and laws of the United States; but no failure or omission of such preliminary examination shall in any case invalidate any information in any court, unless the defendant shall take advantage of such failure or omission before pleading to the merits, by a plea in abatement.

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When information filed without examination, court shall determine whether it is in good faith, etc.

SECTION 4655. Whenever any information shall be filed by any district attorney against a fugitive from justice, without a preliminary examination, and the defendant in such information shall be acquitted or discharged without trial thereof, it shall be the duty of the court in which the defendant shall be so acquitted or otherwise discharged to determine in writing whether such information was filed upon probable cause and in good faith, and when found to be so filed, shall file such determina-

(27), north of range number twenty
Door county, Wisconsin; said pier to
waters of Sturgeon Bay, a distance
ree hundred (300) feet, and to be kno
idge Pier."

This act shall take effect and be
d after its passage and publication.
March 23, 1881.

[Published March 26, 188

CHAPTER 172.

thorize the town of Maine in the county of
ild a bridge across Wolf river and to auth
vise a tax to pay for the building of said bri

the state of Wisconsin, represented in
mbly, do enact as follows:

. The town of Maine in the count
hereby authorized to build a bridge a
n the line between section four (4)
(9) of said town, and for that purpo
d draw town orders to such an amou
sary, not to exceed one thousand do
ny one year, the said tax to be levie
same as town taxes are by law levied

. The said bridge shall be built under
he board of supervisors of said town,
ess than sixteen feet wide, and to be
feet above high water mark, with st
e sides of said bridge, and shall be
maintained in a safe and substantial
assage of teams, animals and foot p
shall not in any way interfere with or
e navigation of said Wolf river or
ting of logs, or lumber, and a draw
l in said bridge over the main chann
l when open shall have a clear spac
f boats or vessels of not less than
and said draw shall always be kep
order and shall be properly open
e passage of boats, vessels, or any
safely pass under said bridge.

This act shall take effect and b
l after its passage and publication.
March 23, 1881.

No. 286, A.] [Published March 28, 1881.]

CHAPTER 173.

ACT to amend section four thousand six hundred and
y-four of chapter one hundred and eighty-nine of the re-
ed statutes, relating to indictments and informations.

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

SECTION 1. Section four thousand six hundred and y-four chapter one hundred and eighty nine of the ed statutes, is hereby amended so as to read as fol-: No information shall be filed against any person ny offense, until such person shall have had a pre-inary examination as provided by law, before a justice he peace or other examining magistrate or officer, s such person shall waive his right to such exam-ion: provided, that information may be filed with-such examinations against fugitives from justice in the meaning of the constitution and laws of the ed States, and against corporations; but no failure mission of such preliminary examination, shall in any invalidate any informations in any court, unless the ndant shall take advantage of such failure or omis-, before pleading to the merits, by a plea in abate-t. No informations to be filed without preliminary examination, except in certain cases.

SECTION 2. This act shall take effect and be in e from and after its passage and publication.
Approved March 23, 1881.

No. 299, A.] [Published March 29, 1881.]

CHAPTER 174.

ACT to amend chapter sixty-six, of the revised statutes, entitled of excise and intoxicating liquors.

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

SECTION 1. Section one thousand five hundred and y-four of said chapter sixty-six, is hereby amended inserting after the word "thereof" in the sixth line aid section the following words, "the wife of such on, or." Wife of spendthrift may forbid the selling to him of liquor.

SECTION 2. Section one thousand five hundred and y-seven of said chapter sixty-six, is hereby amended striking out of lines six and seven of said section, following words, "having good reason to believe to be such;" also amend section one thousand five dred and fifty-eight of said chapter, by striking out Amendments.

ascertained on such examination and from the written testimony taken thereon, whether it be the offense charged in the complaint on which the examination was had or not; but if the district attorney shall determine in any such case that an information ought not to be filed he shall make, subscribe and file with the clerk of the court a statement in writing containing his reasons in fact and in law for not filing an information; such statement shall be filed at or before the term of the court at which the defendant shall be held for appearance for trial; and the court or presiding judge shall examine such statement, together with the evidence filed, if there be any, and if upon such examination the court or judge shall not be satisfied with such statement the district attorney shall file the proper information and bring the case to trial; but if said statement is satisfactory said court or judge shall indorse "approved" upon it; and if at the time of such approval the defendant be confined in jail under commitment for trial the clerk of the court shall forthwith serve upon the sheriff or jailer having such defendant in custody his certificate under the seal of the court to the effect that the reasons for not filing an information have been approved by the court or judge, as the case may be; whereupon the defendant shall forthwith be discharged.

Sec. 1, ch. 190, 1875, and ch. 257, 1889.

Where the examination disclosed that a person charged with incest might have committed rape upon his daughter, and an information was filed charging both offenses in separate counts, a plea in abatement to the count charging rape, on the ground that no preliminary examination had been had for that offense, was properly overruled: Porath v. State, 90 Wis. 527.

Information filed need not be for the offense charged in the complaint before magistrate, but may be for any offense which the testimony taken shows accused to be guilty of. District attorney is not bound by the opinion or adjudication of the magistrate: State v. Leicham, 41 Wis. 565.

Information does not put accused on trial for a different offense from that covered by the examination: Brown v. People, 39 Mich. 37; Yaner v. People, 34 id. 286; Turner v. People, 33 id. 363.

To determine whether such an examination was had as to the specific offense charged recourse can be had only to the examination returned by the magistrate: Turner v. People, 33 Mich. 363.

A similar statute held not to require the district attorney to obtain leave of court to permit him to file his reasons for not filing an information. An entry reciting the title of the cause and that reasons had been filed for not filing an information, and ordering "that he have leave not to file an information," is conclusive both upon the fact that reasons had been filed and that the prosecution was at an end: Spalding v. Lowe, 56 Mich. 366.

Preliminary examination. Section 4654. No information shall be filed against any person for any offense until such person shall have had a preliminary examination, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; provided, that information may be filed without such examination against fugitives from justice within the meaning of the constitution and laws of the United States and against corporations; but no failure or omission of such preliminary examination shall in any case invalidate any information in any court unless the defendant shall take advantage of such failure or omission before pleading to the merits by a plea in abatement.

Sec. 7, ch. 100, 1875 (so amended as to not invalidate an information filed without a preliminary examination, except upon a plea in abatement, to meet decision of supreme court (41 Wis. 565), and ch. 173, 1881.

Purpose of statute. The design of this statute was to secure to some extent the purpose of a presentment by a grand jury under the law as it existed before, in protecting a party against being subject to the indignity of a public trial for an offense before probable cause had been established by evidence under oath: Annis v. People, 13 Mich. 511.

No information shall be filed, etc. Information need not show that there has been a preliminary examination, nor need it be shown by the prosecution; and when defendant relies upon absence of examination it should be pleaded in abatement; and if issue is joined burden of proof is upon accused: Leicham v. State, 41 Wis. 565. Certificate in this case held not to show that an examination was not had before a judge or a court commissioner as is allowed: Peterson v. State, 45 Wis. 535.

Information lies only after a legal examination and commitment: Byrnes v. People, 37 Mich. 515; O'Hara v. People, 41 id. 623. One cannot be compelled to go to trial on an information until he has had or waived an examination: Sneed v. People, 38 Mich. 248.

If accused is charged with the commission

of one of the higher degrees of a crime and has an examination on such charge, he may be informed against and convicted of a lower degree of the same offense without an examination as to the lower degree because the lower degree being included in the higher, an examination upon the charge for the higher degree is an examination upon the minor charge included in it: Hanna v. People, 19 Mich. 316.

The trial must be on the same matters concerning which the proof was offered on the examination: Morrissey v. People, 11 Mich. 341. But it is not designed that the complaint or warrant should stand in place of a formal presentment by a grand jury, nor that the prosecuting officer should be limited by them in the mode of charging the offense in informations: Annis v. People, 13 Mich. 511. Separate informations may be filed against defendants joined in the complaint and examination before the magistrate for an offense which was several as well as joint: Ibid.

Unless the justice of the peace who held the examination has found the alleged offense to have been committed and that the accused was probably guilty thereof, the district attorney has no authority to file an information; the fact that subsequent to the filing of an information the court orders the justice to make a further return does not validate such information. Whether an information might be filed on the second return of the justice was not determined: People v. Evans, 72 Mich. 367.

If the return of the magistrate fails to show that the accused waived a preliminary examination, and such is the fact, the circuit court may order a further return showing such waiver, and he may be tried upon the information filed on the original return: People v. Wright, 89 Mich. 70.

Waiver of right to examination. Defendant may waive his right to a preliminary examination before information is filed as well when called upon to plead to the information as when brought before the magistrate. And if at time of pleading he makes no objection on the ground that such examination has not been had or waived he must be understood to admit that it has been had or waived or then intends to waive it: Washburn v. People, 10 Mich. 372. Plea to information is waiver of examination: People v. Jones, 24 Mich. 215. If defendant intends to insist upon want of examination he should take objection by plea in abatement or by motion to quash: Washburn v. People, *supra*; Peterson v. State, 45 Wis. 535.

Void examination. See note to sec. 4809.

Plea in abatement. A preliminary examination of the accused, unless it is waived by him, must precede the regular filing of an information; but in the absence of such an examination or a waiver of it the irregularity must be taken advantage of by a plea in abatement before a plea to the merits has been made. If such plea is interposed, the more orderly rule is for the district attorney either to demur to it, if he thinks it insufficient, or if sufficient, and its truthfulness is denied, to reply to the plea and try the issue thus formed before trying the accused on the merits. If this practice is not followed, and a motion to sustain the plea in abatement is made and overruled, on writ of error the motion will be treated as involving the question whether the plea was sustained by the evidence in the record before the trial court, and not as testing the sufficiency of the plea as such: Martin v. State, 79 Wis. 165.

While it is irregular to overrule a plea in abatement on the ground that the defendant had not had or waived a legal preliminary examination without trying an issue thereon, the defendant is not thereby prejudiced if the plea is bad upon its face: Baker v. State, 91 Wis. 416; Lester v. State, 91 id. 248.

A plea to the merits is not waived or withdrawn by subsequently filing a plea in abatement. Where a defendant, after trial and conviction, was allowed to plead in abatement he could not for the first time and on a second conviction contend in the supreme court that the plea to the merits was withdrawn by his plea in abatement and that he did not afterwards plead to the merits: Ryan v. State, 88 Wis. 140, 147.

Waiver. By pleading to the merits or offering or attempting to plead in abatement the accused waives the right to object that there was an insufficient examination or none at all. An application, after such waiver, to withdraw his plea in bar and to plead in abatement is addressed to the sound discretion of the court, and its refusal to grant it will not be held erroneous unless there was a clear abuse of discretion. If the application is delayed until the prosecution has prepared for trial it may be denied: Richards v. State, 61 Wis. 172, 176.

The waiver which results from pleading to the merits before interposing a plea in abatement, no leave having been asked or granted to withdraw the plea to the merits, is not affected by a subsequent re-arraignment of the accused and his again pleading to the merits: Ryan v. State, 83 Wis. 486.

Fugitives from justice. "A person who commits a crime within a state and afterwards draws himself from such jurisdiction without waiting to bide the consequences of such crime must be regarded as a fugitive from the justice of the state whose laws he has infringed": In re Voorhees, 32 N. J. L. 141. It is immaterial that he escaped from prison before his sentence expired and left the state; the fact that by so escaping he committed another crime cannot shield him from being brought back to state for trial for a crime committed previous to such escape: People v. Kuhn, 67 Mich. 265. See note to sec. 4843.

Procedure if no examination had. SECTION 4655. Whenever any information shall be filed by any district attorney against a fugitive from justice without a preliminary examination, and the defendant in such information shall be acquitted or discharged without trial thereof it shall be the duty of the court in which the defendant shall be so acquitted or otherwise discharged