[ ] **Accident**. Like "ignorance" or "mistake," accident is generally a defense if it negates a state of mind essential to the crime. It also may be a defense when, in the exercise of a privilege, an unintended result occurs, such as the unintended killing of an innocent third person during a legitimate exercise of self-defense. Wis. J.I.--Criminal 820 (1994) (privilege: self-defense: injury to innocent third party); *see* Wis. Stat. § 939.48(3); *State v. Watkins*, 2002 WI 101, ¶ 45, 255 Wis. 2d 265, 647 N.W.2d 244; *State v. Ambuehl*, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988).

[ ] **Alibi**. Alibi is sometimes called the defense of "nonpresence." An alibi defense is available when there is evidence that at the time of the commission of the offense charged, the defendant was at a place other than where the offense occurred. *See* Wis. Stat. § 971.23(8); Wis. J.I.--Criminal 775 (1995); *Logan v. State*, 43 Wis. 2d 128, 168 N.W.2d 171 (1969). The defense must give notice to the state of its intent to use an alibi defense at the arraignment or at least 15 days before trial. Wis. Stat. § 971.23(8)(a); *see infra* Form 5.41A.

[ ] **Amnesia.** The loss of memory can be a symptom of a mental disease or defect. Thus, when a client has amnesia, the attorney should consider the issue of competency to stand trial. *See Insanity, infra*. However, "e]pisodic amnesia, the inability to remember committing a crime, is not evidence of mental disease or mental defect." *State v. Leach*, 124 Wis. 2d 648, 667, 370 N.W.2d 240 (1985). Before the issues of competency and nonresponsibility can be meaningfully raised, the defense must conduct an investigation into the underlying cause of the client's amnesia.

[ ] **Coercion or Duress**. Coercion or duress is a defense if a threat by a person other than the defendant's co-conspirator caused the defendant reasonably to believe that his or her act was the only means of preventing imminent death or great bodily harm to himself or herself or to another, and caused the defendant so to act. If the offense charged is first-degree intentional homicide, however, successful invocation of the defense will reduce the degree of the crime to second-degree intentional homicide. Wis. Stat. § 939.46; Wis. J.I.--Criminal 790 (1995); *see State v. Brown*, 107 Wis. 2d 44, 318 N.W.2d 370 (1982); *Moes v. State*, 91 Wis. 2d 756, 284 N.W.2d 66 (1979); *State v. Amundson*, 69 Wis. 2d 554, 230 N.W.2d 775 (1975); *State v. Horn*, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

[ ] **Collateral Estoppel**. *See Issue Preclusion, infra*.

[ ] **Consent**. Nonconsent is an essential element of many crimes. In such crimes, the victim's actual or implied consent can constitute a defense. *See* Wis. Stat. § 939.22(48) (definition of "without consent"); *see also Accident, supra*; *Mistake, infra*.

[ ] **Defense of Others**. A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions, and by the same means, as those under and by which he or she is privileged to defend himself or herself, provided that he or she reasonably believes that the third person would be privileged to act in self-defense and that his or her intervention is necessary to protect the third person. Wis. Stat. § 939.48(4); Wis. J.I.--Criminal 825, 830 (1994); *see State v. Jones*, 147 Wis. 2d 806, 434 N.W.2d 380 (1989); *State v. Ambuehl*, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988); *see also Self-Defense, infra*.

[ ] **Defense of Property**. A person is privileged to threaten or intentionally use force against another to prevent or terminate what the person reasonably believes to be an unlawful interference with his or her property. Wis. Stat. § 939.49(1). It is not reasonable to use intentional force intended, or likely, to cause death or great bodily harm for the sole purpose of defending one's property. Only that amount of force necessary to prevent or terminate the interference is allowed. *Id.* This defense may be

Comment [COMMENT1]: Checklist 4.7 Checklist of Possible Defenses

IMPORTANT: When using these forms, refer to the accompanying commentary in the *Criminal Defense Manual*. In addition, ***always*** check original sources of authority for current law and adapt the form language to fit your client's circumstances.

extended to protection of the property of third persons only if the third person is a member of the actor's immediate family or household, or is a person whose property the actor has a legal duty to protect. Wis. Stat. § 939.49(2); Wis. J.I.--Criminal 855 (1994).

[ ] **Double Jeopardy**. This common law concept is incorporated in both the United States and Wisconsin Constitutions. It protects against being prosecuted or tried more than once for the same offense or act. This defense is interposed as a bar to trial. U.S. Const. amend. V; Wis. Const. art. I, § 8; Wis. Stat. §§ 939.71, .72; *see infra* Form 5.25A.

[ ] **Drugged Condition**. *See Involuntary Intoxication, infra; Voluntary Intoxication, infra.*

[ ] **Duress**. *See Coercion, supra.*

[ ] **Entrapment**. This defense is available when a law enforcement officer has used improper methods to induce a defendant to commit an offense and, by the use of such methods, has succeeded in inducing the defendant to commit an offense that he or she was not otherwise disposed to commit. Wis. J.I.–Criminal 780 (2002); *Jacobson v. United States*, 503 U.S. 540, 548 (1992); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *Hawthorne v. State*, 43 Wis. 2d 82, 168 N.W.2d 85 (1969); *State v. Hochman*, 2 Wis. 2d 410, 86 N.W.2d 446 (1957).

[ ] **Exclusion (or Suppression) of Evidence**. Pretrial motions may challenge the admissibility of the state's potential evidence. *See* Wis. Stat. § 971.31. Common grounds for exclusion of evidence include unconstitutional search or seizure, *see Mapp v. Ohio*, 367 U.S. 643 (1961), and failure to advise a suspect of the rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). The defense may also seek exclusion pursuant to the rules of evidence, chapters 901-911 of the Wisconsin Statutes. A pretrial order excluding evidence may leave the state without sufficient admissible evidence to proceed.

[ ] **Failure of Proof.** Failure of proof is available as a defense if the defense can show that the state failed to prove beyond a reasonable doubt that the defendant is guilty, thus failing to overcome the presumption of innocence. Wis. J.I.--Criminal 140 (2000); *see* Wis. Stat. § 939.70.

[ ] **Former Jeopardy**. *See Double Jeopardy, supra.*

[ ] **Ignorance**. *See Mistake, infra.*

[ ] **Immunity**. No person who is compelled to testify or produce evidence may be liable for any forfeiture or penalty for or on account of testifying or producing evidence. This immunity is subject to the restrictions under section 972.085. Wis. Stat. § 972.08; *see Peters v. State*, 70 Wis. 2d 22, 233 N.W.2d 420 (1975); *Hebel v. State*, 60 Wis. 2d 325, 210 N.W.2d 695 (1973); *Elam v. State*, 50 Wis. 2d 383, 184 N.W.2d 176 (1971); *State v. J.H.S.*, 90 Wis. 2d 613, 280 N.W.2d 356 (Ct. App. 1979).

[ ] **Incompetency**. Lack of competency is not technically a defense. It is, however, a bar to prosecution. A person who lacks substantial mental capacity to understand the proceedings or to assist in his or her own defense may not be tried, convicted, or sentenced. Wis. Stat. §§ 971.13, .14. A defense attorney must raise the issue if there is reason to doubt the client's competency. *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). A client's competency may change while a case is pending, and the defense can raise the issue at any time.

[ ] **Infancy**. Infancy is defined as the state of being under the age of legal majority. *Black's Law Dictionary* 792 (8th ed. 2004). In Wisconsin, for purposes of prosecuting violations of criminal law, a

person under the age of 17 is ordinarily considered a child or minor. Wis. Stat. § 938.02(1), (10m). The defense of infancy is most often considered when a juvenile is prosecuted as an adult without being waived from children's court under section 938.18. There are limited circumstances in which a child under age 17 may be charged directly in adult court. *See* Wis. Stat. § 938.183.

[ ] **Innocence**. *See Failure of Proof, supra*.

[ ] **Insanity/Mental Disease or Defect**. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law. Mental disease or defect excluding responsibility is an affirmative defense that the defendant must establish to a reasonable certainty by the greater weight of the credible evidence. Wis. Stat. § 971.15; *see* Wis. J.I.--Criminal 600-662; *State v. Leach*, 124 Wis. 2d 648, 370 N.W.2d 240 (1985); *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972). No lawyer should pursue this line of defense without first consulting experts and without a thorough knowledge of the particular disease, as set forth in the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Ass'n 4th ed. 2000) (commonly known as DSM-IV-TR).

[ ] **Involuntary Intoxication/Involuntary Drugged Condition**. Involuntary intoxication or involuntary drugged condition is a defense if the condition renders the actor incapable of distinguishing between right and wrong with regard to the alleged criminal act at the time the act is committed. Wis. Stat. § 939.42(1); Wis. J.I.--Criminal 755 (1995); *Loveday v. State*, 74 Wis. 2d 503, 247 N.W.2d 116 (1976); *see State v. Repp*, 117 Wis. 2d 143, 342 N.W.2d 771 (Ct. App. 1983), *aff'd*, 122 Wis. 2d 246, 362 N.W.2d 415 (1985). Involuntary intoxication also provides a defense when it prevents the state from proving a state of mind necessary for conviction. Wis. Stat. § 939.42(2).

[ ] **Issue Preclusion.** *Issue preclusion* is the phrase presently used in Wisconsin to replace *collateral estoppel*. *State v. Canon*, 2001 WI 11 n.2, 241 Wis. 2d 164, 622 N.W.2d 270. Issue preclusion is akin to *double jeopardy*, and is perhaps incorporated into it. Simply defined, issue preclusion means that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue may not again be litigated between the same parties in any future lawsuit. *See Dowling v. United States*, 493 U.S. 342 (1990); *Ashe v. Swenson*, 397 U.S. 436 (1970); *see also infra* Form 5.25A.

[ ] **Jury Nullification**. Jury nullification is not a recognized defense in the law. It can be defined as the power of the jury to "nullify" applicable laws by returning a verdict that is contrary to both the facts of the case and the law as applied to those facts. *See* Becker, *Jury Nullification: Can a Jury Be Trusted?* Trial, Oct. 1980, at 41-45. The jury has the power to disregard the judge's instructions and the law in order to find a defendant not guilty even when he or she is technically guilty. Most judges will not instruct the jury on this power or permit the defense to argue the issue directly to the jury. *See* Wis. J.I.--Criminal 705 (1991); *State v. Bjerkaas*, 163 Wis. 2d 949, 472 N.W.2d 615 (Ct. App. 1991). There is little doubt, however, that a jury will act on its conscience when necessary. *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich. L. Rev. 2381, 2420-27 (1999) (discussing jurors' role as community conscience).

[ ] **Justification**. *See Privilege, infra*.

[ ] **Lack of Intent**. When intent is an element of the crime, lack of intent is a defense. *See* Wis. Stat. § 939.23 (criminal intent). The state need not prove that the defendant foresaw or intended specific consequences; the defendant is presumed to intend the natural and probable consequences of his or her actions. *Muller v. State*, 94 Wis. 2d 450, 289 N.W.2d 570 (1980); *see Accident, supra*; *Mistake, infra*.

[ ] **Lack of Knowledge**. *See Accident, supra*; *Lack of Intent, supra*; *Mistake, infra.*

[ ] **Lesser-Included Offense**. In criminal cases, the defense often argues that the defendant is not guilty of the crime charged but rather is guilty of some less serious offense. *See* Wis. Stat. § 939.66; Wis. J.I.--Criminal 112, 112A (2000), SM-6 (1996); *see also State v. Sarabia*, 118 Wis. 2d 655, 348 N.W.2d 527 (1984).

[ ] **Mistake**. An honest error, whether of fact or of law other than criminal law, is a defense if it negates the existence of a state of mind essential to the crime. A mistake as to a minor's age, as to the existence or constitutionality of the section under which the actor is prosecuted, or as to the scope or meaning of the terms used in that section is not a defense. Wis. Stat. § 939.43; Wis. J.I.--Criminal 770 (1998); *Flores v. State*, 69 Wis. 2d 509, 230 N.W.2d 637 (1975); *see State v. Davis*, 63 Wis. 2d 75, 216 N.W.2d 31 (1974).

[ ] **Mistaken Identification**. The defense of mistaken identification centers on the inherent unreliability of eyewitness identification testimony. *See* Wis. J.I.--Criminal 141 (2000); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972); *Hampton v. State*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979); David L. Feige, *"I'll Never Forget That Face": The Science and Law of the Double-Blind Sequential Lineup*, The Champion, Jan./Feb. 2002, at 28; *see also infra* Form 5.45A and accompanying Commentary and Instructions.

[ ] **Necessity**. This defense is available when the pressure of natural physical forces causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster or imminent death or great bodily harm to the actor or another. Necessity is a defense to a prosecution for any crime based on that act; if the prosecution is for first-degree intentional homicide, however, successful use of the defense will reduce the degree of the crime to second-degree intentional homicide. Wis. Stat. § 939.47; *State v. Olsen*, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980).

[ ] **Nonpresence.** *See Alibi, supra.*

[ ] **Posttraumatic Stress Disorder (PTSD)**. "PTSD" is a recognized mental disease caused by a psychologically traumatic event that is generally outside the range of usual human experience--for example, the experience of combat. *See Diagnostic and Statistical Manual of Mental Disorders* 463 (American Psychiatric Ass'n 4th ed. 2000). A PTSD diagnosis may support an argument for a lesser offense, such as imperfect self-defense, or for a finding of not guilty by reason of mental disease or defect. *See also Insanity, supra.*

[ ] **Privilege**. A person's otherwise criminal conduct may be excused if it fits within a recognized legal privilege (e.g., *Coercion*; *Necessity*; *Self-Defense*). *See* Wis. Stat. § 939.45.

[ ] **Prosecutorial Misconduct**. Prosecutorial misconduct can be grounds for a mistrial, and "double jeopardy" may bar retrial under appropriate circumstances. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *State v. Copening*, 100 Wis. 2d 700, 303 N.W.2d 821 (1981); *State v. Harrell*, 85 Wis. 2d 331, 270 N.W.2d 428 (Ct App. 1978).

[ ] **Protection Against Retail Theft**. *See* Wis. Stat. § 939.49; *see also Defense of Property, supra.*

[ ] **Provocation**. Provocation is generally not a defense but might be thought to be one by a jury. *Adequate provocation*, defined in section 939.44(1), is an affirmative defense that reduces first-degree

intentional homicide to second-degree intentional homicide. Wis. Stat. § 939.44(2). Provocation can be an element in *self-defense* or *defense of others*. *See* Wis. Stat. § 939.48; Wis. J.I.--Criminal 835 (1994) (privilege: defense of others: effect of provocation by person defended); *see also Jury Nullification*, *supra*.

[ ] **Renunciation/Withdrawal**. Section 939.05, defining parties to a crime in Wisconsin, allows for a person to withdraw from, or renounce, his or her involvement in a crime. *See* Wis. Stat. § 939.05(2)(c). The elements are that the person: (1) voluntarily changed his or her mind; (2) no longer desired that the crime be committed; and (3) notified the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime, so as to allow the others also to withdraw. Renunciation or withdrawal is a defense in conspiracy cases, but not in cases in which the defendant is alleged to have actually aided and abetted in the commission of a crime. *See* Wis. J.I.--Criminal 400 (1994); *see also May v. State*, 97 Wis. 2d 175, 293 N.W.2d 478 (1980); *Zelenka v. State*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

[ ] **Selective Prosecution**. This defense is based on the equal protection clause of the 14th Amendment to the United States Constitution; it is a pretrial defense. Selective prosecution is available as a defense when a prosecutor selects one person to prosecute but does not prosecute other persons who may have committed the same crime. A good example of selective prosecution is the prosecution of prostitutes but not of their customers. *See Sears v. State*, 94 Wis. 2d 128, 287 N.W.2d 785 (1980); *State v. McCollum*, 159 Wis. 2d 184, 464 N.W.2d 44 (Ct. App. 1990); *see also infra* Form 5.33A.

[ ] **Self-Defense**. A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he or she reasonably believes to be an unlawful interference with his or her person by the other. *State v. Head*, 2002 WI 99, ¶ 4, 255 Wis. 2d 194, 648 N.W.2d 413. The actor may intentionally use only such force or threat of force as the actor reasonably believes is necessary to prevent or terminate the interference. Wis. Stat. § 939.48; Wis. J.I.--Criminal 800, 805, 810, 815 (2001), 820 (1994); *Head*, 2002 WI 99, ¶ 4, 255 Wis. 2d 194.

[ ] **Self-Defense, Imperfect.** Imperfect self-defense (unnecessary defensive force) is a partial defense to first-degree homicide, reducing the charge to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b); *Head*, 2002 WI 99, ¶ 69, 255 Wis. 2d 194. Imperfect self-defense differs from self-defense in that either the belief that the actor was in imminent danger, or the belief that the force was necessary, is an unreasonable belief. *Head*, 2002 WI 99, ¶ 90, 255 Wis. 2d 194.

[ ] **Someone Else Did It**. *See Alibi*, *supra*; *Failure of Proof*, *supra*; *Mistaken Identity*, *supra*.

[ ] **Speedy Trial, Denial of**. The Sixth Amendment to the United States Constitution, article 1, section 7, of the Wisconsin Constitution, and section 971.10 provide for a defendant's right to a speedy trial. Violations of the constitutional right must be distinguished from violations of the statutory right. The former require dismissal, but the latter result only in a continuance and the defendant's release from the conditions of bail or, in a misdemeanor case, only in a release from custody. *Barker v. Wingo*, 407 U.S. 514 (1972); *Scarbrough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977); *Hadley v. State*, 66 Wis. 2d 350, 225 N.W.2d 461 (1975); *see State v. Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (1982); *see also infra* Form 5.49A.

[ ] **Statute of Limitation**. Prosecution for most offenses must be commenced within the time specified in the statutes. A statute-of-limitation defense is available if the defense can show that prosecution was commenced after the statutory time limitation expired. *See* Wis. Stat. § 939.74. A related defense, based on the right to due process, exists when the government intentionally causes substantial prejudice to the defendant's fair trial rights by delaying prosecution. *See, e.g., United States v.*

Lovasco, 431 U.S. 783, 789, 795 n.17 (1977); *State v. Blanck*, 2001 WI App 288, ¶¶ 20-22, 249 Wis. 2d 364, 638 N.W.2d 310.

[ ] **Suppression**. *See Exclusion of Evidence, supra.*

[ ] **Unconstitutional Statute**. If the statute under which the defendant is charged is unconstitutional for any reason, then a pretrial motion attacking the statute and asking for dismissal is appropriate. Whenever the constitutionality of a law is challenged, notice must be given to the state attorney general. Wis. Stat. § 806.04(11). The defense may attack a statute as unconstitutional if it is overly vague or if it prohibits conduct protected under the United States or the Wisconsin Constitution (e.g., free speech or the right to bear arms). This is a pretrial defense. *See State v. Field*, 118 Wis. 2d 269, 347 N.W.2d 365 (1984); *Mack v. State*, 93 Wis. 2d 287, 286 N.W.2d 563 (1980); *see also infra* Form 5.24A.

[ ] **Voluntary Intoxication/Voluntary Drugged Condition**. Voluntary intoxication or a voluntary drugged condition is a defense if the condition negates the existence of a state of mind essential to the crime. The condition is not a defense to liability for criminal recklessness under section 939.24(3). Wis. Stat. § 939.42(2); Wis. J.I.--Criminal 765 (1999); *State v. Schulz*, 102 Wis. 2d 423, 307 N.W.2d 151 (1981); *Ameen v. State*, 51 Wis. 2d 175, 186 N.W.2d 206 (1971).

[ ] **Withdrawal**. *See Renunciation, supra.*