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The *Wisconsin Defender* welcomes all comments and suggestions for articles. Please submit your comments and article suggestions to Gina Pruski at the address below.

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From the Editor...

This issue of the *Wisconsin Defender* leads off with an article by Attorney Keith Findley that provides, in light of the Wisconsin Supreme Court's decision in *State v. Magnuson*, several helpful tips and reminders about situations in which your client may be entitled to jail credit.

This issue also includes a summary of the community prosecution program in Milwaukee county. The program involves two prosecutors from the Milwaukee County District Attorney's Office who work hands-on in the community to reduce crime and improve the quality of life in the community. This particular program has been highlighted in the *Wisconsin Defender* because of both its innovation and its overall success thus far. I hope to highlight in future issues of the *Wisconsin Defender* other innovative, successful programs around the state that help reduce crime.

Also included is a "Practice Pointers" article submitted by Assistant State Public Defender Nicholas Bokas. Attorney Bokas shares his recent experience conducting voir dire in a Chapter 980 case. "Practice pointers," such as the one submitted by Attorney Bokas, are important because they provide specific information lawyers can use in their daily practice. I hope to make "Practice Pointers" a regular feature of the *Wisconsin Defender*.

Finally, Deputy First Assistant State Public Defender Leslee Ruscitti, who teaches juvenile law at Marquette University Law School, shares her law students' surprising observations of Children's Court in Milwaukee county.

As always, I welcome any suggestions you might have about the *Wisconsin Defender* or ideas for articles. Feel free to contact me at the address listed to the left.

Agency Mission

To enhance the quality of justice throughout Wisconsin by providing high quality, compassionate, and cost-effective legal representation; protecting the rights of the accused; and advocating as a criminal justice partner for effective defender services and a fair and rational criminal justice system

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JAIL CREDIT FOR TIME SPENT OUTSIDE THE WALLS

By Keith A. Findley*

Presentence jail credit ought to be a simple matter. Usually it is. Under Wis. Stat. § 973.155 credit is granted at sentencing on a day-for-day basis for time spent in custody in connection with the offense for which sentence is imposed.

But sometimes it gets surprisingly complicated. These complications can result in improperly calculated credit, or in squandered opportunities to obtain full credit.

It is therefore important to stay current on the developing law of jail credit, so that credit due under the law is not overlooked at sentencing. The Wisconsin Supreme Court's decision in *State v. Magnuson*¹ presents one of those opportunities for credit that might be easily overlooked if counsel does not remain vigilant and current. Although *Magnuson* has been the law for a year and a half now, it presents such an opportunity for credit that counsel might not intuitively expect, that it is worth revisiting. The U.W. Law School's Legal Assistance to Institutionalized Persons (LAIP) Project has found that a number of prisoners entitled to credit under *Magnuson* have not received that credit.

***Keith A. Findley** is a Clinical Associate Professor at the University of Wisconsin Law School. He first joined the clinical faculty at the Frank J. Remington Center's Legal Assistance to Institutionalized Persons Project in 1985 where he has served as a Clinical Instructor, Clinical Assistant Professor, Deputy Director, and most recently, as creator and co-director of the Center's Innocence Project. Professor Findley also worked for both the Appellate and Trial Divisions of the Wisconsin Public Defender's Office. He is a 1985 graduate of Yale Law School.

Magnuson addresses the deceptively simple question of whether jail credit is due for time spent in home detention under electronic monitoring. The case law prior to *Magnuson* had gotten surprisingly complicated. Initially, court of appeals decisions rejected all claims for credit for time spent in home detention. Early decisions drew on *State v. Gilbert*² for the rule that credit is due for time spent in a status only if the defendant could be prosecuted under § 946.42(1)(a) of the escape statute for leaving that status. The courts held that one could not be prosecuted for escape under § 946.42(1)(a) for leaving home detention, so no credit was due for the time in such detention.³

But in *State v. Collett*,⁴ which addressed a claim for credit for a period of home detention served under a term in the Division of Intensive Sanctions (DIS), the court of appeals concluded that claims for jail credit should be decided on a case-by-case basis, evaluating whether the DIS conditions were restrictive enough to constitute the "functional equivalent of confinement." Under the *Collett* rule, some inmates in DIS, and some inmates in home detention—but not all—were entitled to credit.

The supreme court in *Magnuson* sought to simplify this inherently complicated, and unevenly-applied, case-by-case analysis of jail credit claims. In a decision, the simplicity of which can only be appreciated by lawyers, the supreme court changed the *Collett* rule in ways that have sweeping implications for individuals who serve time outside of a prison or jail under DIS or various home detention programs. Under the new rule of *Magnuson*, a defendant's status is deemed to be custody, and hence credit is due for time spent in that status (assuming all other requirements are met), whenever the defendant is subject to an escape charge for leaving that status. Unlike the rule of *Gilbert*

and its progeny, however, credit is due for time spent in *any* status that is enforced by *any* escape penalty—not just those set forth specifically in § 946.42(1)(a) of the escape statute. Ironically, the “simplicity” of the *Magnuson* rule means, once again, that some people in home detention are entitled to credit, but some are not. And, counter-intuitively, other people, in even less restrictive community settings, sometimes are entitled to credit.

In *Magnuson* the defendant was placed in home detention under very restrictive electronic monitoring conditions as a condition of bail pending trial. Applying the *Collett* standard, the court of appeals concluded that the conditions were sufficiently restrictive to constitute the functional equivalent of confinement, so that jail credit was due. The supreme court dumped the *Collett* analysis, and instead applied its new rule: credit is due for time spent in any status enforced by any escape penalties. Unfortunately for Paul Magnuson, the court concluded that the general escape statute did not apply to his home detention, and no other specific escape penalties applied either. Therefore, despite the restrictiveness of his confinement, Magnuson was out of luck.

Many defendants in home detention will fare much better under *Magnuson* than did Magnuson himself. The statutes create a number of home detention programs, and each specifically provides that escape penalties apply for unauthorized departure from the home.

For example, § 301.046(1), creates a community residential confinement program, and § 301.046(6) specifically provides that escape charges lie upon unauthorized departure from such residential confinement. Similarly, § 302.425 authorizes the sheriff, the superintendent of a correctional institution, or the Department of Corrections, to place

prisoners in home detention, and § 302.425(6) specifically provides that “[a]ny intentional failure of a prisoner to remain within the limits of his or her detention or to return to his or her place of detention” qualifies as an escape.⁵

Most significantly, escape penalties also apply to DIS.⁶ Under DIS, inmates are subject to various sanctions and restrictions on liberty. These can include home detention, but also less restrictive types of supervision in the community. Section 301.048(5) of the statutes provides specifically that failure to comply with conditions of the DIS program subjects the offender to a charge of escape.

Under *Magnuson*, anyone subject to any of these programs prior to sentencing is entitled to jail credit for the time spent in these programs—regardless of how restrictive the programs are—because flight from them is punishable as escape. Thus, for example, anyone placed in home detention by a sheriff prior to conviction or sentencing to alleviate overcrowding in the jail, or anyone placed in DIS as an alternative to revocation, is entitled to full day-for-day credit for that time, should he or she ultimately receive a sentence for the offense.

In short—and this is where it gets counter-intuitive and might be overlooked by counsel—credit is due under *Magnuson* for DIS placements for the *entire period* of DIS program participation. This situation arises frequently where the defendant was placed on DIS as an alternative to revocation, and then was later revoked. A defendant may be placed in DIS, spend the first months in jail confinement, the next months in home detention, and the remaining months or years in relative freedom under probation-type rules of supervision. But because failure to abide by the DIS conditions is punishable as an escape, sentence credit is

due for the entire period of DIS participation, and not just those months of jail confinement or home detention.

This analysis applies similarly to other types of community placements as well. Credit is due if departure from the placement is punishable as escape. Placement in treatment programs, for example, as a condition of bond, will be subject to credit only if escape penalties apply. If no specific statute applies escape penalties, the general escape statute, § 946.42(1)(a), might do the trick in some cases, because it provides that escape penalties apply to actual custody, and also to constructive custody. Constructive custody exists under § 946.42(1)(a) when a person is released from jail temporarily for purposes of “work, school, medical care,” or various leaves or furloughs specified in the statute. *Magnuson* does not alter *State v. Sevelin*,⁷ which granted credit for constructive custody when a defendant was temporarily released from jail to receive drug and alcohol treatment. It should be noted, however, that the escape statute specifically provides that constructive custody does not extend to “the custody of a probationer, parolee or other person on extended supervision” or to juveniles released to aftercare supervision under chapter 938. Thus, non-jail restrictions on probationers or parolees will not be creditable, unless some other specific statutory provision subjects the person to escape sanctions for violating the terms of those restrictions.

Paul Magnuson’s misfortune was that he was placed on home detention by the trial court as a condition of bail. No statutory provision expressly authorizes such a placement, so no statute expressly imposes escape penalties for violating the conditions of such a placement, and the court concluded that Magnuson was not in either actual or constructive custody under the general escape statute. The

Magnuson court held, accordingly, that Mr. Magnuson was not entitled to credit for the six months he spent confined to his pastor’s home while he was on bond. If the sheriff had put him in home detention while he was awaiting trial, credit would have been due; but because the court did so as a condition of bail, it was not.

So *Magnuson* means that some defendants in community placements get credit, and some do not. The key is to determine whether *any* statutory provision—whether it be the general escape statute under § 946.42(1)(a), or some other specific escape provision of another statute—provides escape sanctions for failure to abide by the terms of the placement. And significantly, anyone who spent time in DIS prior to sentencing is entitled to credit. Ensuring that all such credit is granted is an important part of counsel’s job at sentencing.

Endnotes

¹ 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536 (2000).

² 115 Wis. 2d 371, 340 N.W.2d 511 (1983).

³ See, e.g., *State v. Pettis*, 149 Wis. 2d 207, 441 N.W.2d 247 (Ct. App. 1989); *State v. Swadley*, 190 Wis. 2d 121, 526 N.W.2d 778 (Ct. App. 1994).

⁴ 207 Wis. 2d 319, 558 N.W.2d 642 (Ct. App. 1996).

⁵ The supreme court in *Magnuson* noted that escape charges also apply to placement in a county work camp under § 303.10, a work release plan for prison inmates under §303.065, and a serious juvenile offender program under § 938.538.

⁶ Circuit courts may no longer sentence offenders convicted after 1999 to intensive sanctions. See 1997 Wis. Act 283 §428. However, the DIS program remains otherwise in effect.

⁷ 204 Wis. 2d 127, 554 N.W.2d 521 (Ct. App. 1996). ■

SPD ANNUAL CONFERENCE 2001

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for Criminal Defense Lawyers*

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NEWS BRIEFS

Youth Leadership Training Center Again Accepting Placements

The Legislature's Joint Committee on Finance voted on May 21, 2001 to restore most of the funding and positions for the Youth Leadership Training Center (juvenile boot camp) which had been proposed for closure in the Executive Budget Bill. In response, the Department of Corrections-Division of Juvenile Corrections will begin the next cadet class at YLTC, LC-37, on June 25, 2001. (This supersedes the suspension of admissions announced in Memo 01-04, dated March 6, 2001.) Direct commitments from juvenile courts into YLTC for entry into LC-37 are welcome. Counties may continue to contact Allan Crevier, Office of Juvenile Offender Review, at 715.536.8386 extension 1222, to discuss the suitability of particular youth for YLTC.

The Division of Juvenile Corrections would like for public defenders and assigned counsel to know that direct county court placement in YLTC is once again a dispositional option for their clients (that is, those clients who meet the criteria for correctional placement in s. 938.34 (4m), Stats., and are able to participate in the YLTC program). More information will be forthcoming after the 2001-03 biennial budget act is signed into law. ■

New Jersey Adopts New Rules Related to Eyewitness Identifications

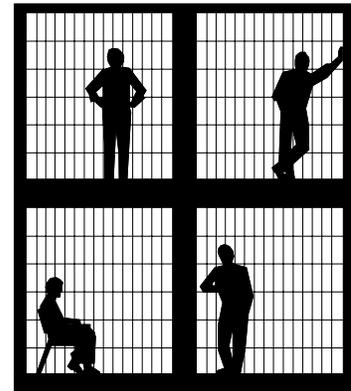
New Jersey will become the first state in the country to use a new technique called a "sequential photo lineup" with witnesses to identify suspects. The old system of poring through mug shots will be gone.

The difference between the old and new systems is very significant, according to experts in eyewitness identification. Under the old system, eyewitnesses are able to browse through photographs of suspects, comparing, contrasting and restudying them at will.

Under the new system, however, eyewitnesses would be shown one photograph after another and would not be allowed to browse. If a person wanted a second look, the person would have to look at all of the photographs a second time, in a new sequence. Moreover, the photographs would be shown by someone who does not know who

the real suspect is.

The new rules will also change the way physical lineups, called showups, are done. Like photo lineups, in showups, the individuals will be presented to the witness one at a time.



The new rules are the result of many years of research in the area of eyewitness identification. Two years ago, the United States Department of Justice published recommendations which included the use of sequential lineups. Research has shown that when witnesses view a traditional lineup, approximately 20 to 40% of the witnesses mistakenly identify someone as the criminal. But when the same suspects are placed in a sequential lineup, the rate of false identifications drops to less than 10%. ■

Stay Informed to Protect Our Kids

Only by knowing how kids are doing in school, how they feel about their schoolwork, and how they spend their free time can we begin to identify those teens most likely to take risky chances. This is the basic finding from *Protecting Teens: Beyond Race, Income and Family Structure*, a recent report using data from the National Longitudinal Study of Adolescent Health (Add Health) survey.



The Add Health survey is the nation's most comprehensive, school-based study of the health-related behaviors of adolescents in the nation. In 1995 and 1996, about 90,000 middle and high school students attending 134 schools across the United States answered a brief questionnaire about their lives. Administrators from the participating schools completed separate questionnaires about school policies and procedures. Over 20,000 in-home interviews of the students were conducted and a parent of each student interviewed was asked to complete a questionnaire.

Dr. Robert W. Blum, lead investigator of *Protecting Teens* summarized the main findings of his analysis of the Add Health data:

"How young people do at school and what they do with their free time are the most important determinants for every risky behavior we studied--regardless of whether they are rich or poor; white, black or Hispanic; or come from one-or two-parent families... Most of the risk and protective factors identified are not unique to a single demographic group, and they are factors we can do something about."

Surely, the first adults that need to pay more attention to teenagers are their parents. Indeed, a feeling of closeness or connectedness with a parent was a key protective factor identified in the survey. But parents alone are not the answer. Those of us raising teenagers, or those who have already weathered the storm, cannot turn our backs on parents any more than we can turn our backs on teens themselves. If we claim to be a child-centered society, as Dr. Blum pointed out, why do we allow work to overrule parenting duties and at the same time make little provision for places in the community where teens can gather in the presence of caring, attentive adults? If we know that teens will get into trouble if left on their own, why do we allow them to flounder in communities with unsafe neighborhoods and few resources to nurture them?



Not every adult can, or should, become a mentor, "Big Brother," coach or role model. But anyone can advocate for more investment in youth development workers, learning centers, or youth training, arts, and employment services. We can support faith community programs, teen centers, community schools, or neighborhood programs that bring kids and adults together.

Before we say our kids have failed us, let us make sure we have not failed our kids. ■

The above piece was excerpted from "Listen Up: A First Step to Protecting Teens" by Jan Richter. Richter's article is a summary of Dr. Robert W. Blum's work on the Add Health data. Richter's complete article can be found at Connect for Kids, <http://www.connectforkids.org>, an on-line publication of the Benton Foundation.

Neighborhood DAs Work Hands-On to Reduce Crime

Milwaukee County is taking an innovative approach to reducing crime. Since July 2000, two prosecutors from the Milwaukee County District Attorney's Office have been working in the community to combat, first-hand, problems such as drug dealing, unemployment, and juvenile crime. Derek Mosley and Shannon Carrick are known as the "neighborhood DAs" and instead of filing criminal complaints and appearing in court every day, they work hands on with landlords in order to help them evict bad tenants and find good tenants, with convicted felons to help them find and retain jobs, and with kids to help them stay out of trouble after school.

Program is one of a kind in Wisconsin

Although over 150 community prosecution programs exist throughout the country, the program in Milwaukee county is the only one that exists in the state of Wisconsin. Each program is different and unlike in other states, private money cannot be used to fund such a program in Wisconsin. Currently, Milwaukee county's program is funded entirely by a federal grant. The grant money runs out in October of this year and it is still unknown whether the program will receive the funding it needs to continue past October.

The program is based in the north side of Milwaukee, specifically in the Harambee and Williamsburg Heights neighborhoods. Mosley and Carrick have offices in Harambee, Williamsburg Heights, and at the 5th District police station in Milwaukee.

The primary goals of the program include:

- Reducing crime
- Improving the quality of life
- Creating long-term solutions to everyday

problems

- Giving neighborhood residents input as to what should be done in their community
- Giving the neighborhood a better understanding of what prosecutors and law enforcement do

The program also has benefits to prosecutors and the work that they do. Specifically, the program:

- Decreases the number of cases that are filed in the system
- Makes witnesses more astute and willing to come forward
- Creates long-term solutions to everyday problems
- Gives prosecutors an opportunity to explain what prosecutors really do

Getting rid of drug houses

Before the program officially began, in order to garner trust from the members of the community, Mosley and Carrick talked extensively with the community about the community's top concerns. At the top of the list was drug dealing. Hence, a big part of Mosley's and Carrick's job involves getting rid of drug houses. Mosley estimates that 80% of the calls they receive relate to drug dealing in or around the various rental properties located in the neighborhoods. Mosley and Carrick have trained the community well by providing them with "checklists" of the various pieces of information that Mosley and Carrick will need in order to successfully eliminate a drug house. After a neighborhood resident has contacted Mosley and Carrick about possible drug dealing, they in turn provide that information to law enforcement who then investigates for possible criminal activity. Rather than filing charges after an arrest has been made, as a "traditional" prosecutor would do, Mosley and Carrick work directly with the landlord.

First, they will advise the landlord of the situation. Oftentimes, the landlord is able to provide Mosley and Carrick with additional

information that is useful to the police to make an arrest. Mosley and Carrick will then work with the landlord to evict the tenant, if appropriate, and then help the landlord, by conducting background checks, find a law-abiding tenant to take over the lease. Without someone like Mosley or Carrick, busy landlords typically could not take the time and effort to find good tenants. The police are unable to provide this type of assistance given the time it takes them to investigate crimes. Mosley and Carrick also get landlords enrolled in training that teaches landlords how to properly screen tenants and educates landlords about the state and local laws they are required to follow. So far, the overall success Mosley and Carrick have had with getting rid of drug houses is very high. Mosley estimates that they have permanently eliminated drug dealing in at least 80 properties in the area.

Helping felons find jobs

Also at the top of the community's list of concerns was the unemployment rate of the offenders living in the community. The



neighborhoods in which Mosley and Carrick work have large concentrations of offenders living in the community and an extremely high unemployment rate. Therefore, Mosley and Carrick have put a lot of effort into helping these offenders find jobs. "Helplink" is their program that brings together the employers who are willing to hire people with felony convictions and the organizations and agencies that work to assist people in getting jobs. So far, Mosley and Carrick have been able to help several offenders find and even keep jobs. For those offenders who are able to maintain employment for at least a year, special low-interest loans will be available

to them to buy homes in the neighborhood.

Keeping teens out of trouble

Another area of need identified by Mosley and Carrick was the lack of after-school programs in the northern part of the Harambee neighborhood. Statistics show that kids are most likely to get into trouble after school—between the hours of 4:00 p.m. and 9:00 p.m. Mosley and Carrick were instrumental in arranging for bus transportation from northern Harambee to southern Harambee so that kids from the northern part of the



neighborhood could participate in the after-school programs in the southern part of the neighborhood. The kids play sports, participate in educational activities, and surf the Internet. Most importantly, the kids have something to keep them busy so they are able to stay out of trouble.

A dream job

In addition to the above, Mosley and Carrick do so much more. They attend block-watch meetings with people in the community. They talk regularly to students about the criminal justice system. They serve as mentors. When Mosley and Carrick were students at Marquette Law School, neither ever dreamed they'd be working in such a rewarding job as this. The most difficult part of their job is wishing they could do more to help. They both enjoy the contact they have with the people in the community and will maintain that contact in some capacity if funding for the program is not continued. ■

To learn more about Milwaukee County's community prosecution program, please contact Derek Mosley and Shannon Carrick at 414.935.7256.

PRACTICE POINTERS

The following practice pointer was submitted by Nicholas Bokas, Assistant State Public Defender in the Milwaukee Trial office. Mr. Bokas received his undergraduate degree from Villanova University and his Master's Degree from the University of Pennsylvania. He earned his Juris Doctor degree from the University of Wisconsin. Mr. Bokas has worked for the Wisconsin State Public Defender since 1981. He currently specializes in Ch. 980 cases.

My co-chair, Meighan Anger, and I recently were prepared to proceed on a Chapter 980 jury trial in Milwaukee county. A venire of 40 was brought into the courtroom and seated. There were going to be 13 jurors hearing the case—12 plus one alternate. Each side was to be given five peremptories. The judge made it known that he would limit voir dire, and directed that questions by counsel be presented to the venire panel as a whole, as opposed to directing questions to individuals, unless done as follow-up to those who raised their hand.

The judge and the DA asked their routine voir dire questions. As a result, the venire panel was able to obtain only a vague, generalized understanding of the case to be tried. The prospective jurors uniformly answered, in response to the court's and DA's questioning, that they could be fair and objective as jurors in this case. This is to be expected, as people like to think of themselves as fair and open minded.

Being mindful of the judge's admonition to counsel, I decided, when my turn came for questioning, to get right to the heart of the matter of assessing the ability of these prospective jurors to sit on this case and give my client a fair trial. I told the venire what they would hear—that my client, 12 years old at the time, engaged in between 30 and 60 incidents of oral sex with a four year

old neighbor boy over a period of about 18 months. The oral sex was both ways. I also told the venire that there possibly may have been anal sex, or more probably attempted anal sex. I further told the venire that my client admitted to a read in of another sexual assault against another boy, but that he later denied it in treatment, and is still denying it. I did not go beyond that in previewing the nature of the sexual offending to the venire.

I then told the venire that the issue in the case is whether my client is a sexually violent person (SVP). I told them that a SVP is someone who suffers from a mental disorder (in this case, allegedly, pedophilia), and who, because of that, is substantially probable to reoffend in a sexually violent manner.

Then I told the venire that, just as in a criminal case, where the accused is presumed innocent, my client was to be presumed not to be a SVP. I specified that the law required that each juror is to presume that my client is not suffering from a mental disorder, and that he is not substantially probable to reoffend.



Then I asked the following two questions:

“How many of you feel that, because of what Cory did in the past, it will affect your ability to sit as a juror on this case?”

“How many of you feel that, given what Cory did in the past, you can presume that he is not a SVP, that is, that he not suffering from a mental disorder, and that he is not substantially probable to reoffend?”

The change in the mood of the venire was immediately apparent, and what ensued was extraordinary.

After follow-up questioning by me, of the 40

people who had just finished saying they could be fair as jurors in this case, only 13 were left who felt they could accord my 19 year old client the presumption that he was not a SVP. Twenty seven of the original 40 were stricken for cause by the court, each on my motion.

Those who were stricken for cause felt they could not presume that Cory was not a SVP. Once they heard the specifics of what my client did in the past, they could not presume that he was not suffering a mental disorder, nor could they give him the presumption that he would not reoffend. Most of these jurors responded unequivocally to my follow-up questions in saying they could not be fair. A few were visibly shaken. One of them said that the state's burden would be met if there was only a one percent likelihood of reoffending. Another said that my client would be likely to reoffend based on the fact that he offended in the past. One by one, I questioned them, and thanked them for their candor.

After the 27 strikes for cause were granted, we were left with 13—which would not suffice given that we had not yet exercised our peremptories. I

felt quite good about those who were left, and thought that most of them would be fair jurors. They were certainly more open-minded than the rest.

Because we ran out of people on the venire, the case had to be rescheduled. We will bring out a larger venire next time. I will ask the same questions.

I share this experience because it demonstrates just how important the jury (or judge) who will decide the case is to the outcome. Probably, a majority of individuals among the general public is unable to be fair as a juror in a Chapter 980 case. But that is not to say that we cannot find open-minded and fair jurors. The 13 who were left seemed to be able to keep my client's past from subverting their objectivity. Whether in a Chapter 980 case, or a criminal case where prior sex (or other) offending will be introduced as evidence, it is important that we inform the venire of the fact and nature of the prior offending, so that we can minimize the chance that persons with the mindset of the 27 will be deciding the fate of our clients. ■

The *Wisconsin Defender* needs your practice pointers. If you have a practice pointer, courtroom observation, or comment you'd like to share with your colleagues, please submit it to Gina Pruski, Editor-*Wisconsin Defender*, at pruskig@mail.opd.state.wi.us or 315 N. Henry St., 2nd Floor, Madison, WI 53703.

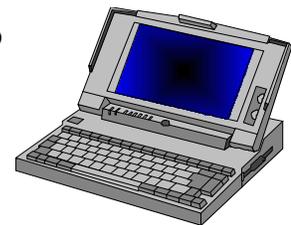
Web Site of the Month

<http://www.crimelynx.com>

Bright, bold and resourceful, this gateway site is designed specifically with the criminal defense practitioner in mind. Displayed in large type and logically organized into understandable categories, even the most internet-illiterate will find it easy to navigate. As a means of reaching some of the most useful forensic and investigative tools available on the net, this site is one of the best.

The site is organized into four basic categories: Research, Forensics, Investigation, and Policy. Once you select a category, you can search for the information you need by either using the helpful subcategories provided or running a Boolean search using the term or phrase of your

choice. From oral argument audio files to a primer on shoeprint identification, you can find it all here.



In addition to the invaluable resource links this site provides, it also collects and summarizes defense-oriented crime news from around the country. Access to numerous media sites like the AP wire service, the New York Times, and C-Span are also available. This truly is a wonderful site with a lot to offer. Spare a moment to take a look; you won't be disappointed.

Thank you to Kathryn M. Dresser, law student at the University of Wisconsin Law School, for submitting www.crimelynx.com.

CHILDREN'S COURT: A LESSON LEARNED

By: Leslee Ruscitti*

There are a lot of attorneys practicing law at Children's Court. Public Defenders, private bar attorneys, GALs, DAs and judges co-exist in a system seemingly on the brink of caving in under the sheer weight of it all. Like every other criminal justice system in nearly every city in this country the growing caseloads and scarce resources place an often untenable burden on those who serve the interests of children. The veneer of informality and the remnants of *parens patriae* do little to mask what is, or should be, a flat out adversarial criminal justice system. As the consequences for juveniles become increasingly punitive and less treatment oriented, the legal community's role must change with the times.

Defense counsel's role, as adversary counsel does not change because the defendant is 10 years old. A zealous defense in accordance with the client's wishes is not diminished because of the young age of the accused. Defense lawyers, especially those who are parents themselves, struggle daily not to influence the client's absolute decision-making rights. Clients should be well informed of the consequences of their decisions and often, like adult defendants, will ask counsel what they should do. It is not easy to put yourself in your client's shoes when your client is in the fifth grade or cannot read or write.

Until recently, zealous advocacy was a concept I took for granted. It was a philosophy stressed in

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law school and reinforced by 15 years of practice as a juvenile attorney in the Public Defender's Office. The judge balances the interests of the community and the interests of the juvenile, the DA acts on the interests of the community and it is defense counsel's responsibility to present a zealous defense. Our office has trained new attorneys, Division of Corrections workers, probation officers, police officers and social workers. The concept of the role of counsel has always stimulated the most discussion. People outside the defense bar find it hard to hold on to the idea that an eleven year old gets to make the critical decisions in his or her own case.

For the past two years I have had the pleasure of teaching the Juvenile Law class at Marquette Law School. The assigned mid-term project consists of a Children's Court observation period and a mid-term paper on those observations.

There is nothing like seeing what you take for granted every day through the eyes of people seeing it for the first time. Some of the papers ran directly along the expected prosecution or defense orientation of the students. Half the class would describe a particular judge as compassionate and "Solomonesque" and the other half would be further divided in their descriptions between tyrant and "wuss". The class saw many of the court center support staff as being over-worked and concepts like "assembly-line" and "going through the motions" appeared on a disturbing majority of the papers. A sizeable majority of the students (40 total class size) believed incorrectly that they must have missed a step in the process.

Far and away the most disturbing revelations came from students that had been taught the role of defense counsel and observed lawyers in the courtroom who did not and had not talked to their clients. While I am sure that there were those instances of attorneys who had previously determined what their client wanted - I am just as sure that there were a sizeable number that believed they were doing what was best for the client without

— See "Children" on Page 47



AGAINST ALL ODDS

This column of the Wisconsin Defender highlights extraordinary results obtained by attorneys who represent indigent clients.

Recent results obtained by State Public Defender appellate attorneys were not only favorable to their clients, but also saved Wisconsin taxpayers over \$500,000.

On May 21, 2001, the court of appeals issued a summary reversal in a Richland county repeater case, *State v. Keller*. The court ruled that the state's failure to allege a specific prior crime in the charging document denied the defendant notice of the repeater allegation. As a result, the defendant's felony battery sentence was reduced from 11 to 5 years and his attempted escape sentence was reduced from 7 1/2 years to 2 1/2 years. The total sentence was reduced from 19 to 7 1/2 years. Keller was represented by Madison Appellate Assistant State Public Defender **Patrick Donnelly**.

In another case, *State v. Anker*, Madison Appellate Assistant State Public Defender **Susan Alesia**, convinced a Shawano county judge that the court cannot allow a defendant to plead guilty to an unconstitutional charge (child exploitation). After vacating the illegal conviction, the court was also persuaded to reduce the sentence from 16 years to 6 years.

Finally, in *State v. Herman*, an operating while intoxicated-6th offense case, Madison Appellate Assistant State Public Defender **Eileen Hirsch** won two victories. First, Eileen was able to get a resentencing based on the fact that the district attorney had convinced all parties at the trial court level that the maximum sentence had been increased, under the truth-in-sentencing legislation, to 7 1/2 years. The maximum sentence had not been increased---the maximum sentence is still 5 years. Then, at resentencing, the court reduced Mr. Herman's sentence from 30 months confinement time to 12 months confinement time, based largely on his successful completion of the prison's intensive AODA treatment program.

The public defenders' efforts in just these few cases---*State v. Keller*, *State v. Anker*, and *State v. Herman*---resulted in Wisconsin taxpayer savings of \$519,062.85 based upon the Department of Correction's own cost figures for the cost of incarceration.

Expert's Corner

By: Barry Hargan*

Drug Cases-Asking the Power Questions

I've testified in many cases over the years--in bench trials, jury trials, revocation proceedings, sentencing and post-conviction hearings, and various motion hearings--but mostly in drug cases. These cases have a tendency to sound the same case after case. Another element of these cases is how I have heard or read police statements which are taken as truth despite the fact that police lack training or expertise in clinical matters such as addictive disorders, tolerance to drugs, differences between social use and addictive use, the relationship between elevations in tolerance and purchasing habits which, in the end, define the difference between simple possession for personal use and an intent to deliver.

When I am on the witness stand in drug cases, I am usually asked the same questions. I am always asked, for example, if I have any training or experience in the execution of search warrants, the packaging and pricing of drugs on the streets or in drug transactions. The effort to dilute my credibility with issues related to packaging and pricing and other non-clinical issues is the usual strategy used by the prosecution with me.

Conversely, how many defense attorneys examine the police as to their training, credentials or expertise related to:

- ◆ Classroom training and continuing education in the area of addictive disorders
- ◆ Understanding the differences among social use, abuse, and addiction
- ◆ An ability to explain what tolerance means and its significance relative to purchasing practices
- ◆ An ability to demonstrate an understanding of usage patterns (e.g., quantity/frequency ratio)

in persons with high tolerance to a mood altering substance such as crack cocaine

- ◆ Understanding the dynamics of drug intoxication and how intoxication impairs cognition, especially when the client is being Mirandized or interrogated
- ◆ Understanding the dynamics of drug withdrawal and how withdrawal impairs cognition, especially when the client is being Mirandized or interrogated
- ◆ Understanding the impact drug withdrawal on purchasing practices

The following questions and answers were taken from an actual transcript of one such case I worked on recently. Please take note that defense counsel is asking the case detective the following on direct examination:

Q: Can you indicate, based upon your training and your experience, what a normal amount is and manner of dealing in crack cocaine in Brown county, based on that experience ?

A: Yes. Typically a user of base cocaine will purchase anywhere from \$50 to \$100 worth of base cocaine, which would be one to two rocks...They generally don't buy more than one or two rocks at a time..."

Q: And when they buy one or two rocks, then they consume one to two rocks in fairly quick order?

A: That's correct...

Q: Okay. And then even more if you go on to the next day, correct?

A: Certainly.

Q: Just depends on if you do buy five times in a day or maybe if you buy one time in a day, correct.

A: It would probably be depending on how much money they would have to spend on that.

See "Expert" on Page 57

Case Digest

This composite digest includes all available digests from April 25, 2001 to August 1, 2001. Segments are arranged in reverse chronological order.

Summaries by Brian Findley*

United States Supreme Court Decisions

DEFENSES

MEDICAL NECESSITY IS NOT A VALID DEFENSE TO THE CRIME OF MANUFACTURING AND DISTRIBUTING MARIJUANA

U.S. v. Oakland Cannabis Buyers' Cooperative, 121 S. Ct. 1711 (2001)

For purposes of the Controlled Substances Act, marijuana has no "currently accepted medical use" and the act reflects a determination that marijuana has no medical benefits worthy of an exception.

DUE PROCESS

THE INS MAY NOT INDEFINITELY DETAIN AN ALIEN WHO HAS BEEN ORDERED DEPORTED

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Zadvydas v. Davis, 121 S. Ct. 2491 (2001)

After a final removal order is entered, an alien ordered removed is held in custody during a 90-day removal period. If not removed the aliens are subject to further detention or supervised release. Petitioners were ordered removed following commission of a crime but no country would accept them, making their detention potentially permanent. The Court finds "nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."

EX POST FACTO

JUDICIAL ABOLITION OF THE COMMON LAW YEAR-AND-ONE-DAY RULE DID NOT VIOLATE EX POST FACTO OR DUE PROCESS CLAUSES OF THE CONSTITUTION WHERE ABOLITION OF THE RULE WAS NOT UNEXPECTED NOR INDEFENSIBLE

Rogers v. Tennessee, 121 S. Ct. 1693 (2001)

Rogers stabbed a man who died 15 months after the stabbing. Rogers claimed that his conviction for homicide violated the common law one-year-and-a day rule. The Tennessee Supreme Court affirmed Rogers' conviction and abolished the common law rule. The Supreme Court upheld the Tennessee court's retroactive application of the decision to abolish the common law rule in part because the Ex Post Facto Clause does not apply to judicial decision making. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964). The abolition of the common law rule also did not violate due process because abolition of the rule was not unexpected and indefensible. The rule had been abolished in a vast number of other jurisdictions, and the rule had a tenuous foothold in Tennessee. The decision is a fractured one with multiple dissents.

JURISDICTION

TRIBAL COURTS DO NOT HAVE JURISDICTION TO HEAR SECTION 1983 ACTIONS CHALLENGING EXECUTION OF A WARRANT ON TRIBAL LAND FOR CRIMES COMMITTED OFF THE RESERVATION

Nevada v. Hicks, 121 S. Ct. 2304 (2001)

Because the Tribe “lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent’s claims that those officials violated tribal law in the performance of their duties.”

FEDERAL COURTS HAVE JURISDICTION TO HEAR HABEAS CHALLENGES TO DENIAL OF WAIVER OF DEPORTATION

INS v. St. Cyr, 121 S. Ct. 2271 (2001)

Sec. 212(c) of the Immigration and Nationality Act of 1952 was interpreted to give the Attorney General broad authority to waive deportation of resident aliens. That section was replaced by the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 after St. Cyr pleaded guilty to an offense. The court holds that federal courts have jurisdiction under 28 U.S.C. § 2241 to decide St. Cyr’s claim that he could still be waived. The INS could not overcome the longstanding rule requiring a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction particularly where the amendments give rise to substantial constitutional questions. In addition, a statute’s language must require that it be applied retroactively. Steven and O’Connor, J.s, dissent.

FEDERAL COURTS HAVE NO JURISDICTION TO HEAR CHALLENGES TO DENIAL OF DISCRETIONARY WAIVER OF DEPORTATION ON DIRECT REVIEW BUT THE COURTS MAY REVIEW IDENTICAL

CHALLENGES IN §2241 HABEAS PETITION

Calcano-Martinez v. INS, 121 S. Ct. 2268 (2001)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expressly precludes the District Courts from exercising jurisdiction to review a final removal order for permanent U.S. residents subject to removal orders because they were convicted of aggravated felonies. However, nothing in the law unmistakably stripped the district courts of jurisdiction to hear habeas petitions raising identical claims. The court therefore holds that sec. 212(c) relief “remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for sec. 212(c) relief at the time of their plea under the law then in effect.”

A FEDERAL HABEAS PETITION IS NOT AN “APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW” AND THEREFORE DOES NOT TOLL THE TIME LIMIT FOR FILING FEDERAL HABEAS CHALLENGE UNDER AEDPA

Duncan v. Walker, 121 S. Ct. 2120 (2001)

A federal habeas petition is not “an application for State post-conviction or other collateral review” within the meaning of § 2244(d)(2). As a result, the pendency of a prior petition for habeas review filed in federal court did not toll the time limits of the Antiterrorism and Effective Death Penalty Act of 1996 for filing a different habeas petition. There were several concurrences and Breyer and Ginsburg, J.’s dissented.

WHERE A STATE’S HIGH COURT REMANDS A CASE TO THE TRIAL COURT FOR FURTHER FACTFINDING AND APPLICATION OF CONSTITUTIONAL LAW, THE ORDER FOR REMAND IS NOT A FINAL ORDER AND THEREFORE THE SUPREME COURT LACKS JURISDICTION TO REVIEW THE CASE

Florida v. Thomas, 121 S. Ct. 1905 (2001)

Title 298 U.S.C. §1257 authorizes the Supreme Court to review “final judgments ... by the highest court of a State ... where any ... right is specially set up or claimed under the Constitution.” The Florida court’s ruling fits none of the four categories for which the Supreme Court has jurisdiction, *see Cox Broadcasting Corp. V. Cohn*, 420 U.S. 469 (1975), and therefore the Court dismissed Certiorari for want of jurisdiction.

POSTCONVICTION AND APPELLATE PROCEEDINGS

THE SUPREME COURT DOES NOT MAKE A RULE RETROACTIVE WHEN IT MERELY ESTABLISHES PRINCIPLES OF RETROACTIVITY AND LEAVES APPLICATION OF THE RULE TO THE LOWER COURTS

Tyler v. Cain, 121 S. Ct. 2478 (2001)

Cage v. Louisiana, 498 U.S. 39 (1990), disallowing as unconstitutional a jury instruction making it reasonably likely that a jury understood that it could convict without proof beyond a reasonable doubt does not apply retroactively to Tyler’s appeal. The Antiterrorism and Effective Death Penalty Act (AEDPA) does not allow successive habeas petitions unless the claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” The retroactivity principles spelled out in *Teague v. Lane*, 489 U.S. 288 (1989) do not change the requirement of Supreme Court action. “The only way the Supreme Court can, by itself, ‘lay out and construct’ a rule’s retroactive effect, or ‘cause’ that effect ‘to exist, occur, or appear, is through a holding. The Supreme Court does not ‘ma[k]e’ a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts.” Breyer, J.,

dissents.

PRETRIAL PROCEEDINGS

THE ANTI-SHUTTLING PROVISION OF THE INTERSTATE AGREEMENT ON DETAINERS (IAD) BARS ANY FURTHER CRIMINAL PROCEEDINGS WHEN A DEFENDANT IS RETURNED TO THE ORIGINAL PLACE OF IMPRISONMENT BEFORE TRIAL

Alabama v. Bozeman, 121 S. Ct. 2079 (2001)

Every prisoner arrival in the receiving state, no matter how long the stay, triggers the Art IV(e) provisions of the IAD that the receiving state must try the prisoner within 120 days. Failure to try the prisoner prior to returning him to the original state requires that the charges “shall” be dismissed with prejudice. The court reads this language as mandatory, and it rejects a claim that a one-day stay was de minimis, technical, or harmless.

SEARCH AND SEIZURE

ADMISSION AT SENTENCING PHASE OF DEATH PENALTY TRIAL OF DEFENSE EXPERT’S REPORT PREDICTING FUTURE DANGEROUSNESS DID NOT VIOLATE FIFTH AMENDMENT

JURY INSTRUCTION ERROR NOT CURED BY SUPPLEMENTAL INSTRUCTION WHERE THE JURY FORMS PROVIDED NO ADEQUATE WAY TO EXPRESS A BELIEF THAT DEFENDANT DID NOT DESERVE DEATH BASED ON MITIGATING CIRCUMSTANCES

Penry v. Johnson, 121 S. Ct. 1910 (2001)

The court rejects the claim that admission of a report of a defense expert claiming that Penry posed a risk of future dangerousness violated the privilege

against self-incrimination. The Court does not directly decide the issue but instead finds that the Texas court's decision was not "contrary to" or an "unreasonable application" of this court's prior decision in *Estelle v. Smith*, 451 U.S. 454 (1981). Even were the Fifth Amendment violated, the error would justify overturning Penry's sentence only if he could establish that the error had a substantial and injurious influence in determining the jury's decision.

The Court struck down Penry's original conviction and sentence in part because the jury had not been adequately instructed with respect to mitigating evidence and had no way to give effect to that evidence. The court again reverses following Penry's new trial and conviction because the supplemental instruction did not cure the error. The court instructed the jury on mitigation but the mechanism it purported to create for the jurors to give effect to that evidence was ineffective or illogical. The verdict form listed three "special issues" with no mention of mitigating circumstances. Therefore a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon the mitigating evidence.

Thomas, Rehnquist, and Scalia, J.'s, concurred in part and dissented in part.

A QUALIFIED IMMUNITY DEFENSE IN AN EXCESSIVE FORCE ACTION REQUIRES AN ANALYSIS NOT SUSCEPTIBLE TO FUSION WITH THE QUESTION OF WHETHER UNREASONABLE FORCE WAS USED IN MAKING THE ARREST

Saucier v. Katz, 121 S. Ct. 2151 (2001)

A claim of qualified immunity by an officer making an arrest requires a two step inquiry. First, the courts look to see whether a constitutional right would have been violated on the facts alleged. Then, the courts look to see whether the right was clearly established. The court must determine

whether it would be clear to a reasonable officer that the conduct was unlawful in the situation confronted. Even if the arrest was not constitutional, the law grants immunity to officers for reasonable mistakes as to the legality of their actions.

USE OF SENSE-ENHANCING TECHNOLOGY, A THERMAL IMAGER, TO OBTAIN ANY INFORMATION ABOUT A HOME'S INTERIOR IS A SEARCH REQUIRING A WARRANT

Kyllo v. United States, 121 S. Ct. 2038 (2001)

"We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' [citation omitted] constitutes a search—at least where (as here) the technology in question is not in general public use." Scalia and Stevens, J.'s, dissenting.

AN OFFICER'S SUBJECTIVE MOTIVATION IS IRRELEVANT IN DETERMINING THE LAWFULNESS OF AN ARREST FOR TRAFFIC OFFENSES

Arkansas v. Sullivan, 121 S. Ct. 1876 (2001) per curiam

Fourth Amendment challenges can not be based on the actual motivation of individual officers. The officer had probable cause to arrest and his subjective intentions were irrelevant.

THE FOURTH AMENDMENT DOES NOT FORBID A WARRANTLESS ARREST FOR MISDEMEANOR TRAFFIC VIOLATION

Atwater v. Lago Vista, 121 S. Ct. 1536 (2001)

The court holds 5-4 that an officer may arrest an individual without violating the Fourth Amendment if there is probable cause to believe that the offender has committed even a very minor offense in the officer's presence. In this case the

officer could arrest a mother because her children were not wearing seat belts, an offense punishable only by a fine. Although the decision can be read as providing support for arrest following purely civil offenses, the decision does not fully resolve the issue.

SENTENCING

A PRISONER SENTENCED UNDER THE ARMED CAREER CRIMINAL ACT MAY NOT CHALLENGE HIS FEDERAL SENTENCE UNDER 28 U.S.C. 2255 ON THE GROUND THAT HIS PRIOR CONVICTIONS WERE UNCONSTITUTIONALLY OBTAINED

Daniels v. U.S., 121 S. Ct. 1578 (2001)

The court applies the rationale of *Custis v. United States*, 511 U.S. 485 (1994) and holds that a person facing sentencing in federal court may not collaterally attack a prior state conviction used as an enhancer unless that state conviction was obtained in violation of the right to counsel.

Wisconsin Supreme Court and Court of Appeals Opinions

CRIMES

POSSESSION OF COMPUTER DISK CAPABLE OF PRODUCING PICTURES OF CHILD PORNOGRAPHY CONSTITUTES CRIME OF POSSESSION OF CHILD PORNOGRAPHY, WIS. STAT. § 948.12

State v. Whistleman, 2001 WI App ____, No. 00-2906-CR (Ct. App. Dist. IV, 7-19-01)

For Appellant: Daniel J. O'Brien, Madison
For Respondent: Michael J. Devanie, La Crosse

Possession of child pornography, Wis. Stat. § 948.12, requires proof of undeveloped film, photographic negative, photograph, motion picture, videotape, or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct. The court is satisfied that "possession of computer disks that produce visual images on a computer screen of children engaged in sexual explicit conduct" satisfies the element of "other pictorial reproduction."

A CONVICTION FOR GOING ARMED WITH A CONCEALED AND DANGEROUS WEAPON INVOLVES "THE USE OF THE DANGEROUS WEAPON" IN COMMISSION OF THE CRIME AND THEREFORE WIS. STAT. § 968.20(1M)(B) PROHIBITS RETURN OF THE WEAPON SEIZED

State v. Perez, 2001 WI 79, No. 99-3108-CR (S. Ct. 06-29-01)

For Appellant: Jeffrey J. Kassel, Madison
For Respondent: R. Douglas Stansbury, Cedarburg

The court concludes that, "a seized dangerous weapon may not be returned to a person convicted of the crime of carrying a concealed and dangerous weapon. A person convicted of carrying a concealed and dangerous weapon contrary to Wis. Stat. § 941.23 has 'committed a crime involving use of the dangerous weapon,' because 'the use' of the dangerous weapon is an indispensable element of a § 941.23 offense. Moreover, our textual and historical analysis convinces us that the legislature intended forfeiture of dangerous weapons in this situation."

WRITING SOMEONE ELSE'S NAME AS PAYER ON A MONEY ORDER DOES NOT CONSTITUTE FORGERY

State v. Entringer, 2001 WI App 157, No. 00-2568-CR (Ct. App. Dist. III, 08-08-01)

For Appellant: Jeffrey J. Kassel, Madison; Timothy W. Funnell, Sturgeon Bay

For Respondent: William E. Schmaal, Madison

Forgery only applies to falsehoods that materially affect the document's legal efficacy, and a money order is as good as cash. Writing another person's name as payer therefore does not constitute "falsely making" the money order even if the purpose for putting someone else's name was for an illegitimate purpose (concealing true identity).

CRIME OF VIOLATING CONFIDENTIALITY UNDER WIS. STAT. § 48.981(7) DOES NOT REQUIRE STATE TO PROVE THAT PARENTS TO WHOM DEFENDANT DISCLOSED INFORMATION DID NOT ALREADY KNOW THE IDENTITY OF EMPLOYEES ALLEGING SEXUAL ABUSE

WIS. STAT. § 48.981(7) IS A STRICT LIABILITY STATUTE AND THEREFORE STATE DID NOT HAVE TO PROVE INTENT

State v. Polashek, 2001 WI App 130, No. 00-1570-CR (Ct. App. Dist. III, 5-30-01)

For Appellant: J.N. Connelly, Oconto, *et al.*, Sandra Nowack, Madison

For Respondent: Nila J. Robinson, Appleton

Wis. Stat. § 48.981(7) makes it a crime for a school official, and others, to disclose to the parents the identities of the persons reporting possible child sexual abuse. The instructions in this case erred because they required the state to prove that the parents did not already know the employees' identities and because they required the state to prove that the school principal acted intentionally.

A DELINQUENCY PETITION ALLEGING THREATS ALONE WITHOUT ACCOMPANYING ACTS IS SUFFICIENT TO SUPPORT A DISORDERLY CONDUCT CHARGE

In the Interest of A.S., State v. A.S., 2001 WI 48, No. 99-2317 (5-16-01)

For Appellant: Jeffrey J. Kassel, James E. Doyle, Madison

For Respondent: Stephen P. Hurley, Marcus J. Berghahn, Madison

A.S.'s graphically detailed threats to harm, kill and rape specific persons were abusive and otherwise disorderly in the context of a discussion of the school murders at Columbine High School because they tended to provoke retaliatory conduct or disrupt good order. They also tended to cause or provoke a disturbance because "such violent threats to kill and seriously harm others could only serve to frighten and cause serious concern to the listeners."

DEFENSES

STATE FAILED TO DISPROVE AFFIRMATIVE DEFENSE OF ACCIDENT AND THEREFORE THE EVIDENCE WAS INSUFFICIENT TO CONVICT

State v. Watkins, 2001 WI App 103, No. 00-0064-CR (Ct. App. Dist. I, 6-13-01)

For Appellant: Steven P. Weiss, Madison

For Respondent: Robert D. Donohoo, Milwaukee; Stephen W. Kleinmaier, Madison

The court finds that Watkins successfully posited a theory of defense that he armed himself with a gun, threatened the victim to stay away, called another person to intervene, and accidentally shot the victim following a struggle. This was a bench trial where the state had failed to disprove the claim of accident because all of the trial court's "critical factual findings-rendered a reasonable hypothesis consistent with Watkin's self-defense." Note: this opinion calls into question the analysis of *State v. Ambuehl*, 145 Wis. 2d 343, 352 (Ct. App. 1988) which held that the court need not instruct the jury on accident. If accident is an affirmative defense then a defendant should be entitled to a jury instruction on it. *See also State v. Gomaz*, 141 Wis. 2d 302, 313 n. 7 (1987)(accident and self-defense

are not always inconsistent with each other).

DOUBLE JEOPARDY

MULTIPLE CHARGES FOR STEALING AND CONCEALING DIFFERENT GUNS ARISING FROM A SINGLE ACT OF TAKING AND A SINGLE ACT OF CONCEALING ARE NOT MULTIPLICITOUS

State v. Trawitzki, 2001 WI 77, No. 99-2234 (S. Ct. 6-29-01)

For Appellant: Donald T. Lang, Madison
For Respondent: Sandra L. Nowack, Madison

Trawitzki, as a party to a crime, stole ten guns during a burglary from a single house. He and others later concealed five of them in the same hiding place. The court finds no multiplicity double jeopardy violation because the taking of the guns requires proof of a different fact, namely the specific identity of each firearm taken away and later concealed. Because the charges are not identical in fact, Trawitzki had the burden of rebutting the presumption that the legislature intended separate charges—a burden he can not meet. The dissent, Bradley, Abrahamson, and Bablitch, J.'s, believe that nothing in the statutory scheme requires proof of the identity of each weapon. The number of weapons taken is only relevant in determining the overall value of the property taken. They see the majority as trying to limit the holding in this case to guns, but they claim that the limitation is not possible: "The unfortunate consequence of the majority's opinion is the gross over-prosecution that its decision will allow."

EACH SEPARATE PHOTOGRAPH DOWNLOADED FROM THE INTERNET CONSTITUTES A SEPARATE COUNT OF POSSESSION OF CHILD PORNOGRAPHY

State v. Multaler, 2001 WI App 149, No. 00-1846-CR (Ct. App. Dist. I, 8-8-01)

For Appellant: Jeffrey W. Jensen, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee;
Sandra L. Nowack, Madison

Conviction for 28 counts of possession of child pornography, Wis. Stat. § 948.12, did not violate double jeopardy. The convictions were not multiplicitous because Multaler had made a conscious decision to download and keep each pornographic page. The legislature intended to allow prosecution "based not only on the medium, but also on each image conveyed by the medium."

WIS. STAT. § 961.45 BARS A WISCONSIN PROSECUTION UNDER CH. 961 FOR THE SAME CONDUCT ON WHICH A PRIOR FEDERAL CONVICTION IS BASED

State v. Hansen, 2001 WI 53, No. 99-1128-CR (S. Ct. 5-30-01)

For Appellant: Pamela Pepper, Milwaukee
For Respondent: Gregory M. Posner-Weber, James E. Doyle, Madison

When determining whether Wis. Stat. § 961.45 bars a Wisconsin prosecution for which the defendant has already been convicted in federal court, the courts do not apply the *Blockburger* different elements test but look to see whether the same act refers to the same conduct on which the federal conviction is based. In this case Hansen had been convicted in federal court of the crime of conspiracy to distribute and possess with intent to distribute cocaine. The state charged her with possession with intent to deliver. Under the *Blockburger* test, her conviction could have stood, but the court reverses because the crimes were based on the same conduct. Note that the limit to the dual sovereignty doctrine, allowing different prosecutions in different jurisdictions for the same crime, applies only to ch. 961 drug offenses.

DUE PROCESS

DESTRUCTION OF OFFICER'S NOTES DID

NOT DENY DEFENDANT PRETRIAL RIGHT OF ACCESS TO EXCULPATORY EVIDENCE WHERE DEFENDANT COULD NOT PROVE BAD FAITH OR THAT THE EVIDENCE WAS APPARENTLY EXCULPATORY

State v. Noble, 2001 WI App 145, No. 99-3271-CR (Ct. App. Dist. IV, 7-11-01)

For Appellant: Jeff P. Brinckman, Prairie du Chien
For Respondent: Timothy C. Baxter, Prairie du Chien, Marguerite M. Moeller, Madison

The Due Process Clause protects a defendant's right of pretrial access to exculpatory information. That right has been violated where: 1) the evidence is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; 2) if the evidence was potentially exculpatory and was destroyed in bad faith. Noble did not allege bad faith and could not prove that the evidence was apparently exculpatory. Therefore, she was not denied the opportunity to prepare a defense.

EVIDENCE

A JOHN DOE PROCEEDING CONDUCTED IN PART BY A PERSON UNAUTHORIZED TO PRACTICE LAW IS AN ABUSE OF THE PROCEEDING AND REQUIRES A NEW TRIAL AT WHICH THE EVIDENCE IMPROPERLY OBTAINED IS EXCLUDED

THE EVIDENCE IS SUFFICIENT TO SUSTAIN A PERJURY CONVICTION WHERE THE DEFENDANT'S TESTIMONY IS DIFFERENT FROM WHAT SHE PREVIOUSLY TOLD THE POLICE

State v. Noble, 2001 WI App 145, No. 99-3271-CR (Ct. App. Dist. IV, 7-11-01)

For Appellant: Jeff P. Brinckman, Prairie du Chien
For Respondent: Timothy C. Baxter, Prairie du

Chien, Marguerite M. Moeller, Madison

At the John Doe proceeding a non-lawyer, a special narcotics investigator, questioned Noble. Her answers were used to convict her of perjury. The court finds that a John Doe proceeding is conducted before a judicial tribunal, and therefore the officer was practicing law without a license. The court concludes that "exclusion of a witness's testimony obtained when an unlicensed person examines a witness at a John Doe investigation properly balances the right of the State to investigate allegations of criminal conduct with prohibitions against the unauthorized practice of law." The court does not suppress the evidence but rather says that if the state retries Noble it must "exclude information obtained by the State's unauthorized practice of law."

The evidence was sufficient to sustain a perjury conviction where Noble told investigating officers she witnessed criminal behavior but then testified that she never made the statements attributed to her.

EVIDENCE OF DEFENDANT'S SEXUAL ASSAULT OF HIS DAUGHTER SIX YEARS PRIOR TO THE CURRENT CHARGE WAS PROPERLY ADMISSIBLE TO PROVE THE ELEMENT OF INTENTIONAL TOUCHING

State v. Veach, 2001 WI App 143, No. 98-2387-CR (Ct. App. Dist. IV, 5-10-01)

For Appellant: Suzanne L. Hagopian, Madison, Edmund C. Carns, Crivitz
For Respondent: Daniel J. O'Brien, Madison; Guy D. Dutcher, Wautoma

The evidence was relevant under the greater latitude rule of *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613, N.W.2d 606. "Given the greater latitude rule, a reasonable judge could decide that the similarities of the ages of the girls, Veach's position of trust with each, and the indisputably sexual nature of the conduct with his daughter make the prior acts probative on the issues of motive and

absence of mistake, notwithstanding the time interval and the differences between the prior acts and the charged incidents. Though the trial court found that the prior conduct was “extremely prejudicial,” the court also correctly found that the prejudice was not unfair “because the evidence was probative on central elements of the offense: motive and absence of mistake.

EVIDENCE OF AN ACT OF ARSON AND OF INSTITUTIONAL MISCONDUCT WHILE AT AN ADOLESCENT TREATMENT CENTER WERE ADMISSIBLE UNDER WIS STAT. § 904.04 IN A CH. 980 COMMITMENT PROCEEDING

In re Commitment of Wolfe, 2001 WI App 136, No. 99-2145 (Ct. App. Dist. II, 7-7-01)

For Appellant: Ann T. Bowe, Milwaukee
 For Respondent: Sally Wellman, Madison; Robert J. Wells Jr., Sheboygan

Evidence of conduct and behavioral history and their effect on treatment are suitable in ch. 980 commitment proceedings where they are presented to establish the person’s diagnosed mental disorder, his dangerousness, and his risk of reoffending. According to the court, “Diagnoses of a mental disorder and dangerousness are directly foretold through past conduct. The jury needed to consider evidence of relevant past conduct to determine whether Wolfe had a mental disorder which predisposed him to commit acts of sexual violence and whether there was a substantial probability that he would commit acts of sexual violence in the future. . . .”

EX POST FACTO

GUILTY PLEA DID NOT WAIVE AN EX POST FACTO CHALLENGE

NO EX POST FACTO VIOLATION OCCURRED FOR CONVICTION OF MISAPPROPRIATING PERSONAL IDENTIFYING INFORMATION OF ANOTHER, WIS. STAT. SECTION 943.201(2)

(1999-2000), WHERE MISAPPROPRIATION BEGAN BEFORE ENACTMENT OF SECTION 943.201 BUT WAS A CONTINUING OFFENSE

State v. Ramirez, 2001 WI App 158, No. 00-2605-CR (Ct. App. Dist. II, 6-13-01)

For Appellant: Elizabeth A. Cavendish-Sosinski, Pewaukee
 For Respondent: Phillip A. Koss, Elkhorn; William C. Wolford, Madison

The guilty plea/waiver rule is one of judicial administration, not one of the court’s power to act. The courts have previously not invoked waiver following a plea where the defendant presents a constitutional challenge, and this is especially so where there are no factual issues, the parties have briefed the issue, and the issue is of statewide importance. Given this standard, the court does not invoke waiver.

Wis. Stat. § 943.201, also known as theft of identity, was enacted after Ramirez used another person’s social security number to illegally gain employment. Ramirez argued that it violated ex post facto to convict him for theft of identity where the theft occurred prior to enactment and the only thing he obtained by the theft was the opportunity to work. The court disagrees finding that the crime is a “continuing offense” under *Toussie v. United States*, 397 U.S. 112 (1970) in which economic benefits continued to flow to Ramirez due to his employment.

FIRST AMENDMENT

SPEECH ALONE CAN CONSTITUTE DISORDERLY CONDUCT

TRUE THREATS ARE NOT PROTECTED SPEECH

In the Interest of A.S., State v. A.S., 2001 WI 48, No. 99-2317 (5-16-01)

For Appellant: Jeffrey J. Kassel, James E. Doyle, Madison

For Respondent: Stephen P. Hurley, Marcus J. Berghahn, Madison

The disorderly conduct statute only proscribes speech that is not protected by the First Amendment. The court concludes that, “application of the disorderly conduct statute to speech alone is permissible under appropriate circumstances. The right of free speech is not absolute. When speech is not an essential part of any exposition of ideas, when it is utterly devoid of social value, and when it can cause or provoke a disturbance, the disorderly conduct statute can be applicable.”

A.S.’ statements that he wanted to harm specific persons and rape another juvenile constituted true threats under the standard spelled out in *State v. Perkins*, 2001 WI 46, listed below. Under the totality of the circumstances, the court found that a reasonable speaker in the position of A.S. would foresee that reasonable listeners would interpret his statements as serious expression of an intent to intimidate or to inflict bodily harm.

WRITTEN SPEECH ALONE CAN CONSTITUTE DISORDERLY CONDUCT EVEN WHERE THE SPEECH DOES NOT CAUSE A DISTURBANCE

INDIRECT THREATS MADE IN THE CONTEXT OF A CREATIVE WRITING ASSIGNMENT ARE NOT TRUE THREATS

In Interest of Douglas D., 2001 WI 47, No. 99-1767-FT (S. Ct. 5-16-01)

For Appellant: Eileen Hirsch, Madison; John C. Gower, Oconto Falls

For Respondent: Jeffrey J. Kassel, Madison; James Doyle, Madison

The disorderly conduct statute, Wis. Stat. § 947.01 is constitutional because it proscribes only speech

that is not constitutionally protected. The statute requires more than mere offensive speech or behavior; the speech must be of a type that tends to cause or provoke a disturbance. The fact that it did not cause a disturbance in this case is irrelevant.

True threats, *see Perkins* below, are not protected speech and therefore may be prosecuted as disorderly conduct. In the context of a creative writing class assignment, Douglas’ story does not amount to a true threat because it was not directly addressed to the recipient, the writing was “impetuous” and at least partly in jest, and the context did not amount to a true threat. The court adds that the school could discipline Douglas even though he could not be prosecuted.

Abrahamson, C.J., dissented stating that the statute is overbroad; that the court has created a new and unwarranted judicial rewrite of the statute; and that no prosecution should be allowed without a specific intent to threaten. Prosser, J., dissents finding that “[b]ecause of the epidemic of violence in public schools, threats against students, teachers and administrators in a school setting should not be afforded First Amendment protection.” There were several concurring opinions.

NEW TRIAL NECESSARY WHEN JURY INSTRUCTED ON CRIME OF THREATENING A JUDGE BUT NOT INSTRUCTED THAT SPEECH WHICH IS NOT A “TRUE THREAT” IS CONSTITUTIONALLY PROTECTED

State v. Perkins, 2001 WI 46, No. 99-1924-CR (S. Ct. 5-16-01)

For Appellant: William E. Schmaal, Madison; John C. Bachman, Eau Claire

For Respondent: Thomas J. Balistreri, James Doyle, Madison

True threats are not constitutionally protected speech, and this case lays out an objective, reasonable person standard for determining whether or not a statement is a true threat: “A true threat is a statement that a speaker would

reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political view, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.” Since the jury was only instructed on threatening a judge and not instructed that the defendant’s speech might be protected by the First Amendment, the court vacates and remands for a new trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

FAILURE TO IMPEACH JAILHOUSE
INFORMANT WITH STATEMENTS MADE TO
ANOTHER PRISONER WAS NOT PREJUDICE
WHERE INFORMANT HAD AN EXTENSIVE
RECORD AND THE EVIDENCE OF GUILT
WAS OVERWHELMING

State v. Lindell, 2001 WI 108, No. 99-2704-CR
(S. Ct. 7-11-01)

For Appellant: Timothy J. Gaskell, Westby
For Respondent: Diane M. Welsh, Madison

A jailhouse informant testified that Lindell confessed to him. Counsel tried but failed to impeach the informant with evidence that the informant had told another prisoner that it would be beneficial to tell the prosecution that Lindell had confessed. Counsel was not ineffective because there was no prejudice. The informant had an extensive record and the evidence was overwhelming.

FAILURE TO OBJECT TO 6-PERSON JURY
TRIAL IS NOT INEFFECTIVE ASSISTANCE OF
COUNSEL BECAUSE FAILURE TO PRESERVE
12-PERSON JURY WAS NOT PREJUDICIAL

State v. Franklin, 2001 WI 104, No. 99-0743-CR

(S. Ct. 7-11-01)

For Appellant: Richard D. Martin, Milwaukee
For Respondent: Gregory M. Posner-Weber

Even if counsel, who should have known that the court of appeals had certified the 6-person jury issue to the Wisconsin Supreme Court, was deficient for failing to request a 12-person jury, appellant’s cannot prove ineffective assistance of counsel because they cannot prove prejudice. “A six-person jury in and of itself is an insufficient basis for us to conclude that the defendant’s were deprived of a fair trial whose result is reliable,” and that is the test under *Strickland*. The difference between a 6-person and a 12-person jury is not so fundamental that a 6-person trial is automatically invalid. The dissenters, Abrahamson, C.J., and Bradley and Sykes, J.’s find that once a defendant has requested a jury “any number other than 12 persons is a denial of a fundamental right guaranteed by the Wisconsin Constitution.”

COUNSEL NOT INEFFECTIVE FOR FAILING
TO IMPEACH WITNESSES WITH THE
NUMBER OF THEIR PRIOR CONVICTIONS
WHERE THE EVIDENCE WAS OTHERWISE
COMPELLING AND THE WITNESSES
TESTIFIED IN PRISON CLOTHING

State v. Trawitzki, 2001 WI 77, No. 99-2234-CR
(S. Ct. 6-29-01)

For Appellant: Donald T. Lang, Madison
For Respondent: Sandra L. Nowack, Madison

Defendant could not prove that his counsel’s failure to impeach hostile witnesses with the number of their prior convictions was ineffective assistance where the three witnesses all said that Trawitzki participated in crimes and where the witnesses appeared in orange prison clothing.

COUNSEL PROVIDES INEFFECTIVE
ASSISTANCE WHERE COUNSEL FILES AN
APPEAL FROM A DENIAL OF SUPERVISED
RELEASE UNDER CH. 980 ONE DAY LATE

REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL IS REINSTATEMENT OF RIGHT TO APPEAL UNDER THE FACTS OF THIS CASE

State ex rel. Ruven Seibert v. Mach, 2001 WI 67, No. 99-3354-W (S. Ct. 6-19-01)

For Appellant: Gregory P. Seibold, Madison
For Respondent: Stephen W. Kleinmaier, Madison

When counsel filed a notice of appeal to a denial of supervised release on the 91st day, one day late, she was ineffective. This is so even though she attempted to fix the problem by filing an amended notice of appeal indicating that she would be filing an *Anders* or no merit brief. The court also finds that the “court of appeals also violated Seibert’s constitutional right to assistance of counsel when it conducted an independent review of the trial record for in the context of his habeas proceeding, contrary to the Supreme Court’s rulings in *Douglas, Anders*, and their progeny.” Denial of counsel during the time that the court is deciding the case is quite different from a claim that counsel’s performance is ineffective. The denial of counsel gives rise to a “presumption of prejudice” and therefore in this case Seibert is not required to prove prejudice. Instead of remanding to the trial court for a fact-finding hearing, the court reinstates his right to file an appeal to the trial court’s denial of his petition for supervised release.

DEFENSE ATTORNEY WHO CLAIMED THAT HE FORGOT TO REQUEST THAT THE JURY BE INSTRUCTED ON A LESSER-INCLUDED OFFENSE WAS NOT INEFFECTIVE WHERE TRIAL COURT DID NOT BELIEVE HIM AND FAILURE TO REQUEST LESSER WAS NOT INHERENTLY DEFICIENT

State v. Kimbrough, 2001 WI App 138, No. 00-2133-CR (Ct. App. Dist. II, 5-30-01)

For Appellant: Glenn L. Cushing, Madison; Arthur B. Nathan, Racine

For Respondent: David J. Becker, Madison

Trial counsel testified at a *Machner* hearing that he had intended to request a lesser-included instruction for 2nd degree reckless homicide but that he forgot to request it. The trial court made a finding of fact that defense counsel never intended to request the lesser-included instruction, and the court of appeals does not reverse that ruling. Had counsel wanted to request the instruction, he would have had many opportunities to request it. An all-or-nothing strategy was objectively reasonable under all of the circumstances of this case, and therefore Kimbrough received a fair trial.

FAILURE TO OBJECT TO A MATERIAL AND SUBSTANTIAL BREACH OF THE PLEA BARGAIN IS PREJUDICIAL BUT ISSUE OF WHETHER IT WAS DEFICIENT PERFORMANCE REMANDED TO TRIAL COURT

SENTENCING COURT HAS DISCRETION TO DETERMINE REMEDY FOR BREACH OF THE PLEA BARGAIN

State v. Howard, 2001 WI App 137, No. 00-2046 (Ct. App. Dist. III, 5-15-01)

For Appellant: Michael F. Howard, Portage
For Respondent: Stephen W. Kleinmaier, Madison; John P. Zakowski, Green Bay

The court finds that failure to object to the breach of the plea agreement was prejudicial and remands to the trial court to determine whether Howard’s counsel may have had a tactical reason to not object. Note: this portion of the ruling may be subject to future challenge given the fact that counsel cannot unilaterally renegotiate the terms of a settled agreement without informing the defendant of the right to enforce the original agreement. *State v. Scott*, 230 Wis. 2d 643, 659, 602 N.W.2d 296 (Ct. App. 1999).

Following a breach of the plea bargain, the trial court and not the defendant has discretion to choose

the appropriate remedy. Usually the court will order resentencing before a different judge. Where the circumstances of the case require it, the court may allow the defendant to withdraw his plea.

FAILURE OF COUNSEL TO SEEK A WALLERMAN-DEKEYSER STIPULATION TO ELIMINATE THE NEED TO PROVE PRIOR MISCONDUCT WAS INEFFECTIVE ASSISTANCE OF COUNSEL

State v. Veach, 2001 WI App 143, No. 98-2387-CR (Ct. App. Dist. IV, 5-10-01)

For Appellant: Suzanne L. Hagopian, Madison; Edmund C. Cairns, Crivitz
For Respondent: Daniel J. O'Brien, Madison; Guy D. Dutcher, Wautoma

An attorney performs deficiently when he or she fails to know that conceding an element of the crime that the state proposes to prove by other acts evidence allows the trial court to relieve the state of the duty to prove that particular element. *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996); *State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W.2d 668 (Ct. App. 1998). Counsel did not know these cases and therefore did not know that the defendant could have eliminated proof of his prior bad acts by stipulating that any touching was intentional. Since the prior acts were "much more intrusive, aggressive and egregious" counsel was deficient for not trying to keep them out. Prejudice arose from the nature of the prior acts and the fact that this was a credibility contest. The dissent, Lundsten J., would have found no prejudice because the trial was fair.

JURORS

ALONGSTANDING, PERSONAL AND FAMILY RELATIONSHIP WITH THE VICTIM CONSTITUTED OBJECTIVE BIAS

FAILURE TO STRIKE A JUROR FOR CAUSE DOES NOT REQUIRE REVERSAL WHERE

DEFENDANT RECEIVED A FAIR TRIAL BEFORE AN IMPARTIAL JURY

State v. Lindell, 2001 WI 108, No. 99-2704-CR (S. Ct. 7-11-01)

For Appellant: Timothy J. Gaskell, Westby
For Respondent: Diane M. Welsh, Madison

"It is not always enough that a prospective juror assures counsel or the court that he or she will be impartial. Circuit courts are often in a better position to judge whether a prospective juror is biased, or potentially biased, than is the prospective juror." Here the long "close" personal and family friendship with the victim and the nature of the crimes—burglary, murder and arson—created objective bias. The court cautions and encourages the circuit courts to strike prospective jurors for cause when the circuit courts reasonably suspect that juror bias exists. Bradley, J., concurring, would find that the juror was not objectively biased.

The court explicitly overrules *State v. Ramos*, 211 Wis. 2d 12, 546 N.W.2d 328 (1997) which held that failure to strike a juror who should have been struck for cause requires reversal and a new trial. The court concludes that *Ramos* failed to adequately analyze long-standing law on peremptory challenges and did not properly read or anticipate changes in the Supreme Court's rulings. Furthermore, *Ramos* created some disturbing systemic problems, and the court's good intentions did not produce good results. According to the court, "[n]othing in this opinion changes the fundamental law that an accused is entitled to be tried by an impartial jury. Our decision requires a defendant to make a conscious choice between exercising a peremptory challenge or waiting for a Sixth Amendment challenge after conviction. However the State must now be more alert and sensitive to a defendant's challenge for cause. Anticipating the defendant's possible strategy, the State has three courses of action: (1) it can join the defendant in urging the court to remove a juror for cause; (2) it can exercise one of its own limited peremptory strikes to remove a juror who should

have been struck for cause; or (3) it can do nothing an risk a new trial if an appellate court finds that a biased juror sat on the jury.” The dissenters, Abrahamson and Bablitch, J.’s, find that the opinion violates the rule of stare decisis and fails to keep the playing field level.

EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT DEFENDANT WITH AN I.Q. IN THE MID 70’S WAS SUBJECTIVELY AWARE OF THE UNREASONABLE RISK OF DEATH OR GREAT BODILY HARM CAUSED BY SHAKING A BABY

State v. Kimbrough, 2001 WI App 138, No. 00-2133-CR (Ct. App. Dist. II, 5-30-01)

For Appellant: Glenn L. Cushing, Madison; Arthur B. Nathan, Racine

For Respondent: David J. Becker, Madison,

Even though defendant has an I.Q. in the mid 70’s, the jury could reasonably find that the defendant knew that shaking a baby can cause death or great bodily harm. Most important in this case was the fact that the defendant lied to officers who were investigating the case.

WIS. STAT. § 948.025 DOES NOT REQUIRE JUROR UNANIMITY ON WHICH THREE PREDICATE ACTS THE DEFENDANT COMMITTED IN ORDER FOR THE JURY TO CONVICT THE DEFENDANT OF THE CRIME OF REPEATED SEXUAL ASSAULT OF A CHILD

State v. Johnson, 2001 WI 52, No. 99-2968-CR (S. Ct. 5-30-01)

For Appellant: Martha K. Askins, Madison; Douglas Henderson, Kenosha

For Respondent: Marguerite M. Moeller, Madison

Unanimity is required on the elements of an offense, but not the alternate modes of commission unless required by due process. The predicate acts of assault are not elements but alternate modes of

commission and therefore unanimity is not necessary for the jury to convict. The Supreme Court’s decision in *Richardson v. United States*, 526 U.S. 813 (1999)(requiring unanimity on specific underlying drug code violations before the jury could convict for engaging in a continuous criminal enterprise) is easily distinguishable based on the language of the statutes, historical tradition and the potential for unfairness. No due process violation occurs because the predicate offenses must be similar, *i.e.* sexual offenses. The dissent, Bradley, Abrahamson and Bablitch, J.’s, finds unfairness, and no traditional or historical support for the ruling.

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO STRIKE A JUROR WHO HAD BEEN A VICTIM OF A SEXUAL ASSAULT AND ANOTHER JUROR WHO GAVE EQUIVOCAL ANSWERS TO QUESTIONS OF IMPARTIALITY WHERE COUNSEL’S TACTICAL DECISIONS WERE REASONABLE

In re Commitment of Wolfe, 2001 WI App 136, No. 99-2145 (Ct. App. Dist. II, 7-11-01)

For Appellant: Ann T. Bowe, Milwaukee

For Respondent: Sally Wellman, Madison; Robert J. Wells Jr., Sheboygan

“Whether trial counsel should move the court to strike a juror for cause is his or her tactical decision to make.” Counsel’s decisions were reasonable given the fact that juror who had been assaulted repeatedly said that she could be fair and the defendant wanted her on the jury, and “it would be inappropriate to strike [the other juror] simply because she provided equivocal answers.” The court expects that honest answers at times will be less than equivocal.

MENTAL COMMITMENT

A CH. 55 SUBJECT IS ENTITLED TO A HEARING ON THE RECORD AT WHICH THE

COURT MUST MAKE FINDINGS OF FACT BEFORE THE COURT MAY ORDER PLACEMENT CONTINUED

In the Matter of the Guardianship and Protective Placement of Goldie H., County of Dunn v. Goldie H., 2001 WI 2, No. 00-1137 (S. Ct. 7-10-01)

For Appellant: John E. Joyce, Menomonie
For Respondent: Nicholas P. Lange, Madison

Following a request to extend a protective placement, the court must review the report and determine whether to hold a full due process hearing or a summary hearing. Although the court may choose to hold a summary hearing, that hearing must be held on the record. "A summary hearing is not an extensive hearing. It is a brief hearing on the record. The person whose protective placement is in question need not be preset. The hearing may be in court or may be held by other means, such as a telephone or video conference. A summary hearing is not an evidentiary hearing." The court must also make findings of fact as enumerated in Wis. Stat. § 55.06(2). This decision is prospective only, and no hearing is required in this case because the court relied on information more than sufficient to make the necessary findings of fact.

JUDICIAL ESTOPPEL BARS APPELLANT FROM CLAIMING THAT COURT LOST COMPETENCE TO PROCEED BECAUSE THE COURT FAILED TO TIMELY HOLD A CH. 51 COMMITMENT HEARING WHERE APPELLANT HIMSELF CAUSED THE DELAY

In the Matter of the Mental Commitment of Edward S., County of Milwaukee v. Edward S., 2001 WI App ____, No. 00-1003 (Ct. App. Dist. I, 7-3-01)

For Appellant: Richard D. Martin, Milwaukee
For Respondent: Robert A. McKnight, Milwaukee

This case is distinguishable from *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 320 N.W.2d 27 (Ct. App. 1982) where the court held

that the time limits for holding a commitment hearing under ch. 51 are mandatory because in this case appellant himself caused the delay. The court scheduled the commitment hearing timely, but appellant fired his attorney the day before the hearing. Before ceasing representation, counsel entered into a stipulation to adjourn the final hearing so that another attorney could be appointed. The court of appeals finds that judicial estoppel applies "because Edward S. asked the court to agree to an adjournment in order to permit him to obtain new counsel."

OWI

EVEN WHERE PERSON ARRESTED FOR OWI OFFENSE REQUESTS A BREATH TEST, WARRANTLESS BLOOD DRAW IS NOT UNREASONABLE UNDER THE FOURTH AMENDMENT

State v. Wodenjak, 2001 WI App ____, No. 00-3419-CR (Ct. App. Dist. II, 8-1-01)

For Appellant: Rex Anderegg, Milwaukee
For Respondent: Robert L. Sager, Oshkosh

As long as the standards for a warrantless blood draw established by *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) and *State v. Thorstad*, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240 are met, "a forcible warrantless blood draw does not violate the Fourth Amendment ... (a)nd it makes no difference whether the suspect refuses the primary breath test and then submits to the blood test (*Bohling*) or the suspect submits to the primary blood test (*Thorstad*)." The fact that Wodenjak asked for the alternative breath test first is insignificant; dissipation of blood alcohol constitutes an exigency that in and of itself justifies the blood draw.

A CRIMINAL SENTENCE BASED SOLELY UPON HABITUAL TRAFFIC OFFENDER STATUS THAT WAS RESCINDED UNDER WIS. STAT. § 351.09 IS A SENTENCE IN EXCESS OF THAT AUTHORIZED BY LAW

State v. Hanson, 2001 WI 70, No. 99-3142-CR (S. Ct. 6-26-01)

For Appellant: James B. Connell, Wausau
For Respondent: Kathleen M. Ptacek, Madison

Hanson was on habitual traffic offender status (HTO) when he committed an OAR that would have been his fifth offense. He then challenged his HTO status under the 1997 changes in the law redefining HTO and allowing for the recalculation of HTO status. Wis. Stat. § 351.09. The Department of Transportation rescinded his HTO status, but then Hanson pleaded no contest to OAR-5th and was sentenced. On appeal the state argued that the rescission does not relate back to the date Hanson committed his new offense when he was still on HTO status. The court rejects this claim finding that “as a consequence of the rescission of Hanson’s HTO status, he could not be subject to the HTO penalty enhancer when subsequently convicted of a violation of §343.44(1).” Wis. Stat. § 971.13 does not allow imposition of a criminal penalty where none is authorized.

PATERNITY

CONDITION OF PROBATION REQUIRING FATHER CONVICTED OF FELONY CHILD NONSUPPORT TO PROVE THAT HE CAN SUPPORT AND IS SUPPORTING HIS NINE CHILDREN BEFORE HE MAY HAVE ANOTHER CHILD IS REASONABLY RELATED TO REHABILITATION AND IS NOT OVERBROAD

State v. Oakley, 2001 WI 103, No. 99-3328-CR (S. Ct. 7-10-01)

For Appellant: Timothy T. Kay, Brookfield
For Respondent: Thomas J. Balistreri, Madison

The test for a probation condition restricting a fundamental constitutional right is whether the condition is reasonably related to the probationer’s

rehabilitation without being overly broad. The court finds constitutional the probation condition that Oakley not father any more children without first being able to prove that he can support his children and is supporting them. This condition is narrowly tailored because Oakley can have more children provided he stops refusing to support his current nine children as required by law. The condition is reasonably related to probation because it will keep him from “adding victims if he continues to refuse to support his children.” There are two dissents in which Bradley, Sykes, and Abrahamson, J.’s join. They find that for the first time the decision allows the birth of a child to carry criminal sanctions and this causes unacceptable consequences and that the decision is overly broad because there are more narrowly tailored means to achieving the same probationary goals.

COURT MAY NOT ENTER A DEFAULT TPR JUDGMENT ON ISSUE OF ABANDONMENT WITHOUT FIRST TAKING EVIDENCE SUFFICIENT TO SUPPORT A FINDING OF ABANDONMENT BY CLEAR AND CONVINCING EVIDENCE

In re the Termination of Parental Rights to Jayton S., a person Under the Age of 18: Evelyn C.R. v. Tykila S., 2001 WI 110, No. 00-1739 (S. Ct. 7-12-01)

For Appellant: Timothy A. Provis, Madison
For Respondent: Theresa L. Roetter, Madison
Guardian ad Litem: Janet Rasmussen, Madison

The trial court entered a default judgment against the parent when she violated a court order to appear. The Wisconsin Supreme Court finds that “by entering a default judgment against Tykila on the issue of abandonment without first taking evidence sufficient to support such a finding, the circuit court failed to comply with the constitutional and statutory requirements for termination of parental rights. We therefore hold that the court erroneously exercised its discretion.” However, in this case the court “remedied this error at the dispositional hearing when, prior to reaffirming the default

judgment and entering the order terminating Tykila's parental rights to Jayton, the court took evidence sufficient to support by clear and convincing evidence a finding that Tykila had abandoned Jayton."

COURT'S DETERMINATION OF WHETHER TO TERMINATE PARENTAL RIGHTS IS A TWO-STEP, SEQUENTIAL TEST

ALTHOUGH THE TRIAL COURT APPLIED THE WRONG STANDARD, REMAND IS NOT NECESSARY GIVEN THE TRIAL COURT'S FINDINGS IN THIS CASE

In re the Termination of Parental Rights to Erin R.S., A Person Under the Age of 18: State v. Kelly S., 2001 WI App ____, No. 01-0328 (Ct. App. Dist. II, 7-3-01)

For Appellant: John J. Grau, Waukesha
For Respondent: Christopher W. Stock, Fond du Lac

Once a jury has found grounds for termination, the trial court must apply a two-step, sequential test before it decides whether to terminate parental rights or to dismiss the petition. First, the court must consider whether the parent's unfitness is of such strength that it undermines the ability to parent. Second, if so, then the court considers whether the inability is seriously detrimental to the child under a best interests standard.

Although the trial court did not apply the proper two-step test, the court made "unmistakable but implicit" findings that satisfied both prongs of the appropriate test. Therefore remand is unnecessary in this case.

TRIAL COURT ERRED WHEN IT PRECLUDED PARENTS FROM PRESENTING MITIGATING CIRCUMSTANCES SURROUNDING THEIR INABILITY TO RE-ESTABLISH VISITATION

In Re the Termination of Parental Rights to Shawn S., A Person Under the Age of 18: State v.

Frederick H./Amanda S., 2001 WI App 141 Nos. 00-3035 & 00-3036 (Ct. App. Dist. I, 7-11-01)

For Appellant: Timothy A. Provis, Madison
For Respondent: Ronald J. Sonderhouse

"While at first blush, Amanda S. and Frederick H. appear to have argued that they should have been allowed to challenge the original CHIPS dispositional orders suspending visitation and imposing conditions to re-establish visitation, they actually sought to introduce evidence explaining the reasons they were unable to meet the conditions for re-establishing visitation." Therefore the trial court erred in precluding the parents from presenting evidence of mitigating circumstances surrounding their inability to re-establish visitation.

PLEAS

A DEFENDANT FAILS TO IDENTIFY A FAIR AND JUST REASON FOR PLEA WITHDRAWAL BEFORE SENTENCING WHERE THE DEFENDANT DOES NOT ESTABLISH THE FACTS NECESSARY TO SUPPORT HIS MOTION AND WHERE THE TRIAL COURT FINDS THAT THE PROFFERED REASON FOR PLEA WITHDRAWAL LACKS CREDIBILITY

State v. Leitner, 2001 WI App ____, No. 00-1718-CR (Ct. App. Dist. IV, 7-12-01)

For Appellant: Jim Scott, La Crosse; James Koby, La Crosse
For Respondent: Mary E. Burke, Madison; Jessica Skemp, La Crosse

After pleading, and reading the negative PSI, Leitner sought to withdraw his plea because he alleged that he had an alibi witness, his fiancée, whom he had previously concealed. The trial court properly denied the motion because it was not supported by a preponderance of the evidence. Neither Leitner nor his fiancée testified at the hearing on his motion and Leitner did not present

any details. The court also found that the reason proffered for the plea withdrawal was not credible since Leitner had no reason to hide his alibi from his attorney. Rather the court was justified in concluding that the withdrawal request was based on something else, the highly negative presentence investigation report.

A PLEA WAIVES A CLAIM OF ERROR THAT THE COURT ERRONEOUSLY ALLOWED THE STATE TO WITHDRAW A PRIOR PLEA AGREEMENT

State v. Oakley, 2001 WI 103, No. 99-3328-CR (S. Ct. 7-10-01)

For Appellant: Timothy T. Kay, Brookfield
For Respondent: Thomas J. Balistreri, Madison

“When a defendant pleads no contest, he or she waives all defenses based on a denial of due process because the prosecutor breached an earlier plea agreement.” The second plea, including an agreement that he not complain about withdrawal of the original plea, waived any earlier error.

A PLEA DOES NOT WAIVE A DEFENDANT’S RIGHT TO CHALLENGE A SENTENCE AS A HABITUAL TRAFFIC OFFENDER (HTO) ON THE GROUNDS THAT THE DEFENDANT’S HTO STATUS HAS BEEN RESCINDED

State v. Hanson, 2001 WI 70, No. 99-3142-CR (S. Ct. 6-26-01)

For Appellant: James B. Connell, Wausau
For Respondent: Kathleen M. Ptacek, Madison

A defendant does not waive a claim that he was improperly sentenced as an HTO offender where the defendant pleads to the HTO-enhanced offense even after rescission of his HTO status under Wis. Stat. § 351.09. Wis. Stat. § 971.13 requires the court to declare a sentence void “[I]n any case where the court imposes a maximum penalty in excess of that authorized by law.” Crooks, Wilcox and Prosser, J.’s, dissent finding that this case

ignores well-established law that a plea waives all non-jurisdictional defects.

USE OF AN ALIAS TO WRITE BAD CHECKS SATISFIES THE FORGERY ELEMENT OF “PURPORTING TO BE ANOTHER” AND THEREFORE PROVIDED A FACTUAL BASIS FOR A PLEA

State v. Mata, 2001 WI App ____, No. 00-2791-CR (Ct. App. Dist. II, 6-6-01)

For Appellant: Lora B. Cerone, Elkhorn; Charles D. Larson, Baraboo
For Respondent: Phillip A. Koss, Elkhorn; William C. Wolford, Madison

The court finds that “[a]lthough Mata claimed an innocent reason for the use of her aliases (i.e. fear of her husband), the fact remains that she also used the aliases as a means of financially benefiting from issuing” worthless checks. In *State v. Czarnecki*, 2000 WI App 155, 237 Wis. 2d 794, 615 N.W.2d 672, the court established that use of an alias as part of a fraudulent scheme satisfies the element of “purporting to be another.”

PROSECUTOR DOES NOT BREACH PLEA AGREEMENT TO NOT MAKE ANY SPECIFIC RECOMMENDATION AT SENTENCING WHERE THE PROSECUTOR STATES AT SENTENCING THAT THIS IS A VERY SERIOUS CASE

State v. Richardson, 2001 WI App 152, No. 00-2129-CR (Ct. App. Dist. I, 5-30-01)

For Appellant: Richard Martin, Milwaukee; Joseph R. Reback, Milwaukee
For Respondent: Robert Donohoo, Milwaukee, *et al.*

The plea agreement required the state to not make any specific sentence recommendation at sentencing. The state was to leave sentencing to the court and not be specific as to length. At sentencing the prosecutor said “this particular case

is, if not the most serious case I've handled this year, it is certainly among the top two or three," and "this is one of the most serious non-fatal crimes that I have dealt with." The court finds that these statements did not violate the plea agreement because taken in context the statements provided the trial court with information that cannot be immunized by a plea. Schudson, J., dissenting, finds that the prosecutor's comments violated the agreement because they urged the judge to order a sentence at or near the top of the statutory range.

THE PROSECUTION BREACHES A PLEA AGREEMENT FOR CONCURRENT SENTENCES WHERE THE PROSECUTION RECOMMENDS CONSECUTIVE SENTENCES EVEN THOUGH THE TOTAL AMOUNT OF REQUESTED CONSECUTIVE TIME IS NO GREATER THAN ORIGINALLY AGREED UPON CONCURRENT TIME

State v. Howard, 2001 WI App 137, No. 00-2046 (Ct. App. Dist. III, 5-15-01)

For Appellant: Michael F. Howard, Portage
For Respondent: Stephen W. Kleinmaier, Madison;
John P. Zakowski, Green Bay

The plea bargain capped the possible recommended time at 25 years and required the prosecution to ask for a concurrent sentence on the fifth count. Instead the prosecution requested 5 consecutive sentences totaling 25 years. This recommendation breached the plea agreement, for "where a plea agreement undisputedly indicates that a recommendation is to be for concurrent sentences, an undisputed recommendation of consecutive sentences that is not corrected at the sentencing hearing constitutes a material and substantial breach of the plea agreement as a matter of law."

PRISONER RIGHTS

PRISONER'S WRIT OF CERTIORARI IMPROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM WHERE PRISONER HAS

ALLEGED FACTS THAT, IF TRUE, WOULD ENTITLE HIM TO RELIEF

State ex rel. Adell v. Smith, 2001 WI App ____, No. 00-0070 (Ct. App. Dist. IV, 7-18-01)

For Appellant: Mark A. Adell, Oregon
For Respondent: Matthew J. Frank, Madison

The Prisoner Litigation Reform Act (PLRA), Wis. Stat. § 802.05(3)(b)4 allows a trial court to dismiss a prisoner action without requiring a response where the court finds that the action fails to state a claim upon which relief may be granted. Wisconsin requires only "fair notice" in civil pleadings and this is particularly true with pro se pleadings. The court reverses because, at its core, "Adell's petition asserts that he has suffered injury due to allegedly erroneous negative comments documented in his inmate records in a matter inconsistent with DOC policy."

POSTCONVICTION AND APPELLATE

SANCTIONS ARE APPROPRIATE FOR FILING NINTH POSTCONVICTION MOTION FOLLOWING COMPLETION OF TWO DIRECT APPEALS AND MULTIPLE DISMISSALS UNDER *ESCALANO-NARANJO*

State v. Casteel, 2001 WI App ____, No. 00-2852 (Ct. App. Dist. III, 7-31-01)

For Appellant: Tayr K. Ghashiyah, Green Bay
For Respondent: John P. Zakowski, Warren D. Weinstein, Madison

The court previously dismissed five appeals under Wis. Stat. § 974.06 and *Escalano-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because Casteel knows or should know that his claims are barred by the law and because the court previously warned him not to file any more frivolous appeals, sanctions are appropriate. The court will accept

no future filings except where Casteel can prove why his claims are not barred.

THE PRISONER LITIGATION REFORM ACT (PLRA) DOES NOT ALLOW FOR A COMMON-LAW FUTILITY-EXCEPTION TO THE EXHAUSTION REQUIREMENT

WIS. STAT. § 227.40(1), A DECLARATORY JUDGMENT STATUTE, DOES NOT TRUMP THE PLRA

State ex rel. Spriggie Hensley v. Endicott, 2001 WI 105, No. 00-0076 (S. Ct. 7-11-01)

For Appellant: Beth Ermatinger Hanan, Milwaukee

For Respondent: Michael D. Oeser, Madison

The language of the PLRA plainly requires exhaustion, and it does not contain an exception regarding futility. The court finds that it is not within the court's judicial function to insert a futility exception into the statute. Therefore, the plain language of the PLRA "requires prisoners to exhaust all their administrative remedies prior to challenging a condition in their respective civil actions or special proceedings, including common law writs of certiorari."

The PLRA is more specific and was enacted later in time than Wis. Stat. § 227.40, which provides that a plaintiff may challenge an administrative rule without first exhausting remedies with the relevant agency, and therefore the PLRA and not § 227.40 controls. The dissenters, Bradley and Abrahamson, J.'s, believe that the rule adopted by the majority will lead to the absurd result that a prisoner will have only two weeks from promulgation of a rule to challenge the constitutionality of a rule on its face. This means that a prisoner incarcerated after the two-week time limit for challenging the rule will have no opportunity to facially challenge the rule.

FAILURE TO APPEAL DENIAL OF RECONSIDERATION MOTION WAIVED NEW

ISSUES RAISED IN THE RECONSIDERATION MOTION

State v. Trecroci, et al., 2001 WI App 126, No. 00-1079-CR (Ct. App. Dist. II, 7-11-01)

For Appellant: David J. Becker, Madison; Robert J. Jambois, Kenosha

For Respondent: Robert Henak, Milwaukee

The courts apply the new issues test of *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 197 N.W.2d 752 (1972) when determining whether a separate notice of appeal must be filed in order to appeal the denial of the reconsideration motion. If the reconsideration motion raises new issues not raised in the original motion, then the reconsideration motion must be appealed by separate notice of appeal or the new issues are waived. This is true even where the basis for the reconsideration motion is a recent published opinion. Failure to appeal the reconsideration motion therefore waived the new issues raised in that motion.

A PRIOR DECISION IS NOT STARE DECISIS WHERE THE DECISION IS INTERNALLY CONTRADICTORY

LEGISLATIVE INACTION FOLLOWING JUDICIAL INTERPRETATION OF A STATUE IS NOT BINDING PRECEDENT WHERE THE PRIOR STATEMENT OF LAW OCCURRED IN A FOOTNOTE UNNECESSARY TO THE DETERMINATION OF THE CASE

State v. Hansen, 2001 WI 53, No. 99-1128-CR (S. Ct. 5-30 -01)

For Appellant: Pamela Pepper, Milwaukee

For Respondent: Gregory M. Posner-Weber, James E. Doyle, Madison

The court does not treat a prior decision as binding precedent because the footnote in question is inconsistent with a preceding footnote in the same opinion. Because of the internal inconsistency, the first opinion established no judicial precedent. The

dissent, Wilcox and Crooks, J.'s, would have found the prior opinion to be precedent. The prior opinion first said it would not address the issue but then did address it. The concurrence, Abrahamson, C.J., would find that "it is improper to erect the high bar of stare decisis until one has successfully cleared the high bar of showing that [the prior opinion] is a judicial precedent in the first place."

Legislative inaction following a judicial determination is generally a "weak reed upon which to lean" and this is especially so where the court is asked to infer acquiescence in response to a footnote which is not precedential and reaches issues not necessary to the resolution of the case.

PRETRIAL PROCEEDINGS

PROSECUTOR'S FAILURE TO PROVIDE A PRETRIAL STATEMENT MADE BY THE DEFENDANT DESPITE A DISCOVERY DEMAND PRECLUDES IMPEACHMENT WITH THAT STATEMENT

State v. DeLao, 2001 WI App 132, No. 00-1638-CR (Ct. App. Dist. II, 7-11-01)

For Appellant: Steven P. Weiss, Madison; Adrienne M. Moore, Racine
For Respondent: Robert S. Flancher, Racine; Jeffrey J. Kassell, Madison

Impeachment with a statement made to the police but not provided to the defense despite a discovery request violated the discovery statute, Wis. Stat. § 971.23. The fact that an investigating officer did not tell the prosecutor of the statement until after the officer testified did not matter because the district attorney's office and the law enforcement offices are viewed as one unit for the purposes of the discovery process. The state could not prove "good cause" for failure to provide the statement even where the state claimed that it had acted in good faith because "good faith is not good cause...negligence or even lack of bad faith does not constitute good faith as a matter of law."

PROBATION AND PAROLE

PRESUMPTIVE MANDATORY PAROLE DOES NOT CREATE A LIBERTY INTEREST IN BEING PAROLED REQUIRING SIGNIFICANT DUE PROCESS PROTECTION

PAROLE COMMISSION VALIDLY EXERCISES ITS DISCRETION TO DENY PRESUMPTIVE MANDATORY PAROLE TO A PRISONER WHO HAS NOT COMPLETED SEX OFFENDER TREATMENT

State ex rel. Gendrich v. Litscher, 2001 WI App 163, No. 00-3527 (Ct. App. Dist. II, 8-8-01)

For Appellant: Michael J. Gendrich, Redgranite
For Respondent: Karla Z. Keckhaver, Madison

The statute creating the presumptive mandatory release scheme does not create a liberty interest in being paroled. It grants the Parole Commission discretion and allows the Commission to deny release when a prisoner either poses a risk to the public or refuses to participate in necessary counseling and treatment. Wis. Stat. § 302.11(1g)(b)1. All the process that is due is an opportunity to be heard and (written) explanation of why parole was denied. Since denial is a discretionary act, it will be reviewed under the deferential substantial evidence test.

A challenge to denial of presumptive mandatory parole is judged under the substantial evidence test, whether reasonable minds could arrive at the same conclusion reached by the Parole Commission. Substantial evidence supports the denial of parole because Gendrich, who had completed a "Denier's Program" has not completed sex offender treatment. The fact that he has not because he was waiting to complete his appeal first is irrelevant.

FIFTH AMENDMENT RIGHT TO BE FREE FROM SELF-INCRIMINATION APPLIES DURING PENDENCY OF APPEAL; THEREFORE PRISONER NEED NOT ADMIT

SEXUAL ASSAULT AS A CONDITION OF PROBATION UNTIL APPEAL ENDS

State ex rel. Tate v. Schwarz, 2001 WI App 131, No. 00-1635 (Ct. App. Dist. II, 7-11-01)

For Appellant: Pamela Moorshead, Brookfield
For Respondent: William C. Wolford, Madison;
Holly L. Bunch, West Bend

A probationer with an active direct appeal on the merits cannot be revoked for refusing to admit to the crime. There exists a Fifth Amendment right which survives conviction and is very much alive while a direct appeal is pending. Once the appeal ends, however, the failure to admit a sexual assault may provide grounds to revoke probation. *See State v. Carrizales*, 191 Wis. 2d 85, 528 N.W2d 29 (Ct. App. 1995).

CHALLENGE TO ILLEGAL CONDITION OF PROBATION WAIVED WHEN NOT APPEALED FOLLOWING UNSUCCESSFUL CHALLENGE OF THE CONDITION IN THE TRIAL COURT

State ex rel. Tate v. Schwarz, 2001 WI App 131, No. 001635 (Ct. App. Dist. II, 7-11-01)

For Appellant: Pamela Moorshead, Brookfield
For Respondent: William C. Wolford, Madison;
Holly L. Bunch, West Bend

Revocation of sexual offender for failure to admit the offense in treatment improperly infringed on offender's Fifth Amendment rights as long as he still had an appeal pending. He moved the trial court to suspend the requirement that he comply with treatment until after his appeal had ended. The trial court denied the motion. The court of appeals finds waiver because Tate did not appeal the trial court's denial of his motion. According to the court, "Tate's obligation, if he wanted to preserve his rights, was to appeal to this court. He failed to do so. Therefore, we affirm holding there is waiver. We emphasize that the appropriate vehicle to seek a remedy is a motion to the circuit court to amend

the conditions of probation before there is a revocation hearing. A writ of certiorari, coming after a probation revocation hearing, will result in waiver of a challenge to probation conditions."

Note: this ruling creates a new procedure that breaks from prior case law. Other cases have allowed challenges to revocation based on unconstitutional conditions without requiring a separate modification request. *See e.g. State ex rel. Kaminski v. Schwarz*, 2001 WI 94 (review on merits although revocation upheld).

PROBATION AGENT MAY REQUIRE SEX OFFENDER TO NOTIFY IMMEDIATE NEIGHBORS OF HIS SEX OFFENDER STATUS

State ex rel. Kaminski v. Schwarz, 2001 WI 94, No. 99-3040 (S. Ct. 7-9-01)

For Appellant: Donald T. Lang, Madison; Michael K. McQuillan, Black River Falls
For Respondent: William C. Wolford, Madison

The court finds that "Wis. Stat. §§ 301.45 and 301.46 do not occupy the field in regulating the dissemination of sex offender registration information, or prohibit a probation agent from imposing a rule requiring a convicted sex offender to notify his or her immediate neighbors of his or her sex offender status. We also find that the rule imposed on Kaminski was not unreasonable." A rule of probation may not validly contravene the directive of a statute, but the language of the statutes does not indicate that the legislature intended to prohibit the DOC from requiring a probationer to inform others of his or her status. Abrahamson, Bablitch and Bradley, J.'s, dissent.

A LITIGANT IS ENTITLED TO USE HABEAS CORPUS TO ARGUE THAT THE OPERATION OF THE STATUTES ENTITLES HIM TO IMMEDIATE RELEASE

PAROLE BOARD'S DECISION TO WAIVE MINIMUM SERVICE REQUIREMENTS DID NOT AUTOMATICALLY ENTITLE DEFENDANT TO EARLY RELEASE

State ex rel. Szymanski v. Gamble, Warden, 2001 WI App 118, No. 00-2272 (Ct. App. Dist. II, 6-13-01)

For Appellant: Dennis P. Coffey, Milwaukee; Stacy C. Gerbert Ward, Milwaukee
For Respondent: James A. Haasch, Sheboygan; Karla Z. Keckhaver, Madison

Because Szymanski argued that the operation of statute requires his immediate release, habeas is the proper remedy. His claim was not that the parole board improperly denied him release but that the operation of the statutes entitled him to release once the parole board waived the minimum service requirement.

The parole board's determination that extraordinary circumstances entitled defendant to waiver of the mandatory service requirements did not automatically entitle defendant to parole. The statute allowing waiver of the minimum service requirements does not eliminate the need for a parole hearing.

SEARCH AND SEIZURE

A CALLER WHO PROVIDES HIS NAME IS NOT ANONYMOUS AND HIS REPORT OF CRIMINAL ACTIVITY CREATES A REASONABLE SUSPICION JUSTIFYING A STOP OF THE SUSPECTS

State v. Sisk, 2001 WI App ____, No. 00-2614-CR (Ct. App. Dist. I, 7-31-01)

For Appellant: Christian R. Larsen, Madison; Nelson W. Phillips III, Milwaukee
For Respondent: Elvis Banks, Milwaukee

A person identifying himself by name made a 9-1-1 call from a pay phone reporting that he had just seen two men whom he described enter an address with guns. The fact that he gave his name allowed the police to reasonably conclude that he "risked

that [his] identity be discovered." The police could weigh this factor when determining the reliability of the tip. Therefore, "the reasonableness of the police suspicion is more firmly rooted than that in *J.L.*" Accordingly, the court concludes that "when a caller identifies himself or herself by name, thus providing 'self-identifying information' that 'places his [or her] anonymity at risk ... and when the totality of the circumstances establishes a reasonable suspicion that 'criminal activity may be afoot,' ... the police may execute a lawful stop...."

COURT OF APPEALS AFFIRMED BECAUSE SUPREME COURT DIVIDED EQUALLY

State v. Bond, 2001 WI 56, No. 98-3139-CR (S. Ct. 5-31-01)

For Appellant: Ellen Henak, Milwaukee; Lew Wasserman, Milwaukee
For Respondent: Marguerite M. Moeller, Madison

The Supreme Court is evenly divided, and therefore the decision of the court of appeals is affirmed. In that decision the court found that telling a defendant that he was "the man behind the man" was interrogation likely to elicit a response when only the person who had committed the crime could have known the significance of those particular words.

REVIEW OF ISSUANCE OF AN ADMINISTRATIVE WARRANT IS ENTITLED TO THE SAME DEFERENCE AS A CRIMINAL SEARCH WARRANT

A BUILDING CODE INSPECTION WARRANT MAY BE BASED ON A SHOWING OTHER THAN PROBABLE CAUSE TO BELIEVE A PARTICULAR DWELLING CONTAINS VIOLATIONS

State v. Jackowski, 2001 WI App ____, No. 00-2851-CR (Ct. App. Dist. IV, 7-26-01)

For Appellant: Thomas E. Hayes, Milwaukee; Ronald C. Shikora, Milwaukee

For Respondent: Robert D. Donohoo, Milwaukee; Stephen W. Kleinmaier, Madison

Like a criminal warrant, “great deference” is accorded a magistrate’s decision to issue an administrative warrant.

Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) provides that absent consent an inspection warrant may be issued on a showing other than probable cause to believe a particular dwelling contains violations. *Camara* held that probable cause for a warrant will exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards may be based “upon the passage of time, the nature of the building ... or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.”

A REVIEWING COURT MAY CONSIDER EVIDENCE NOT INCLUDED IN THE WARRANT APPLICATION WHEN DETERMINING THE REASONABLENESS OF A NO-KNOCK EXECUTION OF A WARRANT

OFFICER SAFETY AND THE NEED TO PRESERVE EVIDENCE MADE THE NO-KNOCK ENTRY REASONABLE

State v. Henderson, 2001 WI 97, No. 99-2296-CR (S. Ct. 7-9-01)

For Appellant: Eileen Hirsch, Madison; Gary J. Kryshak, Wisconsin Rapids
For Respondent: Diane M. Welsh, Madison

Unlike a no-knock warrant, which is subject to after-the-fact judicial review, the manner in which a search warrant is executed is not subject to the warrant clause. For this reason, “a court reviewing the reasonableness of a no-knock execution of a search warrant is not precluded from considering facts known to the police but not included in the search warrant application. The relevant inquiry

focuses on the circumstances existing at the time of the entry and the reasonableness of dispensing with the rule of announcement”

The police asked for a no-knock warrant but the warrant did not authorize or deny a no-knock entry. The court finds that facts related to officer-safety and the need to preserve the evidence made a no-knock entry reasonable in this case. The dissenters, Abrahamson and Bradley, J.’s, find no particularized reasons for the no-knock entry.

THE FACT THAT SUSPECTS HAD PRIOR ARRESTS INCLUDING THOSE FOR ASSAULT WAS NOT SUFFICIENT TO ESTABLISH REASONABLE SUSPICION TO DISPENSE WITH RULE OF ANNOUNCEMENT

GOOD FAITH EXCEPTION APPLIES TO EVIDENCE DISCOVERED BY AN OFFICER ACTING IN REASONABLE RELIANCE UPON A FACIALLY VALID SEARCH WARRANT PROVIDED THE STATE SHOWS THAT THE PROCESS USED IN OBTAINING THE WARRANT INCLUDED A SIGNIFICANT INVESTIGATION AND REVIEW BY EITHER AN OFFICER TRAINED AND KNOWLEDGEABLE IN FOURTH AMENDMENT LAW OR BY A KNOWLEDGEABLE GOVERNMENT LAWYER

State v. Eason, 2001 WI 98, No. 98-2595-CR (S. Ct. 7-9-01)

For Appellant: Stephen W. Kleinmaier, Madison
For Respondent: Suzanne Hagopian, Madison; Jeffrey E. Livingston, South Beloit

The police sought and obtained a no-knock warrant to search Eason’s residence because an informant had purchased drugs there. The fact that Eason had been arrested 14 times, twice for assault, and that the alleged drug dealer had been arrested for aggravated assault ten years before in Illinois did not establish reasonable suspicion justifying a no-knock entry. All of the information relied upon

was either vague or somewhat outdated.

The court adopts the good-faith exception rule of *United States v. Leon*, 468 U.S. 897 (1984) and holds that it applies when an officer conducts an invalid no-knock entry in reliance on a facially valid no-knock warrant. The court holds, “that the good faith exception applies where the State has shown, objectively, that the police officers reasonably relied upon a warrant issued by an independent magistrate. The burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirement of probable cause and reasonable suspicion, or a knowledgeable government attorney.” Therefore the court reversed suppression of the evidence seized. Abrahamson and Bradley, J.’s, dissent finding that the Leon-plus requirements are “disingenuous” because the standards are not spelled out and were virtually ignored in any case. Prosser and Bradley, J.’s, dissent saying that this could have been avoided had the police done their job more thoroughly.

SEARCH WARRANT BASED ON DECADES-OLD INFORMATION SUPPORTED BY PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT’S HOME CONTAINED EVIDENCE OF SERIAL KILLING

State v. Multaler, 2001 WI App 149, No. 00-1846-CR (Ct. App. Dist. I, 8-8-01)

For Appellant: Jeffrey W. Jensen, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee;
Sandra L. Nowack, Madison

Timeliness is determined by the “circumstances and concepts” and not merely the passage of time. Here the unique factual circumstances that serial killers are likely to have a strong compulsion to keep evidence of their crimes and a re-examination of the case supported probable to issue a search warrant for evidence of crimes committed 23 years ago. The dissent, Curley, J., argues that the passage of over two decades made the information stale,

and a fresh analysis of the case did not revive the stale information.

A SEIZURE OCCURS ONLY WHERE AN OFFICER MAKES A SHOW OF AUTHORITY AND THE CITIZEN YIELDS TO THAT AUTHORITY.

THE COMMUNITY CARETAKER FUNCTION JUSTIFIED A STOP OF GIRL SUSPECTED OF POSSIBLY BEING A RUNAWAY

SEIZURE OF JUVENILE AFTER SHE FLED WAS BASED ON A REASONABLE SUSPICION THAT SHE HAD COMMITTED OR WAS ABOUT TO COMMIT A CRIME

TWENTY-MINUTE STOP WAS NOT UNREASONABLY PROLONGED

POLICE HAD RIGHT TO FRISK JUVENILE BEFORE PLACING HER IN THE SQUAD CAR AND TRANSPORTING HER TO HER HOME

In Interest of Kelsey C.R., a Person Under the Age of 17: State v. Kelsey C.R., 2001 WI 54, No. 99-3095 (S. Ct. 5-31-01)

For Appellant: Susan Alesia, Madison; Peter J. Heflin, Milwaukee

For Respondent: Christian R. Larsen, Madison

The officers approached Kelsey whom they thought might be a runaway and told her to “stay put” while they pulled their car to her side of the street. She ran instead and the court finds that her failure to submit to the officer’s authority meant that no stop occurred until the officers applied physical force to her. Note this opinion is fractured, with two concurrences and two dissents. The holding is therefore limited to the narrowest points of agreement between the concurring and lead opinions.

Given the strong public interest in locating runaway juveniles, along with Kelsey’s potential vulnerability in a dangerous neighborhood at night,

the minimal intrusion caused by a stop to determine whether she was a runaway was reasonable.

Kelsey did not contest that the police could seize her after she fled. *See Illinois v. Wardlow*, 528 U.S. 119 (2000) (headlong unprovoked flight from police in high-crime area justified limited stop).

The police issued Kelsey a citation for obstructing and called her mother who confirmed that she was not a runaway. She asked the police to bring Kelsey home. Wis. Stats. §§ 938.19(1)(d)8 and 938.20(2)(ag) authorized the police to bring Kelsey home, but the police wanted to search Kelsey before they transported her in the police car. No female officer arrived for 20 minutes. The delay was reasonable provided that they had the right to frisk her.

The court finds that the police had a reasonable suspicion that Kelsey was armed and dangerous based on six factors: (1) Kelsey's initial appearance and demeanor sitting on the sidewalk against a building with her hood pulled over her head; (2) her age; (3) night time; (4) few people in the area; (5) high-crime area; and (6) her flight from the officers because she was afraid but could not explain why. The concurrence, Sykes and Prosser, J.'s, would apply a rule that where "an officer has an objectively reasonable basis to transport a person in a squad car, it is not unreasonable to allow him to protect himself from assault during the transport by conducting a minimally intrusive protective frisk for weapons." The dissent, Abrahamson and Bradley, J.'s, finds that the opinion "so waters down the reasonable suspicion standard that the majority opinion is in effect adopting the unconstitutional blanket rule ... that the pat-down search of Kelsey was reasonable because it was prudent for the officers to frisk Kelsey before placing her in the squad car." All of the facts cited by the majority "are consistent with vulnerability, not dangerousness to others." The narrowest point of agreement comes from the majority opinion: "a reasonable basis to place someone inside a police vehicle is a factor to be considered in the totality of the circumstances, when deciding the

reasonableness of a pat-down search.

WHETHER WARRANTLESS POLICE ENTRY INTO THE STAIRWAY OF A MULTIPLE UNIT BUILDING IS REASONABLE MUST BE DECIDED ON A CASE-BY-CASE EXAMINATION OF THE FACTS.

CONSENT TO SEARCH GIVEN AFTER POLICE HAVE ALREADY ENTERED AND SEIZED EVIDENCE WAS SUPPRESSIBLE AS FRUIT OF THE POISONOUS TREE

CONSENT TO SEARCH IS NOT VOLUNTARY WHEN GIVEN IN FACE OF POLICE THREAT TO OBTAIN A SEARCH WARRANT EVEN WHERE NO PROBABLE CAUSE EXISTED

A GUEST TEMPORARILY ON PREMISES USED PRIMARILY FOR COMMERCIAL PURPOSES MAY HAVE STANDING TO OBJECT TO A SEARCH IF THE GUESTS RELATIONSHIP WITH THE HOST AND THE HOST'S PROPERTY IS "FIRMLY ROOTED"

State v. Trecroci, et al., 2001 WI App 126, No. 00-1079-CR (Ct. App. Dist. II, 7-11-01)

For Appellant: David J. Becker, Madison; Robert J. Jambois, Kenosha

For Respondent: Robert Henak, Milwaukee

The court rejects adoption of a bright-line rule and affirms the suppression under the proper test and the facts of this case: 1) property interests: the defendants were the owner of the building and persons who rented from him; 2) dominion and control: the defendant's were the only ones with unlimited access to the stairs, and they controlled access with a padlock; 3) use of property: owner had a reasonable expectation of privacy; the question is closer for the renters, but their attempts to keep others out is consistent with historical notions of privacy.

"The fruits of the illegal entry and search were the tools employed by the police to obtain Trecroci's

consent and they were the catalysts for giving consent,” and therefore the evidence should be suppressed. This case is distinguishable from *State v. Phillips*, 218 Wis. 2d 180, 204-13, 577 N.W.2d 794 (1998), because here the police had seized illegal evidence prior to asking for consent whereas in *Phillips* the illegal entry had not produced any evidence before the police obtained the defendant’s voluntary consent to search.

The police may not threaten to obtain a search warrant where there are no grounds for a valid warrant.

In *Minnesota v. Carter*, 525 U.S. 83 (1998), the Supreme Court explained that the standing of a guest to challenge a search is measured by the guest’s relationship to the property and the host. Here the guest had standing because she was the fiancée of one of the renters; they had used the premises before; and they had used it for both their criminal enterprise and for socializing.

SENTENCING

A DEFENDANT WAIVES THE RIGHT TO OBJECT TO EVIDENCE RELIED UPON AT SENTENCING WHERE THE DEFENDANT FAILS TO MAKE A CONTEMPORANEOUS OBJECTION

TRIAL COURT MAY CONSIDER BEHAVIOR UNDERLYING A CONVICTION EXPUNGED UNDER WIS. STAT. § 973.015.

State v. Leitner, 2001 WI App ____, No. 00-1718-CR (Ct. App. Dist. IV, 7-12-01)

For Appellant: Jim Scott, La Crosse; James Koby, La Crosse

For Respondent: Mary E. Burke, Madison; Jessica Skemp, La Crosse

The defendant waived an objection to consideration at sentencing of conduct expunged under Wis. Stat. § 973.015 where the defense did not object to the

prosecution’s claim that such evidence was admissible or to the fact that the court mentioned the prior behavior when passing sentence.

Nothing in Wis. Stat. § 973.015 prohibits the court from considering behavior underlying an expunged conviction.

WIS. STAT. § 968.20 IS AN *IN REM* PROCEEDING AND PROVIDES NO AUTHORITY FOR THE TRIAL COURT TO AWARD MONEY DAMAGES FOR PROPERTY SEIZED

In Re the Return of Property in State v. Glass, City of Milwaukee v. Glass, 2001 WI 61, No. 99-2389 (S. Ct. 6-13-01)

For Appellant: George P. Kersten, Leslie Ban Buskirk, Milwaukee

For Respondent: David J. Stamosz, Milwaukee

Wis. Stat. § 968.20, authorizes the circuit “to hear all claims to the true ownership of property seized under certain circumstances.” The statute establishes an *in rem* rather than an *in personam* proceeding. As such it does not grant the circuit court jurisdiction to award monetary damages if seized property is not returned to the owner. The court can order the property returned, but if (as here) the seizing governmental body does not have the property any more and cannot return it to the owner, the criminal court does not have jurisdiction to award monetary damages.

A PRIOR CONVICTION MAY BE COLLATERALLY ATTACKED AT SENTENCING WHERE THE PRIOR CONVICTION WAS ENTERED IN ALLEGED VIOLATION OF THE RIGHT TO COUNSEL

State v. Peters, 2001 WI 74, No. 99-1940-CR (S. Ct. 6-28-01)

For Appellant: Jane Krueger Smith, Oconto Falls; Stephen Holden, Shawano

For Respondent: William L. Ganser, Madison

The court views this case as falling within the right-to-counsel exception to the general rule against collateral attacks on prior convictions: “Peters may, in the context of this prosecution for fifth offense OAR, collaterally challenge his second OAR conviction, because the no contest plea upon which it was based was entered without counsel.” The court does not address the constitutionality of closed-circuit television pleas.

TRIAL COURT COULD NOT ORDER DEFENDANT TO PAY COSTS OF PRODUCING HIM FROM PRISON WHERE THE RECORD IS UNCLEAR ABOUT WHETHER THOSE ORDERS ARE GENERALLY CHARGED AND PAYABLE BY ANOTHER OR WHETHER THEY ARE MERELY INTERNAL OPERATING EXPENSES

State v. Dismuke, 2001 WI 75, No. 99-1734-CR (S. Ct. 6-28-01)

For Appellant: Richard D. Martin, Milwaukee; Patrick T. Earle, Milwaukee
For Respondent: David J. Becker, Madison

The court reverses and remands to the trial court for fact finding. Whether the expenses of producing Dismuke from prison for court appearances on a new charge are taxable to him depends on whether they are ordinarily charged to and payable by another or whether they are merely internal operating expenses of a governmental unit. If merely internal operating expenses then they are not taxable to him, but if they are regularly charged then he can be ordered to pay for the costs of producing him to court. The record is too conflicted to resolve this issue or to allow consideration of whether charging the costs to him is unconstitutional.

SENTENCING COURT HAS DISCRETION UNDER WIS. STAT. § 973.01(3M) TO DECLARE AN OFFENDER INELIGIBLE FOR BOOT CAMP EVEN WHERE THE DEFENDANT OTHERWISE QUALIFIES

State v. Steele, 2001 WI App 160, No. 00-2864-CR (Ct. App. Dist. II, 8-8-01)

For Appellant: Christopher William Rose, Kenosha
For Respondent: Robert J. Jambois, Kenosha; Maura F. J. Whelan, Madison

Qualification for boot camp is discretionary with the trial court, and, given the seriousness of the defendant’s offenses, the trial court did not misuse its discretion when it found that he did not qualify.

SENTENCE OF 10 YEARS WAS NOT HARSH AND EXCESSIVE WHERE DEFENDANT USED MULTIPLE ALIASES AND ISSUED MORE THAN 200 BAD CHECKS

State v. Mata, 2001 WI App ____, No. 00-2791-CR (Ct. App. Dist. II, 6-6-01)

For Appellant: Lora B. Cerone, Elkhorn; Charles D. Larson, Baraboo
For Respondent: Phillip A. Koss, Elkhorn; William C. Wolford, Madison

SENTENCE FOR OWI-3RD MAY BE SERVED IN HOME DETENTION

State v. Shipler, 2001 WI App ____, No. 00-1738-CR (Ct. App. Dist. IV, 5-10-01)

For Appellant: Joseph E. Mimier, Madison; Jennifer E. Nashold, Madison
For Respondent: Stephen J. Eisenberg, Madison; Pam M. Baumgartner, Madison

A court may order home detention in lieu of a specified minim jail sentence under Wis. Stat. § 346.65(2)(c), just as it may do for offenses that authorize jail sentences but specify no minimum number of days that must be served. The legislature intended to give trial courts discretion and could have excluded the possibility of § 973.03(4) applying to an OWI-3rd sentence, but it did not.

AFTER FINDING OF GUILT ON SECOND AND THIRD OFFENSE, TRIAL COURT CANNOT APPLY PENALTIES FOR THIRD OFFENSE TO BOTH OFFENSES

State v. Skibinski, 2001 WI App 109, No. 00-1278-CR & 00-1279-CR (Ct. App. Dist. I, 6-13-01)

For Appellant: Karma S. Rodgers, Milwaukee
For Respondent: Benbow P. Cheesman, Thomas J. McAdams, Milwaukee

When defendant was found guilty of OWI-2nd he had only one prior OWI and therefore court had to apply the graduated penalties for second offense even though defendant was also being sentenced at the same time for OWI-3rd offense.

SEXUALLY VIOLENT PERSONS

A PERIODIC RE-EXAMINATION REPORT UNDER WIS. STAT. § 980.07 IS NOT NEWLY DISCOVERED EVIDENCE ALLOWING THE TRIAL COURT TO VACATE AN ORDER FOR SUPERVISED RELEASE

In re the Commitment of Daniel Williams, 2001 WI App 155, No. 00-2365 (Ct. App. Dist. II, 8-8-01)

For Appellant: Adrienne M. Moore, Racine
For Respondent: Warren Weinstein, Madison; Robert S. Flancher, Racine, et al.

Based on a psychiatrist's conclusion that she was not sure that Williams was substantially probable to engage in acts of sexual violence, the trial court ordered supervised release. Following that order, the state prepared a periodic re-examination report that found that Williams remained a sexually violent person. The court of appeals holds that the vacation of the release order was not proper because the new report was not newly discovered evidence

under Wis. Stat. § 805.13. It contained no new information but instead was a new evaluation of pre-existing information. Furthermore, the state had failed to present a different expert evaluation at the release hearing and therefore had the failure to discover this information was due to a lack of diligence. Note: the court finds fault with the Wisconsin Resource Center for failing to cooperate with the independent evaluation of the court-appointed psychiatrist.

REVOCAION OF SUPERVISED RELEASE FROM A 980 COMMITMENT CANNOT BE BASED ON AN UNCHARGED RULE VIOLATION

In Re: the Commitment of VanBronkhorst 2001 WI App ____, No. 00-3075 (Ct. App. Dist. III, 7-17-01)

For Appellant: Jack E. Schairer, Madison; J. Patrick E. O'Neill, Jr., Superior
For Respondent: Marguerite M. Moeller, Madison; Daniel W. Blank, Superior

Notice to comply with due process requirements must be given sufficiently in advance of scheduled court proceedings that the person subject to revocation will have an opportunity to prepare. The notice must identify the specific charge. VanBronkhorst was charged with violating multiple rules of his probation, but he was not charged with the rule violation on which the court revoked his probation. The trial court found that one of the rules for which VanBronkhorst had been noticed was minimally violated. The trial court could not revoke on a rule violation for which there was no notice. Therefore, the court of appeals reverses and remands for a hearing on whether the rule minimally violated was itself sufficient to revoke supervised release.

A PERSON COMMITTED UNDER CH. 980 IS CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF COUNSEL IN BRINGING A FIRST APPEAL AS OF RIGHT

State ex rel. Ruven Seibert v. Mach, 2001 WI 67, No. 99-3354-W (S. Ct. 6-19-01)

For Appellant: Gregory P. Seibold, Madison
For Respondent: Stephen W. Kleinmaier, Madison

“Although a sexually violent person committed under Chapter 980, is not a criminal defendant, he or she has the same constitutional rights as a criminal defendant.” The court therefore rejects the state’s claims that Seibert’s right to counsel be limited to that granted by statute. Since Seibert had a right to counsel, counsel’s failure to file an appeal timely was ineffective assistance of counsel. Note that the decision assumes that a no merit report may be filed in a 980 appeal.

72-HOUR TIME LIMIT FOR HOLDING A CH. 980 PROBABLE CAUSE HEARING IS DIRECTORY AND NOT MANDATORY

THE PROBABLE CAUSE HEARING MUST BE HELD WITHIN A REASONABLE AMOUNT OF TIME

APPELLANT ENTITLED TO HEARING UNDER *THIEL* TO DETERMINE WHETHER HE WAS WITHIN 90 DAYS OF RELEASE WHEN THE STATE FILED THE PETITION

In Re: the Commitment of Deryl B. Beyer, 2001 WI App ____, No. 00-0036 (Ct. App. Dist. IV, 6-7-01)

For Appellant: Jack E. Schairer, Madison; R. Alan Bates, Janesville
For Respondent: Stephen w. Kleinmaier, Madison; Gary L. Luhman, Monroe

The court construes Wis. Stat. § 980.04 and determines that the 72-hour time limit in which the court “shall” conduct a probable cause hearing is directory, not mandatory. In this case, Beyer filed a motion for substitution of judge at the last minute, and the hearing could not be heard timely. This case therefore demonstrates the need to read the statute as directory.

Given the circumstances, a one-month delay was not unreasonable.

“Because Beyer has brought this direct appeal from the judgment committing him and has clearly raised the ninety-day issue in his appellate briefs” he is entitled to remand on the issue of whether he was within 90 days of release when the state filed the petition. The court rejects a request by the state that the court determine on the facts of record that the petition was filed timely.

A CHAPTER 980 PETITION MUST BE FILED WITHIN NINETY DAYS OF DISCHARGE FROM A SEXUALLY VIOLENT OFFENSE DELINQUENCY ADJUDICATION INDEPENDENT OF WHETHER OR NOT THE PERSON REMAINS IN A SECURE JUVENILE INSTITUTION FOR A SEPARATE JUVENILE OFFENSE

THE PERSONAL SERVICE REQUIREMENTS OF CIVIL PROCEEDINGS DO NOT APPLY TO COMMENCEMENT OF A CHAPTER 980 PROCEEDING

In re Commitment of Wolfe, 2001 WI App 136, No. 99-2145 (Ct. App. Dist. II, 7-11-01)

For Appellant: Ann T. Bowe, Milwaukee
For Respondent: Sally Wellman, Madison; Robert J. Wells Jr., Sheboygan

The court rejects Wolfe’s claim that the petition was premature because he was still incarcerated in a juvenile prison on a separate charge even though he was within 90 days of release for his sexual offense. This rule differs from the adult criminal law, *State v. Keith*, 216 Wis. 2d, 573 N.W.2d 888 (Ct. App. 1997), because there is no provision for consecutive dispositions in the juvenile code.

Wisconsin Stat. Ch. 980 provides its own procures for commencing a ch. 980 action and therefore the personal service requirements of chs. 801 and 802 are inapplicable. ■

“Children” continued from Page 14

actually spending the time to explain the options and let the child decide. I have had attorneys tell me that their clients needed treatment and were refusing to agree to be placed outside the home. Many attorneys fail to explain to their young clients what the consequences of a decision will be and that it is always their decision about how to proceed. This is not always an easy task when dealing with children. A significant number of our clients are receiving some form of treatment for mental illness, some children are so nervous that they find it difficult to sit still and listen and some children just do not understand the process. Every lawyer who represents children has to take the time to explain what is happening and then ask the right questions to make sure that his or her client has sufficiently grasped the concept. In addition, for defense counsel, dealing with a client's parents may present some real obstacles. I have lost count of the number of times a well-meaning parent has told me what they wanted for their child and how I should make sure that this happened. Many parents believe that attorneys have no right to speak to their children unless they can be present. The parents

often become angry when I insist on seeing the child alone, for a preliminary interview, before bringing in the parent and discussing the process. There are a substantial number of children who do not want their mothers to know what they did. It takes a lot of time to establish a rapport and explain, in age appropriate language, what the consequences may be.

This year's midterms were even more surprising. There were reports of one lawyer doing a sentencing hearing by telephone, of numerous lawyers being unprepared for hearings and of client's being totally confused and dismayed by what was happening around them.

The entire teaching process has been, to say the least, an eye-opening experience. Even third year law students have an erroneous perception of the role of counsel as it pertains to children. It should not be surprising that some lawyers labor under the same misapprehensions and need to re-evaluate their representation of children. The staff attorneys in the Public Defender's Office remain available

See “Children” on Page 57

Review Granted in the Wisconsin Supreme Court

(May 2001 through August 24, 2001)

State v. I. Shuttlesworth 99-2980-CR
REVW 06/05/01
District 1/Milwaukee County
Unpub

Issues: Whether it is improper to present expert testimony on a DNA “match” without accompanying statistical evidence that clarifies the probability of a random match? Whether the State failed to comply with the requirements of Wis. Stat. 972.11(5)? Whether trial counsel was ineffective with respect to its handling of the DNA issues? Whether the charges against the defendant were multiplicitous and/or inadequately differentiated and, if so, was trial counsel ineffective for failure to challenge?

State v. M. DeLao 00-1638-CR REVW 07/20/01
District 2/Racine County
2001 WI App 132
Issues: Whether the state is required to provide

discovery to a criminal defendant that is not specifically provided for under Wis. Stat. section 971.23, if that information is requested in the defendant's discovery demand and the state does not object? Whether the state must disclose a defendant's oral statement under Wis. Stat. section 971.23 (1)(b) as soon as the investigating officer learns of the statement?



State v. R. Robinson 00-2435-CR
CERT 07/20/01

District 2/Winnebago County
Issues: What is the appropriate remedy when, as the result of a plea agreement between the state and a defendant, the defendant's two convictions of recklessly endangering safety violate the United States and Wisconsin Constitutions' prohibition against double jeopardy?

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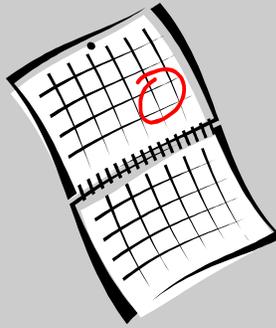
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“Expert” continued from Page 16

Q: Right. But nothing would prevent such a user from buying in volume, correct?

A: Certainly not.

This attorney was able to astutely debunk the myth that addicts never indulge in bulk purchases, that all crack cocaine addicts have the ability to make multiple trips to their dealer every day, spending (in Brown county) \$50 to \$100 each trip. Actually, addicts are cost-conscious out of necessity and will purchase in volume whenever they can because it is cheaper to purchase an 8 ball (approximately 3.50 grams) for \$100 or \$150 than three separate grams at a \$100 each.

Take a chronic alcoholic with means who drinks a case of beer a day. Will this person make four separate trips to the beer depot in order to purchase one six pack each time? Probably not. Instead, this person will probably buy a case at a time for both time and cost considerations.

Work together with your experts to develop the Power Questions. Cite research to back up your clinical ammunition relative to the quantities of particular drugs the addicted brain is capable of using in a single day. You’d be amazed.

Forensic Substance Abuse Evaluations and the adroit use of experts may at least give you a chance to get a possession with intent to deliver charge reduced to simple possession. At least that has been my experience at times. ■

**Barry Hargan, MS, is a Sentencing & Dispositional Specialist who prepares Alternative Pre-sentence Investigation Reports, Alternative to Revocation Plans and Forensic Substance Abuse Evaluations anywhere in Wisconsin and Illinois. He can be reached by phone at 262.250.7655 or by fax at 262.250.0751. For case referrals, please allow four weeks lead time.*