

1977 Wisconsin Senate Bill 148

Wisconsin State Senate

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1977 WISCONSIN SENATE BILL 148*

AN ACT to repeal 247.39, 251.03 to 251.07, 251.11, 251.16, 251.17, 251.21 to 251.23, chapter 817, 974.03 and 974.04; to renumber 251.15, 251.181, 251.182, 251.19, 251.20 and 256.28(3); to renumber and amend 251.08 to 251.10, 251.12, 251.14, 251.18, 251.72, 251.94 and 973.08; to amend 251.01, 974.05(1) (intro.), (a) and (b) and (2) and 974.06(1); to repeal and recreate 251.02 and 974.02; and to create 251.08, chapter 808 and 973.08(2) of the statutes, relating to appellate practice and procedure.

Analysis by the Legislative Reference Bureau

This bill is explained in the notes provided by the judicial council.

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

PREFATORY NOTE: In December 1975, the National Center for State Courts completed a study of Wisconsin appellate practice and procedure which had been requested by the Wisconsin Supreme Court. This report urged a general revision of the statutes and rules governing appeals to the Supreme Court.

In January 1976, the Supreme Court, consistent with s. 251.18 which provides that "the Judicial Council shall act in an advisory capacity to assist the Court in performing its duties under this section (dealing with rules of pleading and practice,)" requested the Judicial Council to form a special committee to review appellate practice and procedure and to prepare specific recommendations. The committee began work in February 1976.

This bill constitutes a portion of the recommendations of the Judicial Council Appellate Practice and Procedure Committee. The balance of the recommendations consist of proposed rule changes which have been submitted for consideration to the Supreme Court. The statute and the rule changes are part of a complementary package intended to become effective simultaneously on January 1, 1978.

* **EDITOR'S NOTE:** In sections containing amendments to the statutes deleted language has been indicated by *italic* typeface and deleted punctuation has been bracketed. Added words and punctuation are indicated by **boldface** type.

SECTION 1. 247.39 of the statutes is repealed.

NOTE: Section 247.39 is repealed and is replaced by s. 251.72 as renumbered and amended. See the note following new s. 247.39.

SECTION 2. 251.01 of the statutes is amended to read:

251.01 Terms of Justices. The term of office of *each of the elected justices* **an elected justice** of the supreme court *shall commence* **commences** on the first Monday of January next succeeding *their* **the justice's** election.

NOTE: This section is amended to clarify language. It contains no substantive change.

SECTION 3. 251.02 of the statutes is repealed and re-created to read:

251.02 Employes. The supreme court may appoint the employes it considers necessary for the execution of its functions and may designate titles, prescribe duties and fix compensation. Compensation and benefits of employes should be consistent with that paid to state employes in the classified service for services involving similar work and responsibility. Each justice may appoint and prescribe the duties of a secretary and an attorney to assist the justice in the performance of the justice's duties. A person appointed by the supreme court or a justice serves at the pleasure of the court or the justice.

NOTE: This section replaces former ss. 251.02 to 251.055, which dealt with the authority of the supreme court to appoint specific employes, such as clerk, deputy clerk, reporter, crier and marshall. It is sufficient in the statutes to recognize the court's authority to appoint employes necessary for the execution of its functions without special mention of specific positions.

SECTION 4. 251.03 to 251.07 of the statutes are repealed.

NOTE: See the note following new s. 251.02.

SECTION 5. 251.08 to 251.10 of the statutes are renumbered 251.05 to 251.07 and amended to read:

251.05 Appellate Jurisdiction. The supreme court *shall have and exercise an* **has** appellate jurisdiction only, except *when as* otherwise *specially* provided by law or the constitution[,] *which shall extend.* **The appellate jurisdiction extends** to all matters of appeal, error or complaint from *the decisions or judgments* **a judgment or order** of any of the a

circuit or county courts and shall extend to all questions of law which may arise in said courts upon a motion for a new trial, in arrest of judgment, or in cases reserved by said courts court.

251.06 Discretionary Reversal. In any action or proceeding brought an appeal to the supreme court by appeal or writ of error, if it shall appear to that court appears from the record[,] that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the supreme court may in its discretion reverse the judgment or order appealed from, regardless of the question whether the proper motions, objections, or exceptions appear **motion or objection appears** in the record or not, and may also, in case of reversal[,] direct the entry of the proper judgment or remit the case to the trial court for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with the statutes governing legal procedure or rules, as shall be deemed are necessary to accomplish the ends of justice.

251.07 (title) Writs. In addition to the writs mentioned in section 3 of article VII of the constitution the supreme court shall have has power to issue all writs of prohibition, superse-deas, procedendo and all other writs and process not specially provided by statute which may be necessary to enforce the due administration of right and justice throughout the state; and any justice of said court in vacation shall, on good cause shown, have power to allow writs of error, supersedeas and certiorari, and also to grant injunctional orders. **One or more justices may issue writs to the extent permitted by court rules or internal procedures.**

NOTE: Section 251.05 is former s. 251.08 amended to clarify language. It contains no substantive change.

Section 251.06 is former s. 251.09 amended to clarify language. It contains no substantive change.

Section 251.07 is former s. 251.10 amended to clarify language. It contains no substantive change.

SECTION 6. 251.08 of the statutes is created to read:

251.08 Enforcement of Judgments and Determinations.

The supreme court has all power and authority to enforce its judgments and determinations and to exercise its jurisdiction as the supreme judicial tribunal of the state.

NOTE: Section 251.08 is former s. 251.11 restated to delete unnecessary language.

SECTION 7. 251.11 of the statutes is repealed.

NOTE: See note following new s. 251.08.

SECTION 8. 251.12 of the statutes is renumbered 251.09 and amended to read:

251.09 (title) Referral of Issues of Fact and Damages. *Whenever an issue of fact shall be joined or an assessment of damages by a jury be necessary in any action commenced in* **In actions where the supreme court has taken original jurisdiction,** *the court may[,] in its discretion, send the same refer issues of fact or damages to some a circuit court and it shall be there determined in the same manner as other issues of fact are tried or assessments made, and return be made thereof as directed by the supreme court or referee for determination.*

NOTE: Section 251.09 is former s. 251.12 amended to clarify language. It contains no substantive change.

SECTION 9. 251.14 of the statutes is renumbered 251.10 and amended to read:

251.10 Decisions to be Written; Part of Record; Certified to United States Court; Printed for Justices. *The supreme court shall give their decisions in* **decide** *all cases in writing[,] which shall be filed with the other papers in the case; and such decisions and all decisions and opinions delivered by the court or any justice thereof in relation to any action or proceeding pending in said court. One copy of each written decision or opinion delivered by the court or a justice in an action or proceeding in the court shall remain in the office of the clerk[.] Every written opinion or decision of the supreme court which shall have been filed with the clerk and one copy shall constitute and be held a part of the record in the action or proceeding in which it shall have been given and filed and shall be certified therewith to any a court of the United States to which such the action or proceeding or the record thereof may be in any manner is certified or removed. The state printer shall print for the use of the justices so many of such supreme court may require the department of administration to print its decisions and opinions[,] and at such times, as shall be in the form and number directed by them the court.*

NOTE: Section 251.14 is former s. 251.10 amended to clarify procedures. It contains no substantial change from former practice.

SECTION 10. 251.15 of the statutes is renumbered 251.11.

SECTION 11. 251.16 and 251.17 of the statutes are repealed.

NOTE: Section 251.16 is repealed as unnecessary due to the provisions of new ss. 808.05 and 809.25.

Section 251.17 is repealed as unnecessary in view of new s. 251.06 (former s. 251.09).

SECTION 12. 251.18 of the statutes is renumbered 251.12 and amended to read:

251.12 Rules of Pleading and Practice. The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. *Such* **The** rules shall not abridge, enlarge or modify the substantive rights of any litigant. The effective dates for all rules adopted by the court shall be January 1 or July 1[,] *but in no case shall a.* A rule **shall not** become effective until 60 days after its adoption. All such rules shall be printed by the state printer and paid out of the state treasury, and the court shall direct the *same* **rules** to be distributed as it *may deem* **deems** proper. All statutes relating to pleading, practice and procedure may be modified or suspended by rules promulgated *pursuant hereto* **under this section**. No rule modifying or suspending such statutes *shall may* be adopted until the court has held a public hearing with reference *thereto*. *The court may establish days certain in each year at which dates the public hearings shall be held. Said hearings shall be held at 1:30 o'clock in the afternoon, or at such other time as the court shall direct* **to the rule**. Notice of public hearings shall be given by publication of a class 3 notice, under ch. 985, the expense of the publication to be paid out of the state treasury. Notice shall also be given in *the* **an** official publication of the state bar of Wisconsin, *said the* notice to be published not more than 60 days[,] *not nor* less than 30 days[,] before the date of hearing. The state bar of Wisconsin shall not charge the state treasury for publication of this notice. Proposed rules, including changes, if any, in existing rules, shall be set forth in full in the notice. *Nothing in this* **This** section shall **not** abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure. The judicial council

shall act in an advisory capacity to assist the court in performing its duties under this section.

NOTE: Section 251.12 is former s. 251.18 amended to delete unnecessary language and to allow notice of proposed court rules to be given in any official publication of the state bar of Wisconsin.

SECTION 13. 251.181 of the statutes is renumbered 808.07.

SECTION 14. 251.182 of the statutes is renumbered 251.03.

SECTION 15. 251.19 of the statutes is renumbered 165.26.

NOTE: Section 165.26 is former s. 251.19 renumbered for more appropriate placement in the statutes.

SECTION 16. 251.20 of the statutes is renumbered 251.04.

SECTION 17. 251.21 to 251.23 of the statutes are repealed.

NOTE: These sections are repealed because their substance and that of former s. 251.90 are included in new s. 809.24.

SECTION 18. 251.72 of the statutes is renumbered 247.39 and amended to read:

247.39 (title) Alimony or Other Allowances Pending Appeal. (1) In actions affecting marriage pending in *this the supreme court*, no allowance for suit money, counsel fees or disbursements in *this the court*, nor for temporary alimony or maintenance of either spouse or the children during the pendency of the appeal will be made in *this the court*.

(2) *Such allowances* **Allowances specified in sub. (1)**, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to *this the supreme court*, provided, that if *such the* allowance is ordered before the appeal is taken *such the* order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal is perfected.

NOTE: Section 247.39 is former s. 251.72 moved to a more appropriate location in the statutes. Former s. 247.39 provided that alimony could be allowed in accordance with supreme court rule s. 251.72. The renumbering places the substance of the rule into the chapter dealing with actions affecting marriage.

SECTION 19. 251.94 of the statutes is renumbered 256.28(3)(b) and amended to read:

256.28(3)(b) Applications by attorneys for admission to the bar pursuant to section 256.28(3) **under this section**, together with supporting proofs, must be filed with the clerk *at least 60 days before they are acted upon*. Each applicant shall, at the time of filing *his the* application, deposit with the clerk the sum of \$100 or *such* other amount as may be required for *such the* investigation as may be necessary to satisfy the court that *he the applicant* is of good moral character and has been engaged in the actual practice of the law in the state or territory from which *he the applicant* comes for the required period. Applications shall be in the form prescribed by the court.

NOTE: Subsection (3)(b) is former s. 251.94 amended to clarify language and eliminate an unnecessary time restriction.

SECTION 20. 256.28(3) of the statutes is renumbered 256.28(3)(a).

SECTION 21. Chapter 808 of the statutes is created to read:

CHAPTER 808

APPEALS AND WRITS OF ERROR IN THE SUPREME COURT

808.01 Definitions. “Appeal” means a review in the supreme court by appeal or writ of error authorized by law of a judgment or order of an inferior court.

NOTE: The term “appeal” applies both to an appeal authorized by statute and the writ of error guaranteed by section 21 of article I of the constitution. The objective is to provide the same procedure for appeals and writs of error. Historically, the review authorized by a writ of error was limited to questions of law, while both the law and the facts could be reviewed on appeal. The Wisconsin supreme court does not distinguish between its power in appeals and in writs of error. Although under the former procedure, appeals were normally used in civil cases and writs of error in criminal cases, the only differences between them were in nomenclature and methods of initiating the review process. There is no reason to retain these formalistic differences.

808.02 Appeals to Supreme Court. (1) **APPEALS AS OF RIGHT.** A final judgment or a final order of a circuit court or county court may be appealed as a matter of right to the supreme court unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) which disposes of the

entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

(2) **APPEALS BY PERMISSION.** A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the supreme court in advance of a final judgment or order upon leave granted by the supreme court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

NOTE: This section represents a major substantive change. It replaces former ss. 817.09 and 817.33.

Subsection (1) is based on former s. 817.09. It provides that final orders and final judgments are appealable as a matter of right to the Supreme Court from a circuit court or county court. It also defines a final judgment or order. The reference to ss. 806.06(1)(b) and 807.11(2) is intended to resolve the problem that arises when an appeal is taken from an order issued in chambers or not reduced to writing. This subsection makes clear that only a judgment which has been entered in accordance with the provisions specified is appealable as a matter of right.

This subsection further makes clear that a judgment that is final as to some but not all of the parties, such as described in the first sentence of s. 806.01(2), is a final judgment. The significance of this provision is that a judgment dismissing one defendant must be appealed within the time provided in s. 808.03. There may be inconvenience to some party whether an appeal must be taken immediately after the dismissal or at the termination of the entire case. It is the conclusion of the Judicial Council that the more reasonable alternative is to require appeal of the dismissal at the earlier time.

Subsection (2) replaces former s. 817.33. That section contained a list of nonfinal orders which could be appealed to the Supreme Court as a matter of right. The recommendation of the National Center for State Courts is that "interlocutory trial court determinations should be reviewable only at the discretion of the Supreme Court". The purpose of the recommendation is to avoid unnecessary interruptions and delay in trial court proceedings caused by multiple appeals and to reduce the burden on the Supreme Court of dealing with

unnecessary appeals. Subsection (2) is intended to provide standards for determining when permission to appeal an intermediate judgment or order should be granted. It is based upon s. 3.12 of the tentative draft of *Standards Relating to Appellate Courts* of the American Bar Association Commission on Standards of Judicial Administration (1976).

The procedure for appeal from a judgment or order not appealable as a matter of right is provided in s. 809.30.

808.03 Time for Appeal to the Supreme Court. (1)

INITIATING AN APPEAL. An appeal or writ of error to the supreme court must be initiated within 45 days of entry of judgment or order appealed from if written notice of the entry of judgment or order is given, or within 90 days of entry if notice is not given, except as provided in this section or otherwise expressly provided by law.

(2) **EXCEPTIONS.** (a) Subsection (1) does not apply to an appeal for which a specific time period for initiating an appeal is expressly provided by law. Appeals for which special time periods are provided include: s. 9.10(4)(a) (recall), 30.30(3)(c) (harbor improvements), 32.05(13) (condemnation), 32.06(13) (condemnation), 48.911 (adoption proceedings), 62.075(4) (detachment of farm lands), 66.014(7)(b) (municipal incorporation), 66.021 (10)(b) (annexation), 66.05(8)(c) (razing buildings), 66.435(4)(b) (urban renewal act), 87.16 (flood control projects), 88.09(2) (drainage of lands), 102.25(1) (worker's compensation), 111.07(7) (employment relations commission), 117.03(5) (school district reorganization), 128.15(1) (objections of creditors' claims), 128.20(2) (settlement of receiver's or assignee's accounts), 182.60(10)(b) (special economic improvement districts), 186.29(5) (revaluation of credit union shares), 215.32(12) (revaluation of savings and loan accounts), 227.21 (administrative procedure act), 227.26 (enforcement of laws attacked in federal court), 247.37(4) (divorce), 251.51 (criminal, juvenile, youthful offender and mental commitment cases), 289.29 (log liens), 296.03 (conveyance: specific performance), 879.27(3) (probate court), 879.31 (extension of probate court appeals) and 974.02 (criminal, juvenile, youthful offender and mental commitment cases).

(b) A person imprisoned on a criminal sentence against whom a civil final judgment or order is rendered has 120 days in which to appeal the civil judgment or order.

(c) When a party to an action or special proceeding dies

during the period allowed for appeal, the time to appeal is the time permitted by law or 120 days after the party's death, whichever is later. If no personal representative qualifies within 60 days after the party's death, any appellant may have a personal representative appointed under s. 856.07(2).

NOTE: Subsection (1) provides the general rule for the time within which an appeal must be initiated. It reduces the time for an appeal from 90 days if notice of entry of judgment is given and 6 months if no notice is given to 45 days and 90 days, respectively. An analysis of cases docketed in the Wisconsin Supreme Court in the 1973 and 1974 terms of the court shows that the median time for filing the notice of appeal in a civil case, including both those in which notice of entry of judgment was and was not given was 50 days. This indicates that the present time allowances are excessive. They also exceed the times allowed in the federal courts and in most other states. These shorter appeal periods are consistent with the overall effort to reduce the time lag between the rendition of a judgment in a trial court and the review of that judgment by the Supreme Court.

Paragraph (a) of subsection (2) lists a number of specific statutory exceptions to the general rule for appeal time. This list is for the convenience of litigants and is believed to be complete, but omission from this paragraph is not intended to have any effect on other specific exceptions or require application of the general rule to them.

Paragraph (b) of subsection (2) is a substantial change from former s. 817.01(1) which provided for tolling the time to appeal for up to 10 years for a person against whom a judgment is rendered and who at the time of rendition is a minor, insane or imprisoned. The new provision reduces the appeal time for an imprisoned person to 120 days (as compared to 45 days under the general rule). The repeal of s. 817.01(1) leaves minors and incompetent persons bound by the general rule. However, it should be noted that minors and incompetent persons are protected under s. 803.01(3) which provides for representation by a general guardian, attorney or guardian ad litem. A guardian ad litem has a duty to appeal if he deems it in the interest of the ward to do so. *Tyson v. Tyson*, 94 Wis. 225, 231 (1896). Section 803.01(3)(c) provides for vacation of a judgment if the court finds within a year after entry of judgment that the person against whom the judgment is entered was a minor or mentally incompetent and not represented in the proceeding as provided in that section.

Paragraph (c) of subsection (2) is substantially the same as former s. 817.01(2).

808.04 Relief Pending Appeal. (1) **EFFECT OF APPEAL.** An appeal does not stay the execution or enforcement of the judgment or order appealed from except as provided in this section or as otherwise expressly provided by law.

(2) **AUTHORITY OF A COURT TO GRANT RELIEF PENDING APPEAL.** (a) A trial court or the supreme court, during the pendency of an appeal, may:

1. Stay execution or enforcement of a judgment or order;
2. Suspend, modify, restore, or grant an injunction;
3. Make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; or

4. Hear and determine a motion filed under s. 806.07.

(b) Relief under this subsection may be conditioned upon the filing of an undertaking in the trial court.

(3) **UNDERTAKING FOR COSTS.** An undertaking for costs is not required unless specifically required by statute, or by the trial court acting in its discretion.

(4) **PROCEEDINGS AGAINST A SURETY.** A surety on an undertaking is subject to the jurisdiction of the trial court and irrevocably appoints the clerk of that court as the surety's agent for service of any papers affecting his or her liability on the undertaking. A person may seek to enforce the surety's liability by filing a motion in the action or proceeding in the trial court in which the undertaking was filed.

(5) **PUBLIC OFFICIALS.** A person or agency suing or being sued in an official public capacity is not required to execute an undertaking as a condition for relief under this section unless required by the court in its discretion.

(6) **SURETIES ON UNDERTAKINGS.** A surety shall file with the undertaking an affidavit that the surety has a net worth in property within this state not exempt from execution which exceeds the amount of the undertaking, except as provided in s. 204.07. The respondent may by motion object to the sufficiency of a surety within 10 days after service of a copy of the undertaking.

NOTE: This section replaces all or portions of former ss. 817.06 to 817.08, 817.11(2) and (3) and 817.14 to 817.31.

Subsection (1) is a statement of the general rule.

Subsection (2) is based on s. 806.08(3) and (5) and Rule

8(b) of the Federal Rules of Appellate Procedure. It is intended to recognize the broad discretionary authority in the courts to grant appropriate relief. Provision (d) is intended to make clear that the trial court has jurisdiction to hear a motion for relief from a judgment or order. This means that although an appeal of the final judgment may have been taken so that the Supreme Court has jurisdiction to hear the appeal, the trial court nevertheless has jurisdiction to entertain a motion concerning the judgment under s. 806.07.

Subsection (3) eliminates the general requirement for filing an undertaking for costs and replaces provisions relating to undertaking for costs in ss. 817.06, part of 817.11(2), 817.11(3) and 817.16. Instead, the matter is left to the discretion of the trial court. Also, s. 809.53(1) permits the Supreme Court to award reasonable attorneys fees, damages, interest and double costs where it finds that an appeal is taken for the purpose of delay. Section 809.24 provides for allowance of costs and fees to the prevailing party.

Subsection (4) is a modification of Rule 8(b) of the Federal Rules of Appellate Procedure.

Subsection (5) is based upon former s. 817.26. It should be noted, however, that the provision in former s. 817.26 for an automatic stay of execution or performance of the judgment or order appealed from has been deleted. The effect of this change is to place public officials on the same footing as other parties to an appeal in seeking relief pending the appeal.

808.05 Further Proceedings in Trial Court. When the record and remittitur are received in the trial court:

(1) If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.

(2) If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.

(3) If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

NOTE: Section 808.05 is former s. 817.36 restated to clarify language. It contains no substantive change.

808.06 Reversal, Affirmance, or Modification of Judgment. Upon an appeal from a judgment or order or upon a writ of error the supreme court may reverse, affirm or modify the judgment or order as to any or all of the parties; may order a new trial; and, if the appeal is from a part of a judgment or order, may reverse, affirm or modify as to the part appealed from. In all cases the supreme court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance with the judgement or decision.

NOTE: Section 808.06 is former s. 817.35(1) restated to clarify language. It contains no substantive change.

SECTION 22. Chapter 817 of the statutes is repealed.

NOTE: Chapter 817 is repealed as the subject matter of that chapter is now covered by ch. 808 and, to a limited extent, ch. 809.

SECTION 23. 973.08 of the statutes is renumbered 973.08(1) and amended to read:

973.08(1) When any defendant is sentenced to the *Wisconsin* state prisons, a copy of the judgment of conviction shall be delivered by the officer executing the judgment to the warden or superintendent of the institution when the prisoner is delivered. *The transcript of the testimony and proceedings shall be filed pursuant to s. 256.57(2) within 120 days from the date sentence is imposed unless the period is extended by the court.*

SECTION 24. 973.08(2) of the statutes is created to read:

973.08(2) The transcript of the testimony and proceedings shall be filed at the institution, under s. 256.57(2), in the following manner:

(a) The transcript of any portion of the proceedings relating to the prisoner's sentencing, within 120 days from the date sentence is imposed.

(b) The transcript of all other testimony and proceedings upon order of a court, within 120 days of a request by the prisoner or the state.

NOTE: The treatment of s. 973.08 changes the requirement that all transcripts in criminal proceedings must be filed within 120 days. The needs of the prisoner, the parole board and the institution are met by the new provisions which require transcription of the proceedings relating to sentencing

within 120 days and of the other testimony within 120 days of a request by the prisoner or the state.

SECTION 25. 974.02 of the statutes is repealed and re-created to read:

974.02 Appeals and Post-Conviction Relief in Criminal, Juvenile, Youthful Offender and Mental Commitment Cases. (1) An appeal to the supreme court by the defendant, juvenile or subject individual in a criminal, juvenile, youthful offender or mental commitment case or motion for post-conviction relief in a felony case must be taken in the time and manner provided in s. 809.40. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 must be taken under ss. 808.02(2) and 809.30, with notice to the attorney general and the district attorney and opportunity for them to be heard.

(2) A motion challenging the sufficiency of the evidence is not necessary to raise on appeal the sufficiency of the evidence.

NOTE: Sections 974.02 to 974.04 relating to appeals in criminal cases and post-conviction relief in felony cases are repealed. The newly created s. 974.02 provides that the procedure for appeal is provided in s. 809.40. It also makes this appeal procedure applicable to juvenile, youthful offender and mental commitment cases. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial pursuant to s. 970.03 must be taken in accordance with ss. 808.02 (2) and 809.30 concerning appeals from judgments or orders not appealable as a matter of right.

Subsection (2) is intended to eliminate the need for a motion for new trial to set aside the judgment because of insufficiency of the evidence as a condition to raise the sufficiency of the evidence on appeal. It does not change the quantum of evidence needed for the court to accept a guilty plea.

SECTION 26. 974.03 and 974.04 of the statutes are repealed.

NOTE: See note following s. 974.02.

SECTION 27. 974.05(1) (intro.), (a) and (b) and (2) of the statutes are amended to read:

974.05(1) (intro.) *A writ of error or* **Within 45 days of entry of the judgment or order to be appealed and in the manner provided for civil appeals under ch. 808, an appeal may be taken by the state from any:**

(a) Final order or judgment adverse to the state made before jeopardy has attached or after waiver thereof or after the setting aside of a verdict of guilty or finding of guilty, whether following a trial or a plea of guilty or no contest.

(b) Order granting a *new trial* post-conviction relief under s. 974.02 or 974.06.

(2) *Whenever* If the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, as provided by s. 817.12 809.10(2)(b).

NOTE: Subsection (1) (intro.) and (a) change the law as declared in *State v. Detco Inc.*, 66 Wis. 2d 95, 223 N.W.2d 259 (1974). Under this new language, the state will be able to appeal from a decision of a trial court judge setting aside a finding of guilty and dismissing the charges. Such appeal used to be allowed by statute in Wisconsin but the statute was repealed by chapter 298 of the laws of 1971. The repeal was based on the concern that to allow such an appeal was unconstitutional in light of *Benton v. Maryland*, 395 U.S. 784 (1969), as violative of the double jeopardy clause of the United States Constitution. Such concern has recently been shown to be unfounded by the case of *United States v. Wilson*, 420 U.S. 332 (1975), which held that “. . . when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause.”

Paragraph (b) is amended to conform to the changes in Sections 7 and 11 of this act.

Subsection (2) is amended to correct the reference in s. 974.05(2) to s. 817.12 which is repealed by this act and to refer to the appropriate rule of the Supreme Court.

SECTION 28. 974.06(1) of the statutes is amended to read:

974.06(1) A After the time for appeal or post-conviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

NOTE: Section 974.06(1) is amended to make clear that the remedies in s. 974.06 are available only after the time for appeal or post-conviction remedy provided in s. 974.02 has expired.

SECTION 29. Cross Reference Changes. In the sections of the statutes listed in Column A, the cross references shown in Column B are changed to the cross references shown in Column C:

A	B	C
Statute Sections	Old Cross References	New Cross References
23.83(1)	ch. 817	ch. 808
35.38 (intro.)	251.15	251.11
45.50(4)	ch. 817	ch. 808
48.03(3)	251.182	251.03
48.911	ch. 817	ch. 808
51.20(16) (f)	ch. 817	ch. 808
51.45(13) (q) 1	ch. 817	ch. 808
62.075(4)	817.11 to 817.16	chs. 808 and 809
88.07(1)	251.182	251.03
102.25(1)	817.11(3)	808.04
196.43(2)	817.11(3)	808.04
196.49(6)	ch. 817	ch. 808
226.13	817.29	808.04
253.142(2) (a)	251.182	251.03
256.283(8) (intro.)	251.181	808.07
256.28(4)	256.28(3)	256.28(3) (a)
257.19(2)	251.182	251.03
299.205(2)	251.182	251.03
299.30(2)	ch. 817	ch. 808
299.30(4)	ch. 817	ch. 808
299.30(6)	ch. 817	ch. 808
345.315(3)	251.182	251.03
345.50(1)	ch. 817	ch. 808
551.62(2)	817.11(3)	808.04
801.15(2) (c)	817.01	808.03
801.58(2)	251.182	251.03
801.59	251.182	251.03
806.08.(4)	817.14 to 817.30	808.04
895.346	817.14	808.04
971.10(2) (b)	251.182	251.03
971.20(4)	251.182	251.03
974.01(6)	ch. 817	ch. 808

SECTION 30. Program Responsibilities. (1) DEPARTMENT OF ADMINISTRATION. In the list of program responsibilities specified for the department of administration under section 15.101 (intro.) of the statutes, reference to section "251.20" is deleted and reference to section "251.04" is inserted.

(2) DEPARTMENT OF JUSTICE. In the list of program responsibilities specified for the department of justice under section 15.251 (intro.) of the statutes, reference to sections "251.19" and "817.05" are deleted and reference to section "974.02(1)" is inserted.

SECTION 31. Reconciliation. If a supreme court order which relates to appellate practice and procedure and which renumbers sections 251.49 and 251.51 of the statutes to be sections 809.30 and 809.40 and creates section 809.10(2)(b) of the statutes does not take effect on January 1, 1978, then in the statute sections in Column A, as affected by this act, the cross references shown in Column B are changed to the cross references shown in Column C:

A	B	C
Statute Sections	Reference if the specified order takes effect on January 1, 1978	Reference if the specified order does not take effect on January 1, 1978
62.075 (4)	ch. 809	ch. 251
974.02	809.30	251.49
974.02	809.40	251.51
974.05 (2)	809.10 (2) (b)	817.12, 1975 stats.

SECTION 32. Applicability. Sections 808.01, 808.02 and 808.03 of the statutes, as created by this act, and section 974.02, as affected by this act, apply only to judgments or orders entered on or after January 1, 1978.

SECTION 33. Effective Date. This act takes effect on January 1, 1978.