

# WISCONSIN DEFENDER

The Wisconsin Public Defender's Journal of Research and Education

## REMARKS FOR THE ATTORNEY GENERAL National Symposium on Indigent Defense

*Mayflower Hotel, Washington D.C., February 25, 1999*

I am delighted to be with you today at this historic symposium. Never before in the history of the Department of Justice has there been a meeting like this one. The Department of Justice has brought together representatives from all levels of government and from every part of the criminal justice system, to explore how we can better collaborate to strengthen indigent defense services and, by extension, the criminal justice system as a whole. I applaud the efforts of Laurie Robinson, Nancy Gist, and everyone in the Office of Justice Programs and the Bureau of Justice Assistance, who have worked extremely hard to bring this extraordinary group together for this important meeting.

I also want to thank Bennett Brummer and Judge Wetherington for joining us and for their thoughtful remarks. Sitting up here with them, I am reminded of our work together in Miami. As I listened to Bennett and Judge Wetherington speak about the collaboration between prosecutors and defenders that has been developed in Dade County, I recalled the "good old days" when I was part of that collaboration.

My experiences as a prosecutor and as Attorney General have taught me just how important it is for every leg of the criminal justice system to stand strong. All of us here recognize that the defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded, and operating with effective standards. The reality is that despite the Supreme Court's decision 36 years ago in *Gideon v. Wainwright* that every defendant, rich or poor, has the right to be represented by a lawyer when charged with a serious crime, our system of indigent defense needs to be improved. But it is not just poor defendants who have a stake in our system of indigent defense. Just ask a prosecutor, an arresting officer, or even a victim of crime: would they rather face a vigorous defense at trial or risk an overturned conviction and retrial? When the conviction of a defendant is challenged on the basis of inadequate representation, the very legitimacy of the conviction itself is called into question. Our criminal

justice system is interdependent: if one leg of the system is weaker than others, the whole system will ultimately falter.

You heard about the collaboration that has taken place in Florida to strengthen indigent defense services

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# News Briefs

## UPDATE: CRIMINAL PENALTIES STUDY COMMITTEE

The Criminal Penalties Study Committee and its subcommittees have continued to meet during the past month, including plenary meetings on March 5 and March 18-19. Although the committee has yet to resolve many specific details of its recommendations, some significant decisions have been made within the respective subcommittees and the full committee. The status of the committee's work is reported below under the topic headings of the three major subcommittees.

### Code Reclassification Subcommittee

This subcommittee has developed a proposed classification system that comprises nine felony classes. The maximum terms of initial imprisonment range from life imprisonment (Class A) to 18 months (Class I). Within this classification system, the subcommittee continues to consider the proper classification of the present felony offenses. The subcommittee uses a conversion formula to tentatively classify an offense according to the maximum time an inmate can serve under current law to his or her mandatory release date (for example, a present Class B felony converts to a new Class C, with a maximum of 25 years imprisonment). Then the subcommittee considers whether the relative severity of the offense requires an adjustment up or down the classification system (for example, the subcommittee recommends raising first-degree sexual assault and first-degree reckless homicide back to the new Class B, with a 40-year maximum prison term).

This subcommittee also is reviewing mandatory and presumptive minimum sentences, penalty enhancers, and "special interest" crimes. The subcommittee is likely to recommend that many statutes in these areas be converted to factors within the sentencing guidelines, rather than separate statutes with their present impact on potential sentences.

The subcommittee will recommend that the maximum term of extended supervision (ES) not exceed 20 years (for Class B cases, with lower ES maximums for lesser felonies). This change would eliminate the possible 59-year ES term authorized by the Truth in Sentencing legislation for Class B cases. In the course of its work, the subcommittee has considered some arguably overbroad

*See News Briefs at page 28*

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WISCONSIN DEFENDER is published every two to three months, and is free to all public defenders, private attorneys on the active public defender appointments list, and all judges in Wisconsin. Subscriptions are available to others for \$15.00 per year, \$5.00 per year for prisoners.

The views expressed in the articles in this publication are those of the authors and do not necessarily represent the views of the State Public Defender. WISCONSIN DEFENDER welcomes correspondence and article submissions. The deadline for submitting material for the next issue is May 28, 1999. Materials received after that date will be considered for the following issue.

### Remarks from page 1

there, and I can tell you from firsthand experience – these two individuals deserve a lot of the credit. But don't think for a minute though that our collaborative efforts in Miami made us any less committed to doing our jobs as advocates. I think I have gotten more angry at Bennett Brummer than almost anybody I know. He has made me frustrated, but I have been blessed and spoiled by the excellence and zeal of the public defenders in his office. The quality of indigent defense services in Miami made us better prosecutors and advanced all of us in our pursuit of justice.

Over the years, I have come to appreciate how good we had it in Miami. I believe – more strongly than ever – that all of us – regardless of our position in the criminal justice system – have the responsibility to work to improve the quality of criminal defense for the poor. The bottom line is that our system of justice will only work, and will only inspire complete confidence and trust of the people, if we have strong prosecutors, an impartial judiciary, and a strong system of indigent criminal defense.

I firmly believe that the Department, as the nation's leading federal law enforcement agency, is uniquely positioned to call needed attention to indigent defense issues and play an important role in strengthening indigent defense. Let me now tell you what the Department of Justice has been doing to support improvements in indigent defense and foster collaboration among all parts of the criminal justice system.

We have been doing this by committing our resources and using our influence to promote adequate and efficient indigent defense systems. Let me tell you how.

The Office of Justice Programs, the sponsor of this symposium, and the Office of Policy Development in the Department, have developed a comprehensive plan for the Department's work on indigent defense that is built of six building blocks. I want to tell you about each element and give you a specific example or two of what we're doing to further our strategy.

First, our strategy starts with the need for an understanding of the scope and nature of the most important problems facing indigent defense. I have been engaged in an ongoing dialogue with the leadership of national defender organizations to get their perspective on what issues and problems should be addressed. At our meetings, we have had wide-ranging, open discussions of the issues, including the need for reasonable rates of compensation for public defenders and assigned counsel, increased access to technology by indigent defense lawyers, more opportunities for professional training, and workable standards for indigent defense.

Also, for the first time since 1983, the Department's Bureau of Justice Statistics is collecting comprehensive, nationwide data on indigent defense systems so that we can have current information about how different jurisdictions operate and identify models that work.

Second, we have made a commitment to educating the public and the criminal justice community about the importance of a strong system of indigent

### U.S. Department of Justice Provides Useful Information On-Line

The U.S. Department of Justice, its Bureaus and Program Offices provide a wide variety of reports and publications on-line that are of use to the criminal defense practitioner. Department publications include reports on all aspects of criminal justice, informational papers on programs like drug treatment courts, and state and local criminal justice statistics. Some of the DOJ sites of interest are:

U.S. Department of Justice	<a href="http://www.usdoj.gov">www.usdoj.gov</a>
Office of Justice Programs	<a href="http://www.ojp.usdoj.gov">www.ojp.usdoj.gov</a>
Bureau of Justice Assistance	<a href="http://www.ojp.usdoj.gov/bja/">www.ojp.usdoj.gov/bja/</a>
National Institute of Justice	<a href="http://www.ojp.usdoj.gov/nij/">www.ojp.usdoj.gov/nij/</a>
Bureau of Justice Statistics	<a href="http://www.ojp.usdoj.gov/bjs/">www.ojp.usdoj.gov/bjs/</a>
Drug Courts Program Office	<a href="http://www.ojp.usdoj.gov/dcpo/">www.ojp.usdoj.gov/dcpo/</a>
Office of Juvenile Justice and Delinquency Prevention	<a href="http://www.ojjdp.ncjrs.org/">www.ojjdp.ncjrs.org/</a>

(See the Office of Justice Programs Press Release on prisoners and drug abuse at page 5.)

defense. I firmly believe that as the nation's top law enforcement agency, we have a responsibility to explain that strong systems of indigent defense are good for prosecutors, police, victims, the public, and justice.

To further this goal, I have taken the opportunity to encourage governors, chief justices, bar association presidents, and others, to use their positions of leadership to play a role in improving indigent defense services. And just last week, the Assistant Attorney General for the Criminal Division, Jim Robinson, spoke about indigent defense issues at the annual meeting of the National Association of Criminal Defense Lawyers. When Department of Justice officials speak about the importance of indigent defense, it sends an important message that every part of the criminal justice system should be concerned about indigent defense.

Third, the Department has supported efforts to increase funding for indigent criminal defense. Disparities in resources among different parts of the criminal justice system have had a corrosive effect on the ability of poor defendants to secure effective representation.

At the federal level, we have called on the Congress to provide the funds necessary to enable CJA attorneys to earn the \$75 per hour rate that they are authorized to receive.

We have also urged State Byrne Program Administrators to include defenders on their policy boards and consider the needs of indigent defense in their planning and funding decisions. Wherever it's appropriate, we identify defenders as eligible applicants in grant announcement. Consequently, under the open

solicitation issued by the Bureau of Justice Assistance in 1998, the public defender in Vermont received a \$150,000 grant so that developmentally disabled defendants could be evaluated by medical specialists to determine when necessary accommodations should be made consistent with the Americans with Disabilities Act to ensure that everyone gets treated fairly by the criminal justice system.

At the same time that we have supported increased funding for indigent defense, we also have been working with the Administrative Office of the U.S. Courts, States, and localities, to appropriately contain the costs of these services. Every part of the criminal justice system – indigent defense included – must work to deliver quality services at a reasonable cost. Even though indigent defense services are the least well-funded part of the system, there are ways, such as sharing technology and pooling resources, to make the system operate more efficiently and effectively. By doing so, we'll be better able to make the case for increased funding.

Fourth, I strongly believe that prosecutors and defenders not only can work together to improve the system, they can also learn together through joint training. My prosecutors in Miami told me time and again that some of their best training experiences were at the University of Florida, where they trained together with public defenders. That's why the Department is actively exploring possibilities for joint training programs for federal prosecutors and defenders.

We have also made grants to provide training and technical assistance to state and local indigent defense service providers. For example, the Office of Juvenile Justice and Delinquency Prevention is establishing a Juvenile Defender Center to provide resources, training, and technical assistance to juvenile defenders. And the Bureau of Justice Assistance awarded grants to the Vera Institute to train senior managers of indigent defense services, and to the National Legal Aid and Defender Association to provide technical assistance and training to state and local defenders.

Fifth, the Department is working to assure that we bring the tools of technology to every part of the criminal justice system. Technology creates incredible opportunities for accessing and exchanging information, managing cases, investigating crimes, and improving the efficiency and quality of our work.

To that end, the Bureau of Justice Assistance will shortly announce a series of awards to support indigent defense training and case management, with an eye to emerging technological and evidentiary aids.

Last but not least, the sixth building block in our comprehensive plan for indigent defense focuses on improving the quality of indigent defense by encouraging the development and dissemination of minimum standards and best practices. I believe this effort is essential if our nation is to fulfill our obligation under *Gideon* to provide every criminal defendant charged with a serious crime with competent counsel. With a lot of input from the defense bar, we are in the process of developing links to the Office of Justice Programs web site – which will be accessible through the Department's

web site at [www.usdoj.gov](http://www.usdoj.gov) – to enable all who are interested to download “best practices documents” and other useful materials.

Also, we are collecting information on standards for indigent defense programs and representation from around the country. An advisory board of practitioners will review these standards, and the Bureau of Justice Assistance will publish a compendium of those standards that represent the best in criminal defense practice today.

Let me also suggest that we should try to see just how well best practices work by identifying a local jurisdiction in which leaders in the court system, the bar, and the local government commit to becoming a model jurisdiction for indigent defense by adopting best practices and minimum standards. I encourage each of you to consider whether you know of a jurisdiction that might lend itself to becoming a model for the rest of the country.

Finally, I would like to go back to where I began and touch again on the important work taking place at this symposium to improve our indigent defense systems through collaboration. Collaboration is the motor that drives the engine of progress on indigent defense, and there are many powerful models of that motor represented here today, such as:

- Fulton County, Georgia's effort to improve indigent defense by bringing together every player in the system to develop a criminal justice plan;
- Nebraska's statewide study of indigent defense by a broad-based task force including representatives from all three branches of state government, and leading prosecutors, defenders, academics, and county officials;
- Florida and Arizona's efforts to “Fill-the-Gap” in funding so that the adjudicatory phase of the process is as well funded as the enforcement and corrections phases; and
- Delaware's project to create a statewide computer system to link all components of the criminal justice system, including indigent defense.

These examples, and many others, should inspire us to do more.

While we at the Department of Justice have been working of late to improve indigent defense, those of you here in this room – and your colleagues around the country – are the real heroes and heroines on this issue over so many years and decades. And I commit to building our partnership with you. Our efforts at the Department depend on every other part of the criminal justice system, at every level of government, working together to provide full luster and sound to *Gideon's* trumpet.

Thank you for giving me the opportunity to be with you today. I look forward to working with you, and I welcome your questions or comments. ■

## Office of Justice Programs Press Release: More Than Three-Quarters of Prisoners Had Abused Drugs in the Past

WASHINGTON, Jan. 5 /PRNewswire/ — Fifty-seven percent of state prisoners and 45 percent of federal prisoners surveyed in 1997 said they had used drugs in the month before their offense — up from 50 percent and 32 percent reported in a 1991 survey, the Justice Department's Bureau of Justice Statistics (BJS) said today. Eighty-three percent of state prisoners and 73 percent of federal prisoners had used drugs at some time in the past.

In 1997, 33 percent of state and 22 percent of federal prisoners said they committed their current offense while under the influence of drugs, compared to 31 percent and 17 percent in 1991, and about one in six of both state and federal inmates said in 1997 they committed their offense to get money for drugs.

According to this special BJS substance abuse report, about three-quarters of all prisoners can be characterized as being involved with alcohol or drug abuse in the time leading up to their arrest. Sixty-four percent of state prisoners and 59 percent of federal prisoners reported having driven an automobile or other motor vehicle at one time or another while under the influence of alcohol or drugs.

Even with an increase in reported drug and alcohol use between 1991 and 1997, substance abuse treatment provided to state and federal prisoners declined. However, there was increased participation in self-help, education or awareness programs for drug and alcohol abuse.

Among those prisoners who had been using drugs in the month before their offense, 15 percent of both state and federal inmates said they had received drug abuse treatment during their current prison term — down from a third of such prisoners in 1991. Among those who said they had used drugs in the month before their offense, 28 percent of the state inmates and 32 percent of the federal inmates said in the 1997 survey that they had participated in a self-help group or drug awareness program.

Eighteen percent of both state and federal inmates who said in 1997 that they had been using drugs at the time of their offense reported participation in drug treatment programs, compared to about 40 percent in 1991. In 1997, among such prisoners, 32 percent of state inmates and 38 percent of federal inmates reported participating in a self-help, peer counseling, education or awareness program since admission.

Since their admission to prison nearly a quarter of state inmates and 20 percent of federal inmates had been in treatment or other programs for alcohol abuse. Among those with a history of alcohol abuse or

dependence, more than 40 percent reported taking part in a treatment or alcohol-related program since admission.

More than 277,000 offenders were in prison for a drug law violation in 1997 — 21 percent of state prisoners and over 60 percent of federal prisoners. The majority of these inmates were serving time for drug trafficking or possession with intent to distribute (70 percent of state drug offenders and 86 percent of federal). More than two-thirds of state and federal drug offenders reported that they possessed or were trafficking in cocaine or crack during their current offense.

In 1997 more than 80 percent of state prisoners and more than 70 percent of federal prisoners reported some type of past drug use. Twenty percent of state prisoners and 12 percent of federal prisoners said they had used drugs intravenously.

A quarter of state and a sixth of federal prisoners reported experiences consistent with a history of alcohol abuse or dependence. Forty-one percent of state prisoners and 30 percent of federal prisoners reported having consumed as much as a fifth of liquor in a single day (20 drinks, 3 six-packs of beer or 3 bottles of wine). Forty percent of state prisoners and 29 percent of federal prisoners reported having had a past alcohol-related domestic dispute.

With the exception of marijuana use, reported drug use among state prisoners remained stable after 1991. The percentage of state inmates who used marijuana in the month before their offense rose sharply — from 32 percent in 1991 to 39 percent in 1997. During the same period, the percentage of state prisoners who used cocaine or crack in the month before the offense remained unchanged at 25 percent.

Among federal prisoners, the reported prior use of all drug types rose, with marijuana and cocaine-based drugs leading the trend. In 1997, 30 percent of federal prisoners said they had used marijuana in the month before the offense and 20 percent said they used cocaine or crack, compared to 19 percent and 15 percent, respectively, in 1991.

The special report, "Substance Abuse and Treatment, State and Federal Prisoners, 1997" (NCJ-172871), was written by BJS Policy Analyst Christopher J. Mumola. Single copies may be obtained by calling the BJS Clearinghouse at 1-800/732-3277. It is also available on the Internet. The BJS Webpage address is: <http://www.ojp.usdoj.gov/bjs/>

Additional criminal justice materials can be obtained from the Office of Justice Programs Internet homepage at: <http://www.ojp.usdoj.gov> ■

# REVOCAION LITIGATION ALERT

**By Bill Tyroler**  
**SPD Assistant Legal Counsel**

The Prison Litigation Reform Act, promulgated as 1997 Wis. Act 133, effective 9/1/98, imposes a number of conditions on “prisoner” lawsuits. The court of appeals recently held that the PLRA applies to revocations. *State ex rel. Marth v. Smith*, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_ (Ct. App. 1999). This holding, if not overturned, will affect every effort to obtain judicial review of a revocation. PLRA restrictions include the following:

- **Fees:** A prisoner requesting leave to commence an action without prepayment will have his or her trust fund account attached until fees and costs are fully paid, absent danger of imminent serious harm to the prisoner. Wis. Stat. § 814.29(1m).

- **Time limit:** “An action seeking a remedy available by certiorari made on behalf of a prisoner is barred unless commenced within 45 days after the cause of action accrues....” Wis. Stat. § 893.735(2).

- **“3-strikes”:** If a prisoner seeking waiver of costs and fees has filed three previous frivolous or “improper” actions or appeals, the current action will be dismissed (absent, again, imminent danger). Wis. Stat. § 801.02(7)(d).

- **Screening:** If the court deems the prisoner’s action frivolous or improper, it may dismiss without requiring an answer. Wis. Stat. § 802.05(3).

- **Penalty:** A court, upon finding that the prisoner’s action was malicious or filed to harass the opposing party, or that the prisoner testified falsely or presented false evidence or information, may order DOC to extend the prisoner’s MR date or order the sheriff to forfeit good time. Wis. Stat. §§ 302.11(1q)(a), 302.43, 807.15.

*Marth* is a very poorly reasoned decision. Marth himself was a pro se litigant. As might be guessed, he wasn’t able to put together the most persuasive arguments against PLRA inapplicability. The court of appeals, undeterred by the absence of any real adversarial input, lazily adopted the attorney general’s own casual treatment. *Marth* deserves to be vigorously challenged. Nonetheless, the court of appeals simply lacks authority to overturn its own published cases. *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997) (“the constitution and statutes must be read to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals”). In all likelihood, then, the supreme court will have to be the focus of attack. In the meantime, it’s vital to understand both the infirmities of and the duties imposed by *Marth*.

## I. ARGUMENTS AGAINST PLRA APPLICABILITY

### A. Plain Language of Statute.

“Prisoner” has a very technical meaning under the PLRA. Wis. Stat. § 801.02(7)(a)2., as follows (emphasis supplied):

“Prisoner” means any person who is incarcerated, imprisoned or otherwise detained in a correctional institution or who is arrested or otherwise detained by a law enforcement officer. “Prisoner” does *not* include any of the following:

- a. A person committed under Ch. 980.
- b. A person bringing an action seeking relief from a judgment terminating parental rights.
- c. A person bringing an action seeking relief from a judgment of conviction or a sentence of a court, including an action for an *extraordinary writ* or a supervisory writ *seeking relief from* a judgment of conviction or a *sentence* of a court or an action under s. 809.30, 809.40, 973.19 or 974.06.

Thus, PLRA’s reach expressly falls short of certain litigants, notably those bringing extraordinary writs seeking relief from sentence. Certiorari certainly is an extraordinary action (as is habeas), *see* Wis. Stat. § 781.01; the question thus narrows to whether writ-review of revocation “seeks relief from a sentence.”

Revocations occur in three contexts: probation/withheld-sentence; probation/imposed-and-stayed-sentence; parole. A revoked-probation litigant challenging revocation of probation very obviously seeks relief from sentence. Probation has the effect of placing the defendant in DOC custody. Wis. Stat. § 973.10(1). But after the withheld-sentence probationer has been revoked, he or she *must* be returned to court for sentencing; and the stayed-sentence probationer has the sentence immediately executed, Wis. Stat. § 973.10(2).

Where sentence had been withheld, the revocation challenger seeks restoration of the *status quo ante*, which means *vacating* the sentence and returning the litigant to his or her probationary status. Viability of a sentence imposed after revocation turns wholly on the validity of the revocation. If the revocation is overturned, then the sentence has no jurisdictional basis and cannot stand. This is so obviously “relief from” sentence that elaboration hardly seems necessary. Probation is no longer an option after revocation. The *only* reason to seek reversal of the revocation is to vacate the sentence mandated by the revocation and restore the individual to probation — the only relief possible.

The same reasoning applies to revoked, stayed-sentence probation, even though this litigant isn't seeking in effect to vacate the sentence. Instead, this litigant seeks to restore the stay of execution of sentence (something a court otherwise lacks authority to do, *State v. Balgie*, 76 Wis. 2d 206, 251 N.W.2d 36 (1977)). A "stay" is a statutorily designated form of relief against a judgment. *See, e.g.*, Wis. Stats. § 808.07(2). Similarly, caselaw typically uses "stay" and "relief pending appeal" interchangeably. *E.g.*, *Leggett v. Leggett*, 134 Wis. 2d 384, 385-86, 396 N.W.2d 787 (Ct. App. 1986); *Faust v. Faust*, 178 Wis. 2d 599, 601, 501 N.W.2d 810 (Ct. App. 1993). In practical terms, the stayed-sentence revocation litigant seeks a very significant form of relief — release from incarceration. Therefore, restoring a stay satisfies the PLRA definitional exclusion for actions seeking relief from sentence. (A revoked parolee seeks the same form of relief.)

Moreover, the potential overlap of judicial challenges to revocation and collateral attacks on the sentence itself is too great to ignore. The viability of probation often enough turns on the jurisdictional viability of some action by the sentencing court. If the court, for example, fails to enter a timely extension order, *State v. Stefanovic*, 215 Wis.2d 309, 572 N.W.2d 140 (Ct. App. 1997); or if the court improperly extends probation as a collection lever, *State v. Olson*, 207 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998), then DOC jurisdiction over the probationer is lost. The remedy in such instances is to terminate probation. *E.g.*, *State v. Davis*, 127 Wis. 2d 486, 487, 381 N.W.2d 333 (1986); *Stefanovic*, 215 Wis. 2d at 318 ("the defendant is entitled to discharge as matter of law"). To the extent that these sorts of issues can be raised on certiorari review, the proceeding very directly scrutinizes the sentencing process. *See generally* 9 *Wis Pl & Pr* § 83.04, p. 128 (1993) ("the writ of certiorari issues to review questions of jurisdiction, for example, whether an agency kept within its jurisdiction" — arguably, if DOC has lost jurisdiction over the probationer, then it has not kept within its jurisdiction in revoking him or her). *See also State ex rel. Mulligan v. DH&SS*, 86 Wis. 2d 517, 519-20, 273 N.W.2d 290 (1979) (on certiorari review of probation revocation, court entertains challenge to constitutionality of probation condition which litigant was revoked for violating). In other words, it is arbitrary to try to distinguish revocation-review from sentence-review.

*Marth* simplistically reasons "that probation revocation does not concern the validity of the conviction or sentence. . . . Probation revocation is distinct from the underlying proceedings which culminated in a judgment of conviction and sentence." Slip op., pp. 3, 4. But this very concrete assessment fails to recognize that, as noted, a challenge to revocation necessarily raises a challenge either to the sentence itself or its execution, and sometimes to jurisdiction lost in the sentencing court. *Marth*, then, is untenable on the very threshold question of statutory construction.

### **B. Comparison to Federal PLRA**

The Wisconsin PLRA was stimulated by, if not precisely modeled after, the federal version, 28 USC § 1915. Nonetheless, the federal PLRA defines "prisoner" much

more broadly than ours: "As used in this section, 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or terms and conditions of parole, probation, pretrial release, or diversionary program." 28 USC § 1915(h). In other words, no attempt is made to limit the definition. The Wisconsin PLRA definition of "prisoner," by contrast, contains important exclusions, and its carefully hedged language therefore strongly suggests an intentionally narrow rather than broad reach.

Moreover, despite the seemingly unqualified language of the federal Act, the majority of cases hold that it does *not* cover revocation, which raises the issue of execution of sentence rather than prison conditions. *Blair-Bey v. Quick*, 151 F.3d 1036, 1039-41 (D.C. Cir. 1998); *Davis v. Fecht*, 150 F.3d 486, 489-90 (5<sup>th</sup> Cir. 1998); *McIntosh v. United States Parole Commission*, 115 F.3d 809, 811-12 (10<sup>th</sup> Cir. 1997). *Contra*, *Newlin v. Helman*, 123 F.3d 429, 432 (7<sup>th</sup> Cir. 1997), *cert. denied sub nom*, *Robinson v. Smith*, 118 S.Ct. 707 (1998). If the much more unconditional language 28 USC § 1915 does not encompass revocation, then Wisconsin's PLRA hardly can.

*Marth*, oddly, adopts *Newlin* (slip op., p. 4) without acknowledging that it represents a singular, minority view. Nor does *Marth* acknowledge the distinct language of the federal PLRA — even if a sustainable view of the federal Act, *Newlin* simply does not offer persuasive support for the holding in *Marth*. The court of appeals, then, fails to explain its reliance on a foreign scheme that, if anything, supports the opposite conclusion from the one drawn by the court.

### **C. Out-of-state Prisoners and Equal Protection**

This particular argument was neither raised nor considered in *Marth*.

A "prisoner," to come within the Act, must be either "in a correctional institution" or "detained by a law enforcement officer." Wis. Stat. § 801.07(a)2. "'Correctional institution' means any state or local facility that incarcerates or detains any adult accused of, charged with, convicted of, or sentenced for any crime. A correctional institution includes a Type 1 prison, as defined in s. 301.01 (5), a Type 2 prison, as defined in s. 301.01 (6), a county jail and a house of correction." Wis. Stat. § 801.07(a)1. An out-of-state facility is not, of course, a "state or local facility." Nor is it a Type 1 or 2 prison (which are various *state* institutions mentioned and cross-referenced in Wis. Stat. §§ 301.01(5)&(6) and 302.01). Thus, the PLRA expressly excludes from its ambit an out-of-state inmate.

Obviously, this argument can and should be made on behalf of an out-of-state inmate, but this perhaps only begs the question, Why *does* the PLRA exclude out-of-state prisoners? Most likely, it's because the drafters intended to deter frivolous/harassing suits related to prison conditions. *See, e.g.*, *Kincade*, 117 F.3d at 951 (congressional history and text of federal PLRA both show "that the drafters' primary

objective was to curb prison condition litigation”); *Davis*, 150 F.3d at 490 (same). If that was the intent, it was pulled off a bit inartfully. No matter: an in-state prisoner should have an equal protection argument, in that no rational basis exists to allow an out-of-state prisoner to pursue a revocation challenge untrammelled, while in-state prisoners are subject to significant restrictions. The procedure is identical for both. There is no reason to believe that in-state prisoners are more likely to file frivolous or harassing revocations.

#### D. Impairment of Habeas Corpus

In some circumstances a revocation litigant may collaterally attack the revocation itself, via habeas corpus. *E.g.*, *State v. Ramey*, 132 Wis. 2d 266, 278-79, 392 N.W.2d 177 (Ct. App. 1994) (ineffective assistance of revocation counsel); *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 522, 563 N.W.2d 883 (1997) (incompetence of revocation subject). *Cf. State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 278-80, 392 N.W.2d 453 (Ct. App. 1986) (circuit court’s unreasonable delay in reviewing certiorari challenge to revocation is itself cognizable on habeas). *Marth* itself involved a pro se habeas petition, alleging ineffective assistance of revocation counsel.

PLRA restrictions are incompatible with habeas procedure. For example, the three-strike disqualification rule, Wis. Stat. § 801.02(7)(d), conflicts with the habeas-specific mandate that the writ be granted without delay (absent a prohibition appearing on the face of the pleading), Wis. Stat. § 782.06. See also Wis. Stat. § 782.09 (judge’s refusal to grant writ of habeas corpus creates \$1,000 liability). Similarly, the federal PLRA is uniformly held not to apply to habeas challenges to convictions. *E.g.*, *Anderson v. Singletary*, 111 F.3d 801, 803 (6<sup>th</sup> Cir. 1997), and *United States v. Levi*, 111 F.3d 955, 956 (D.C. Cir. 1997), cases cited therein. This conclusion is based at least in part on the notion that the Act’s inhibiting qualities “would be contrary to a long tradition of ready access of prisoners to federal habeas corpus, as distinct from their access to tort remedies.” *Martin v. United States*, 96 F.3d 853, 855-56 (7<sup>th</sup> Cir. 1996). This reasoning should apply with equal force to our PLRA, as indicated by the preceding paragraph. See also, *Wis. Const.*, Art. I, § 8(4) (“The privilege of the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it.”). The PLRA hardly can be compatible with habeas procedure for one purpose, incompatible for another.

Moreover, a habeas is not a civil “action,” and therefore falls outside the PLRA. The Act applies to a “prisoner [who] makes a request for leave to commence ... an action[.]” Wis. Stat. § 814.29(1m)(a). “Action” is not defined, but can only mean civil action. Habeas proceedings are hybrid, not necessarily civil. *E.g.*, *Kincade v. Sparkman*, 117 F.3d 949, 950 (6<sup>th</sup> Cir. 1997) (“Upon careful review of the text and history of the Prison Litigation Reform Act, we conclude that the term ‘civil action’ set forth in 28 U.S.C. § 1915 does not include habeas corpus actions or motions to vacate ... Reading the term ‘civil’ to include habeas petitions and motions to vacate produces absurd results.”) Thus, in

addition to the PLRA definition of “prisoner,” the Act’s language excludes habeas corpus actions.

A habeas challenge to revocation, then, should not be subject to the PLRA, *Marth* notwithstanding (the court failed to consider this argument). It closely follows that a certiorari challenge can’t be subject to the PLRA, either, as the definition of “prisoner” makes no distinction between these types of extraordinary writs.

#### E. Legislative History

The *Marth* court’s lackadaisical treatment also failed to discuss the legislative history. The PLRA was intended to address suits related to prison treatment. As a DOC Fiscal estimate (1/6/98) put it: “The bill sets new time limits during which prisoners may commence actions related to prison or jail conditions ... and requires that a prisoner present considerable documentation at the time of filing any action related to prison or jail conditions.” Indeed, the first drafting effort, SB 388, was animated by express concern over costs associated with often-frivolous prison condition lawsuits. Needless to say, challenges to revocation are quite distinct from such actions.

#### F. Development To Watch For

The presently established method for challenging both probation and parole revocation is by common law writ of certiorari in the court of conviction, *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 185 N.W.2d 306 (1971), to review the administrative revocation proceeding. (Review occasionally is by writ of habeas corpus, as discussed above.) Significant change in this procedure is very possible, at least for probation revocations. See *State v. Horn*, Wis. S. Ct. No. 97-2751-CR, *pending on certification*, which challenges, on separation-of-powers grounds, administrative authority to conduct probation revocations.

*Horn*, in other words, may return probation revocations to the sentencing court, and in the process may greatly strengthen the argument against *Marth*. The trial court in *Horn*

characterized probation as a judicially ordered stay in an ongoing criminal action. Therefore, according to the trial court, it had “continuing authority over, and responsibility for, the management of the defendant’s probation, so that it will follow the path of rehabilitation envisioned by the judge when, in the exercise of judicial discretion, the determination to enter a stay was made.” ... ¶ Moreover, because the DOC alone determines whether continuing probation is appropriate, and because revocation results in the probationer’s incarceration and loss of liberty, the statute wrongly permits administrative law judges to perform a core judicial function: vacating a court’s discretionary sentencing decision and ordering imprisonment. Based upon the preceding rationale, the trial court found § 973.10(2) unconstitutional.

Certification, pp. 2, 3.

*Horn* similarly argues:

The revocation of probation is part and parcel of the imposition of penalty which belongs to the judiciary in Wisconsin's sentencing system. Probation revocation triggers either the lifting of a stayed sentence or a defendant's return to court for sentencing....

[T]he criminal proceeding is not at an end with the imposition of probation if the probation is later revoked. Rather, as the trial court held, the case is stayed.

*Horn*, Brief-in-Chief, pp. \_\_.

If that analysis is adopted, then it will be very easy to characterize a (judicial) revocation as a *continuation* of the sentencing process and, therefore, a challenge to revocation as a direct challenge to the sentencing process. In other words, sentencing and revocation are integrally related – points along the same case-continuum – and a revocation challenge necessarily challenges (“seeks relief from”) sentence. As the *Horn* Certification puts it (p. 7), “Boiled down to its essence, the trial court’s position is that because a core function of the judiciary . . . is to ‘impose sentence’ and because the revocation of probation can result in the loss of liberty, the revocation proceeding is necessarily part of the ‘imposition of sentence.’” A rejection of this position would not itself defeat a challenge to *Marth*; but adoption of it would provide additional, compelling support for excluding probation revocations from the PLRA. (And, if probation revocations are excluded, parole revocations must be as well, since the Act doesn’t distinguish between the two.)

## II. APPELLATE STRATEGY

### A. Lower Courts

As noted, *Cook v. Cook* almost certainly dooms any effort to argue in the court of appeals against PLRA applicability. Nonetheless, the safest course may be to comply with PLRA restrictions, over objection, and attempt supreme court review. Failure to comply (either in circuit court or court of appeals) will undoubtedly result in a loss of right of certiorari review. The supreme court may restore that right at some point, but if not, it will be gone forever.

What PLRA conditions must be observed? The 45-day deadline for filing the certiorari petition, for starters. When the petition is filed, it must be accompanied by the following forms: “Prisoner’s Petition/Affidavit” (Wis. Stat. § 814.29(1m)); Justice Department Certification as to prior dismissal (Wis. Stat. § 801.02(7)(d)); certified copy of trust fund account statement of last six months (Wis. Stat. § 814.29(1m)(b)2.); copy of authorization to agency holding trust fund account allowing funds to be forwarded to court, for payment of costs and fees when balance exceeds \$10 (Wis. Stat. § 814.29(1m)(d)). If and when a notice of appeal is filed, the same requirements seem to obtain. Wis. Stat. § 814.29(1m).

(Note that appellate filing fees are \$150, Wis. Stat. § (Rule) 809.25(2)(a)1.)

The remedy is to induce supreme court review on a petition for bypass, Wis. Stat. § (Rule) 809.60. No attempt will be made here to describe bypass procedure. Criteria aren’t mentioned in the Rule, but as a leading treatise puts it, “(t)he supreme court’s practice indicates that to be appropriate for bypass, a matter generally must satisfy one or more of the criteria for petitions for review under Rule 809.62(1), Stats.” Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 24.2 (1995). Discretionary review is, to be sure, always a tough sell, but the broad policy implications of this issue, coupled with the court of appeals’ forgettable analysis, support a plausible case for review. Take note, as well, of the following caution: “Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent’s brief is filed will be dismissed as premature.” *Id.*, § 24.3.

### B. Supreme Court

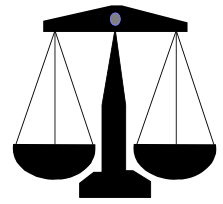
Although a bypass petition may get the issue removed to the supreme court, a more efficient but admittedly riskier method would be to file in that court an original supervisory writ (mandamus), Wis. Stat. §§ (Rules) 809.51 and 809.71.

The settled method of challenging a circuit court’s refusal to waive costs and fees is by mandamus. *State ex rel. Smith v. McCaughtry*, 222 Wis. 2d 68, 70, \_\_ N.W.2d \_\_ (Ct. App. 1998):

Smith filed a notice of appeal from an order denying his petition to proceed under § 814.29, Stats., without payment of fees. Because the appropriate method to obtain review of this order is a petition for a supervisory writ in this court, we construed the notice of appeal as such a petition. *See State ex rel. Staples v. DHSS*, 130 Wis. 2d 285-287-88, 387 N.W.2d 118, 120 (Ct. App. 1986).

When a court refuses to accept an indigency filing, the litigant may employ a supervisory writ, because s/he has no remedy at law: “Because no action was commenced, the order [refusing to waive fees] could not be appealed as of right,” and the court of appeals therefore typically employs mandamus as a review mechanism. *State ex rel. Luedtke v. Bertrand*, 220 Wis. 2d 574, 579-80, \_\_ N.W.2d \_\_ (Ct. App. 1998), rev. gr. This is clear enough as to circuit court activity, the wrinkle here being that the writ would probably have to be filed in the supreme court rather than court of appeals. Section 809.71 inhibits filing in the supreme court, unless “it was impractical to seek the writ in the court of appeals[.]” *Marth* may establish impracticality: under *Cook* it is probably futile to file the writ in the lower court. Otherwise, a writ might be filed in the court of appeals so that the arguments never considered by *Marth* could be raised.

*Continued on page 29*



# COMPONENTS OF AN OBJECTION

by J. Vincent Aprile II

Perhaps the most frequently used weapon of a trial lawyer is the mundane and ostensibly simplistic procedural device of the oral objections. As a procedure the verbal objection freezes the trial or hearing in a state of suspended animation, propels the objector to center stage to be heard, provides a vehicle by which the objector can persuade the trial judge that the objection should be sustained and appropriate curative relief granted, and insures that a reviewing court will understand exactly what the overruling of the objection and/or the requested relief did to prejudice the accused's right to a fair trial. To appreciate the functions of the trial objection, one must dissect the objection and analyze its anatomy.

Reduced to a basic structure, the eleven components of an objection are:

1. **HAIL.** The word, phrase or sentence used to interrupt the proceedings and to secure an opportunity to speak on the record. Examples of effective hails include: May I approach the bench? May I be heard? May the defense be heard? Objection! The defense objects!
2. **OBJECTION.** A phrase or sentence which immediately notifies the court and your adversary that you object and identifies exactly what question, answer, tactic, conduct or occurrence you believe is objectionable. For example: Object to the question. Objection, the witness's answer is replete with inadmissible hearsay. The defense objects to the prosecutor's characterization of the defendant as "pond scum."
3. **GROUND.** A statement of the legal basis, whether statutory, decisional, procedural or constitutional, for your objection. Kentucky only requires a statement of "the specific grounds" of an objection "upon request of court...if the specific ground was not apparent from the context." KRE 103(a)(1). Nevertheless, explaining the grounds for the objection is often necessary to persuade the trial court and to insure that the record on appeal clearly states the defense position.
4. **PREJUDICE.** A description of how the objectionable matter will adversely impact on your client's "substantial rights" [KRE 103(a)] with specific references to the unique circumstances of your individual case. Example: If the prosecution is allowed to introduce evidence of my client's membership in a gang, the jury will infer from that

information that: (1) he has committed prior "uncharged misconduct" with the gang; (2) his character is bad and is compatible with the commission of the charged violent crimes; (3) he is unbelievable as a witness due to his gang loyalties; (4) he is a member of an ongoing criminal conspiracy run by the gang; and (5) he condones and in fact encourages violent and lawless conduct. This ruling will allow the prosecution to suggest without any proof that the defendant has a prior record, has a flawed character, has been impeached as a witness, is involved in yet undiscovered ongoing crimes, and by his lifestyle explicitly rejects any semblance of law and order in the community.

5. **CONSTITUTIONALIZATION.** Identification of the federal and state constitutional provisions which will be violated by the objectionable evidence, tactic, conduct or occurrence. Example: The prosecutor's question is intended to elicit inadmissible hearsay and the introduction of that evidence will violate the accused's rights of confrontation and cross-examination as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution.
6. **REQUEST FOR RULING.** Having voiced an objection, counsel must request that the trial court either sustain or overrule the objection. Examples: Your Honor, the defense requires a ruling on its objection. The defense objection is still pending and requires a ruling by you before the trial [hearing] can proceed.
7. **RULING.** "[I]f an objection is made, the party making the objection, must insist that the trial court rule on the objection, or else it is waived." *Bell v. Commonwealth, Ky.*, 473 S.W.2d 820, 821 (1971); *Harris v. Commonwealth, Ky.*, 342 S.W.2d 535, 539 (1961).
8. **REQUEST FOR RELIEF.** When a defense counsel merely objects to an error, such as improper evidence being presented to the jury, without requesting any relief, the trial court's sustaining of the objection affords the defense as much relief as is requested. *See Wheeler v. Commonwealth, Ky.*, 472 S.W.2d 254, 256 (1971). Normally the requested relief should begin with the greatest relief available, such as dismissal of the charges or mistrial. If the trial court denies that level of relief, then defense counsel should request a lesser degree of relief, such as an admonition to the jury. Defense counsel should note on the record that the defense request for the lesser relief does not waive the original request for the more substantial relief.
9. **REQUEST FOR RULING ON RELIEF.** Having sought a specific form of relief, counsel must request

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## Keeping Up with the Consequences of Delinquency Adjudication

In the past few years there has been a torrent of legislation related to the Children's Code and delinquency. Keeping up-to-date has been difficult for practitioners of juvenile law due to the overhaul of the Code in July 1, 1996 and the many changes to the law both before and since. This article is intended to give attorneys a review of the many consequences of juvenile delinquency adjudications so the attorney can intelligently discuss the issues with his or her client.

Much of what occurs in a courtroom mystifies the untrained observer. That is particularly true for children who are the subject of delinquency proceedings and who are worried about what the judge will do with them. They are scared, and the brief explanation the judge provides in court is normally not sufficient for the child to understand all the consequences of the order.

It does not appear to be the responsibility of the judge to explain every aspect of an order. The responsibility for discussing the collateral effects of a guilty plea falls to the child's attorney. For example, in *State v. Myers*, 199 Wis. 2d 391 (Ct. App. Dist. III, 1-17-96), the Wisconsin Supreme Court held that it is not the obligation of the court to advise defendants of possible exposure to the sexual predator law as a consequence of a guilty plea to a sexual assault charge. The future sexual predator prosecution is a collateral consequence of the guilty plea, the court said, and need not be addressed by the court at the guilty plea. The same logic can be applied in juvenile proceedings. It falls to the child's attorney to explain these consequences, not only so the child can understand the court proceedings, but also understand the importance of complying with any court order.

### *The Basic Advice to Clients*

Before turning to the less well-known effects of delinquency adjudication, it is appropriate to mention some basic, but essential, aspects of delinquency adjudications that every lawyer should discuss with their client.

In the years after juvenile court proceedings are concluded, children will fill out forms for schools,

employment and other opportunities. Every child who is adjudicated delinquent should be advised that adjudication of delinquency is not a conviction of a crime, §938.35(1), Wis. Stat. By the same token, children are "taken into custody," not arrested, §938.297 (4), Wis. Stat., and they should respond accordingly to questions about an arrest record. Though the law of confidentiality has been curtailed in juvenile proceedings, it has not been eliminated. Make sure your client understands the proper responses to these queries.

The delinquency judgement also "does not impose any civil disabilities and does not operate to disqualify the juvenile in any civil service application or appointment," §938.35(1), Wis. Stat. Therefore voting and government employment are not affected, though there are possible exceptions regarding military service. Children interested in joining the military should consult with the branch they are considering.

### *Confidentiality*

In the past, a primary purpose of special provisions devoted to children was to remove the long-term effects of conviction from a child's future prospects and reputation. Part of that protection was offered by confidentiality of juvenile records, which kept information about delinquent behavior within the juvenile court system. That has changed dramatically. Juvenile clients should be informed that, though the general rule calls for confidentiality of juvenile records, there are numerous exceptions. §938.396(2), Wis. Stat. The record may be used in other court proceedings, like bail hearings and sentencing in adult court. It may be used to impeach the juvenile if he/she ever testifies. It may be used in family court custody issues. §938.35, Wis. Stat.

School boards are notified within five days of a delinquency adjudication. However, if a felony is charged, the school board is informed upon its filing in juvenile court. The notification is to include the nature of the charge and the disposition of the court. §938.396(7)(a), (am), Wis. Stat. Victims also are given notice of the judgement under §938.346, Wis. Stat.

*See Juvenile Law at page 17*

# Someone You Should Know ...



Deb Smith, SPD Training Director

*In January of this year, Deb Smith was appointed to the position of Training Director of the Office of the State Public Defender. Deb's career with the agency has extended over almost 20 years. She began working as a staff attorney in the Janesville and Madison Trial offices, and then in 1993, she became the First Assistant of the Madison region. "When I went to law school, the plan was to learn a trade and get a job. I didn't know what kind of law I wanted to do when I started school, but I was sure I did not want to do criminal law. I thought I wasn't mean enough to be a prosecutor, and I felt the responsibility for defending someone was a little more than I wanted to take on. But I just fell in love with it, and I was good at it. It's hard not to like something that you're good at."*

You can learn a lot about Deb Smith just by walking into her office and looking at what's hanging on her walls. You can learn, for example, that she was elected to Phi Beta Kappa at the University of Wisconsin-Milwaukee, where she earned her undergraduate degree in Philosophy in 1975. Then, she began a four-year Ph.D. program at the University of Minnesota in Philosophy. After a couple of years, Deb knew that graduate school was not a good fit.

"It was not for me for a number of reasons, not the least important of which was that graduate students would go to cocktail parties at professors' houses and they would talk about Philosophy! At cocktail parties you talk about sex, politics and sports. You don't talk about Philosophy."

You can also learn that she fancies Native American art quite a bit. "I admire the community aspect of the culture," Deb said. "A couple of years ago I went to a northern tribe's art show in Sioux Falls, and part of the weekend they had a powwow. It was really interesting to watch because everyone from the tiniest toddler to grandma and grandpa were there in their dance costumes going out and doing the grand entrance, which is when everybody goes out and does a couple of circles of the floor before they do their individual dances. There's something about the magical and mystical nature of a lot of the art that appeals to me."

Deb's walls also tell you that she is an honorary citizen of New Orleans. "One of the guys in my class at Harvard University's Program for Senior Executives last summer was a city council member for the French Quarter, and everybody got to be honorary citizens. This guy also had gumbo for one hundred flown up for lunch one day while we were there. How cool is that?"

You can also learn a lot about Deb by talking to the people that know her best—her co-workers. Her sense of humor has been described as very "Drew Carey," and people say that she has a quick wit. Deb agrees with that assessment.

"I think I have a good sense of humor. I have a reputation at the courthouse for being able to get away with saying

pretty outrageous things to almost anybody and having them find it amusing. I've found that you can say almost anything to anyone if you say it with a smile."

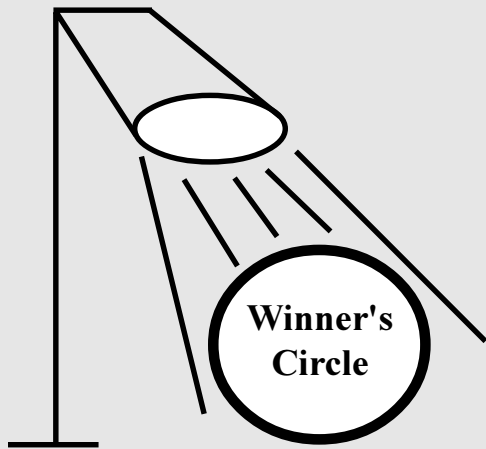
It has also been said that Deb has a reputation as a prankster, but Deb feels any pranks she's pulled have been nothing exceptional. "I guess I've just done the regular silly pranks. There were a couple of times I left phone messages for Stan Woodard, who was the First Assistant of the Madison office before me, saying that Mr. Wolf called and then I'd leave the number for the zoo. It's nothing very sophisticated. I think we took the hinges off somebody's door once."

"On first impression, people think I'm tough and serious, but I think I'm really not very scary." In social situations, Deb says that she is most likely the person sitting in the corner, observing and getting the feel of the room. "At work I'm a lot more outgoing. I'm usually willing to do anything for anyone if they ask me to, and I care about the people I work with and what's going on with them. But underneath that I am really tough."

Growing up in Racine, Deb was very active in theater. Her parents were involved with the Racine Theater Guild and the Racine Children's Theater, so there were always extra parts for kids. Deb and her sister and brothers were kid extras through their high school years.

Deb laughs as she explains, "I was the mascot for the junior series of children's theater and I would come out before the play started and tell the children to sit down and be quiet and take off their coats and announce what the play was and what it was about. The mascot was Packy the Elephant so several times during the high school year I would have to spend Saturday in this big elephant costume with this *giant* elephant head."

In high school, Deb joined an improvisational theater comedy group and performed in most of the prisons in Wisconsin. "We did one trip to New York and did several shows at the Manhattan Detention Center for Men also known as the Tombs."



**Cynthia O'Brien of the Kenosha trial office successfully challenged a sua sponte finding of contempt against her juvenile client.** She represented the juvenile at an extension hearing. Prior to the hearing, the client left her placement without permission and the court authorized a *capias* for her arrest. Surprisingly, the client appeared for the hearing. After the parties argued placement, the judge found the client in contempt of court sua sponte and ordered 12 days secure detention as a sanction. A new hearing for argument on placement was set for the twelfth day.

Cynthia filed a writ of habeas corpus, arguing that a court may not sua sponte impose sanctions. Numerous rights were violated, including the rights to notice, a hearing, cross-examination and calling of witnesses on the client's behalf. The judge hearing the habeas petition agreed that Cynthia was right on the law, but determined that he could continue holding the client in custody pending a reconsideration hearing in the original trial court, questioning whether one could collaterally attack another judge's ruling - the express purpose of habeas corpus.

The original trial judge initially refused to rehear the matter, but all parties camped out in chambers until he agreed to a hearing that day. He also agreed with the law cited in Cynthia's petition and released the client.

Cynthia thinks the case was significant because it demonstrated the willingness of the office to pursue extraordinary remedies, something she believes may have a significant impact on future cases as well as earn the respect of the court. ■

**Gene Bartman of the Appleton trial office obtained an acquittal of first degree sexual assault and recklessly causing injury to a child by demonstrating to the jury that the client had given a false confession in response to police interrogation.**

It was alleged that the client had digital sexual contact causing injury to the two-year-old daughter of his girlfriend. The client took the child with him while running errands. When he returned with the child, the child's mother was hostile to him because he was gone longer than expected. When the mother discovered the child's diaper was full of blood, the police were called and the child was taken to the emergency room for examination. A cut in her vaginal area led the police to conclude that a sexual assault had occurred. The client was arrested at work and questioned for hours. He denied any sexual misconduct and explained that the girl had fallen onto a metal wastebasket from the counter at the motor vehicle department where he had been on one of his errands. His exculpatory statement was reduced to writing and he was jailed on a charge of exposure because he admitted taking the girl with him to the restroom at the motor vehicle department, and that she may have seen him urinating.

The client was interrogated at the jail the next day by an investigative officer who believed a sexual assault occurred. The officer reported that the client confessed to taking the girl into the restroom at the motor vehicle department and, while checking for injuries from the fall, decided to sexually experiment using his finger, causing the child injury. The "confession" was not reduced to writing.

Several days later, a man who read about the charges in the newspaper reported to the police that he'd seen the girl fall from the counter onto the rim of a metal wastebasket, straddling the wastebasket. He reported that she cried intensely and held the area of her her groin.

Terry Young, investigator for the defense, interviewed the examining doctor prior to trial and learned that the girl's injury was outside her vagina and was likely caused by the fall. Further, the examination showed no evidence of injury to the vaginal opening consistent with being penetrated. Anatomical drawings shown to the jury via overhead projectors were used to demonstrate that the laceration was outside the vagina. Terry Young also obtained an expert witness, Dr. Richard Ofshe, who testified about how police interrogation techniques often lead to false confessions. Gene Bartman learned about Dr. Ofshe from the SPD newsletter. Dr. Ofshe's testimony helped address the natural tendency of most people to conclude that someone wouldn't admit doing something terrible unless they are really guilty. Dr. Ofshe testified about cases he had worked on where the police obtained a confession to mass murder from persons who later were shown to be completely innocent.

The combination of outstanding investigation by Terry Young and the testimony of Dr. Ofshe regarding false confessions were key to gaining an acquittal in this case. The case highlights how critical it is to conduct an in-depth interview of the client about the interrogation process soon after the interrogation and confession. ■

# JURY INSTRUCTIONS REPORT

by Richard D. Martin

## Wis JI - Criminal 175 Motive

This is a stylistic revision. The only substantive change is the inclusion of a definition of motive.

## Wis JI--Criminal 232 BAC Tests Showing .04 Grams or More But Less Than .10 Grams

This revised instruction informs the jury that test results “may be considered by you”. The old instruction declared that the results “are relevant”. Admission of the test results is an implicit finding of relevance, but the change removes the arguable judicial highlighting of this evidence that the old instruction’s imprimatur bestowed.

## Wis JI - Criminal 924 Criminal Recklessness

This revision divides the definition into three parts to emphasize the separate characteristics of “criminal recklessness”. It was felt that the prior definition (which tracked the statutory definition in sec. 939.24 Wis. Stats.) was too brief in its treatment of an important concept.

## Wis JI - Criminal 925 Criminal Negligence

This instruction has been similarly revised. It retains the definition of “ordinary negligence” and the paragraph on violation of a safety statute. However it brackets these sections and explains why the Committee has concluded that they should not be routinely given.

## Wis JI--Criminal 999 Minor Passenger or Unborn Child in the Vehicle.

This is an existing instruction for the penalty enhancer applicable when a child under 16 is a passenger in the defendant’s vehicle. It has been revised because 1997 Wisconsin Act 295 provides for an enhanced penalty when unborn children are passengers in cases involving homicide by intoxicated use of a motor vehicle or firearm (section 940.09(1) Wis. Stats) and injury by intoxicated use of a vehicle (sec. 940.25 Wis. Stats.).

## Wis JI – Criminal 1010 First-Degree Intentional Homicide

Stylistic changes have been made to the pattern instruction, to enhance its clarity. The definition of intent has been reworded, with particular attention to when intent may be formed and how long it must continue. The motive paragraph (see JI 175, above) has also been revised and more clearly linked to the intent paragraphs. Similar changes will need to be made in other homicide jury instructions.

## Wis JI – Criminal 1011 First-Degree Intentional Homicide of an Unborn Child; 1020A First-Degree Reckless Homicide of an Unborn Child; 1227 Battery to an Unborn Child

These new instructions were created for use in prosecutions under sections 940.01(1)(b), 940.02(1m) and 940.195(1) Wis. Stats. respectively. These offenses, created by 1997 Wisconsin Act 295 (effective July 1, 1998) involve crimes against unborn children. There are several statutory exceptions, sec. 939.75(2)(b) Wis. Stats., The most obvious is, of course, induced abortion. The committee did not draft language for the absence of any of the exceptions because it was felt their applicability would probably be determined either at charging, or before trial.

## Wis JI – Criminal 1171 Homicide of an Unborn Child by Negligent Operation of a Vehicle; 1185 Causing the Death of an Unborn Child by Operation of a Vehicle

**With a Prohibited Alcohol Concentration; 1185A Causing the Death of an Unborn Child While Under the Influence**  
These are also new instructions dealing with vehicular deaths of the unborn.

## Wis JI – Criminal 1272 Neglect of Residents of Facilities – Sec. 940.295

My last report contained the new jury instructions (1268, 1271) concerning the abuse of vulnerable adults, and residents of facilities. This instruction covers another subsection from the same bill (1997 Wisconsin Act 180), addressing neglect.

## Wis JI--Criminal 1495 Theft of Telecommunications Services

A definition of “private financial gain” has been added to the pattern instruction. It makes clear that this phrase means more than simply receiving free service for personal use.

## Wis JI – Criminal 1605 Commercial Gambling: Collecting the Proceeds of a Gambling Machine

This instruction has been revised so that it now covers both alternative ways of committing the offense, collecting the proceeds from a machine or setting it up for the purpose of gambling.

Wis JI--Criminal 175
Wis JI--Criminal 232
Wis JI--Criminal 924
Wis JI--Criminal 925
Wis JI--Criminal 999
Wis JI--Criminal 1010
Wis JI--Criminal 1011
Wis JI--Criminal 1171
Wis JI--Criminal 1272
Wis JI--Criminal 1495
Wis JI--Criminal 1605
Wis JI--Criminal 2122

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*Richard Martin is an Assistant State Public Defender in the Milwaukee Appellate Office.*

# Representing Foreign Nationals: Consular Notification and Access

*The number of foreign nationals accused and convicted of crimes in the United States has risen dramatically in recent years. Status as a foreign national in a criminal proceeding brings with it certain rights and the availability of resources not widely recognized by the general criminal defense practitioner. For example, Article 36 of the Vienna Convention on Consular Relations gives foreign nationals the right to assistance from their countries' consular officers when "arrested or committed to prison or to custody pending trial...." The treaty binds the state of Wisconsin [U.S. Const. Art. VI] and rights under the treaty have been recognized in criminal cases. e.g. U.S. v. Jose Lombera-Camorlinga, No. 98-50347 (9th Cir. filed 3-25-99) (statement suppressed for Vienna Convention violation if defendant can show prejudice). The Consulate General of Mexico in Chicago recently sent to the State Public Defender useful information that explains some of the rights and resources available to alien criminal defendants. The materials the Consulate provided are too lengthy for this space but the cover letter outlining them is reproduced below.*

*A copy of the materials included with the letter may be obtained by contacting the Madison Appellate Office of the State Public Defender.*

To: Defense Attorneys in charge of cases involving Mexican and other foreign nationals  
 From: Consulate General of Mexico in Chicago  
 Re: Consular Notification  
 Dear Attorneys,

I am writing to inform you about Consular Notification. I am enclosing information which ought to be of help to you in dealing with all cases involving foreign nationals. In the prototypical case, the defendant is a Mexican national who made self-incriminatory statements after he or she was arrested.... In this regard, Mexican citizens rarely are immediately informed of their right to consular assistance. When such is the case, there exists a violation of Article 36 of the Vienna Convention on Consular Relations.

Generally speaking, we believe that in all cases which might involve capital punishment or any serious sentence, it is particularly important to make sure that the sentence is not imposed in contradiction with substantial civil rights, International human rights, and instruments or principles of International Law. International Law is not a vague matter, relevant only at the international arena. Subject to certain domestic requirements, International Law is acknowledged in most national constitutions, including the Mexican and the U.S. constitutions, as the Supreme Law of the Land.

The Vienna Convention on Consular Relations states the right of an alien suspect to be informed of the possibility of contacting his consular representative. Not informing an alien suspect of this right is a serious violation of International law, which can be analogized to a violation of the "Miranda Rights." In the majority of cases it is our experience that, neither do the law enforcement officers handling the investigation notify the Consulate General of Mexico that the Mexican national had been detained and was subject to interrogation nor is the suspect informed of his right to contact his consular representative. This is a serious violation of the Vienna Convention and when it occurs it is also a violation of the Mexican national's due process rights. Article 36 of the Vienna Convention states that:

"if he so requests, the competent authorities of the receiving State (*the United States*)\* shall

## **Jury Instructions from page 14**

### **Wis JI – Criminal 2122 Sexual Exploitation of a Child – Sec 948.05(1)(c)**

In *State v. Zarnke* the Wisconsin Supreme Court struck down this statute as unconstitutional, at least as applied to offenses other than "producing or performing in". This instruction will be replaced with a single sheet explaining this.

### **Miscellany**

The new Chair of the Committee is Eau Claire County Circuit Judge Gregory Peterson. He was elected to replace Judge Edward Dahlberg, whose term expired. Judge Peterson will soon join the Court of Appeals, District III. He is unopposed in his bid for an open seat.

The Committee is beginning a review of its general instructions with the goal of enhanced clarity through the use of "plain language." The Committee is revising existing published material such as **SM-32, Accepting a Plea of Guilty** and **SM-34 Sentencing Procedure, Standards, and Special Needs** in light of 1997 Wisconsin Act 181, the "Victims' Rights" bill. It is also working on new "Special Materials" concerning stipulations and collateral attacks on prior convictions. □

*Continued on page 16*

without delay, inform the consular post of the sending State (*Mexico*)\* if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his right under this sub-paragraph.”

\*Added for clarification.

In addition, the Bilateral Consular Convention between Mexico and the United States (signed on August 12, 1942) states that “Nationals of either High Contracting Party shall have the right at all times to communicate with the consular officers of their country.”

We believe that similarities can be drawn between the right to communicate with a suspect’s consular representative and the Miranda rights. Miranda deals with the need for procedures to make sure that the individual is accorded his privilege not to be compelled to incriminate himself and his right to have an attorney prior and during interrogation. Obtaining a confession from an alien without informing him of his right to contact his consular representative is a violation of the Vienna Convention which in turn constitutes a violation of constitutional rights of the suspect alien, and prevents consular officers from having the opportunity to help one of their nationals and to observe that due process rights are accorded.

Obviously, the difficulties faced by an alien who has been charged with a crime in a foreign country could be eased through the intervention of his consular representative, in the case on point, had the Mexican Consulate been informed of the detention of the Mexican national, a Mexican Consular Officer would have sought access to the detainee as soon as possible in order to ascertain his identity and citizenship, to make him aware of his rights, to advise him of the availability of legal counsel, to help him get in touch with his family or friends, to alert him of the state’s criminal justice system, and to observe that he had not been mistreated. In a few words, the Mexican Consular Officer would have made sure that the Mexican detainee was receiving a treatment at least equal to that given to a U.S. citizen.

In all cases, contacting one’s consular representatives is crucial for any Mexican detainee. Mexican detainees often do not speak English perfectly, nor understand the State (or Federal) criminal procedural law. In these instances, a Mexican Consular Officer would have explained to this individual his rights, such as the right against self-incrimination and the right to have an attorney prior and during interrogation. The obligation of informing the detainee of his right to contact a

Mexican Consular Officer is often overlooked by the police authorities in charge of the investigation, and this therefore constitutes a serious violation of International law and even of the U.S. Constitution.

The United States Department of State has persistently sought enforcement of the rights guaranteed under the Vienna Convention on Consular Relations by repeatedly calling on States’ Governors, Attorney Generals and local law enforcement authorities for observance of the treaty. The Department of State has also issued a Consular notification manual directing state and local law enforcement authorities on how to deal with foreign nationals when they are detained (You can obtain a complete copy at their website at [http://www.state.gov/www/global/legal\\_affairs/ca-notification](http://www.state.gov/www/global/legal_affairs/ca-notification)).

Similarly, the American Bar Association has just recently approved a resolution calling on local and state authorities to observe and enforce the right to consular notification and adopt a “Miranda” type warning. We are enclosing copies of these documents for your convenience.

In addition, we are enclosing copies of the letters sent to Judge D’Italia in Hudson County New Jersey, following the *Cevallos vs. New Jersey* case. In that case, Hudson County has implemented a requirement that all foreign nationals be informed of their right to Consular assistance.

Also, we are enclosing copies of recent articles in Ohio’s “The Plain Dealer” and in Illinois’ “Daily Herald” in regards to ongoing cases in which local authorities have acknowledged the growing need for observance of this treaty provision.

We encourage you to obtain articles by Prof. John Quigley of the Ohio State University College of Law, the foremost authority on the subject. In addition, you can find out further information about treaty interpretation in “International Human Rights” by Frank Newman and David Weissbrodt.

Finally, we make ourselves available to testify and present affidavits in any court in regards to these issues, to appear on behalf of your client and to facilitate contact with other expert witnesses in this area.

I thank you again for your help in resolving this case and also thank you in advance for the concern and assistance that your office can provide to other Mexican nationals in the future. I hope this information is also helpful to you in their representation. If you have any questions regarding this matter, please contact us at (312) 855-0067.

Very truly yours,  
SALVADOR A. CICERO  
Foreign Service Officer, S.E.M.  
Legal Affairs & Human Rights Dept. ■

Court records of children charged with delinquency based on an adult felony who were previously found delinquent are open to any requester. §938.396(2m)(b), Wis. Stat. However, this rule does not apply to all of the court records. Evaluations or medical reports under §938.295, Wis. Stat., and court reports under §938.33, Wis. Stat., are not available to the requester. §938.396 (2m), Wis. Stat.

### ***Charge-Specific Consequences***

#### ***1. Felonies***

There is a range of consequences that are specific to the type of charge forming the basis of a delinquency finding. Though courts will announce these consequences as part of the order made in the courtroom, attorneys should prepare their clients for them before the hearing. The broadest application is the restriction on possession of a firearm after being found delinquent for a felony. §938.341, Wis. Stat. There is an exemption to this provision for any delinquent who demonstrates to a court that he or she “is not likely to act in a manner dangerous to public safety.” See §941.29(8), Wis. Stat.

A practical problem that results is that clients are prevented from a number of job opportunities, like security guard, police officer, and military service.

#### ***2. Violent Violation in A School Zone***

If certain violations occur on or within 1000 feet of school premises, or on school buses or at school bus stops, the juvenile may be subject to up to 100 hours of community service or 100 hours of a supervised work program. §938.34(13r), Wis. Stat. The offenses are listed at §939.632(1)(e), Wis. Stat.

#### ***3. Graffiti***

A delinquency based on a graffiti violation is subject to not less than 10 hours or more than 100 hours in a supervised work program or community service work. Children under 14 may be ordered to perform up to 40 hours of work or service. §938.34(13t), Wis. Stat.

#### ***4. Hate Crimes, Computer Violations and Motor Vehicle Violations***

The juvenile justice code also addresses hate, computer and motor vehicle violations with distinct disposition options for the court. Hate violations, defined

in §939.645, Wis. Stat., are subject to restitution, supervised work or community service programming, victim-offender mediation and sensitivity training or diversity training. §938.34(14d), Wis. Stat.

A court may restrict the child’s use of computers if the child violates a computer crime as defined in §943.70, Wis. Stat.

Courts may restrict, suspend or revoke the driver’s license of any juvenile who violates a law in which a motor vehicle is involved. If the court suspends or revokes the juvenile’s license, the court is to immediately take possession of the license. See §938.34(14m), Wis. Stat.

#### ***5. Drug Violations***

Counsel should advise their clients that upon adjudication for drug offenses, except for drug paraphernalia offenses, the driving privileges of the juvenile will be suspended or revoked for not less than six months or more than five years. See §938.34(14r), Wis. Stat. For possession, the court must order forfeiture. See §938.34(14s), Wis. Stat. However, the court may stay such a disposition with the agreement of the child and require that an alcohol or drug assessment be completed, that an outpatient alcohol or other drug abuse treatment program be entered, and that a pupil assistance program or an alcohol or other drug abuse education program be completed. See §938.34(14s) (b), Wis. Stat.

#### ***6. Sexual Assault***

The most complex and critical area of specialized treatment of delinquency adjudication is for orders regarding sexual assault cases. The implications are serious and long-term.

##### ***Sexual Offender Reporting Requirement***

Upon adjudication for first, second, or third degree sexual assault, or for first and second degree sexual assault of a minor, a child *is required* to report to the Department of Justice for fifteen years after discharge from custody or supervision, under §938.34(15m)(bm), Wis. Stat. Other offenses to which the reporting requirement applies are incest, child enticement and other sexual offenses against children. Section 938.34(15m)(am) lists offenses for which the reporting requirement *may be* ordered if the conduct was sexually

*Continued on next page*

motivated. The list includes whole chapters of criminal offenses, including Life and Bodily Security (Chapter 940) and Sexual Morality (Chapter 944).

The reporting requirements, found in §301.45, Wis. Stat., call for the child to inform the Department of Justice annually of his or her address, school location or place of employment and description of his or her motor vehicle.

### *DNA Data Bank*

Any child adjudged delinquent for any degree of sexual assault or of sexual assault of a child must provide a DNA sample for analysis and inclusion in a DNA data bank. §938.34(15), Wis. Stat. If a child is found delinquent for any violation of Chapters 940 (Crimes Against Life and Bodily Security), 944 (Crimes Against Sexual Morality), or 948 (Crimes against Children), or selected crimes against property (Chapter 943), the child **may be** ordered to provide a DNA sample.

### *Sexual Predator Law, Chapter 980*

Children who are found delinquent of any sexually violent offense listed in §980.01(6), Wis. Stat., must be warned that they may be subject to a petition under Chapter 980, Sexually Violent Person Commitments. See Wis. Stat. §980.01(7). Counsel should bear this possibility in mind when advising clients about possible plea bargains and consequences of trial. As noted in *Myers*, above, the judge is not required to inform the juvenile of the potential for Chapter 980 proceedings before taking a plea.

Within 90 days of discharge or release from a secured correctional facility or child caring institution, the state may file a petition asking that the juvenile be held as a sexually violent person. The petition must allege that the juvenile has a mental disorder and is dangerous to others because his or her mental disorder creates a substantial probability that he or she will engage in acts of violence. The child is entitled to a trial by jury on the petition. Counsel should always assume that a sexual offense may lead to a Chapter 980 petition and warn the client of that consequence of delinquency adjudication.

Counsel should also consider what charges are defined as sexually violent offenses. Third and fourth degree sexual assault charges do **not** fall within Chapter 980 jurisdiction.

### *Caregiver Restrictions*

For any child who has been found delinquent

while over age 12, the child's ability to work as a child caregiver may be restricted or eliminated. Sections 48.685, Wis. Stat., and 50.065, Wis. Stat., prevent persons who have been adjudicated delinquent for "serious crimes" from working in group and family day care centers for children and in day camps for children.

Applicants for these positions must complete a "Background Information Disclosure" form for the Department of Health and Family Services. If the person has a delinquency history, the Department determines whether the offense creates a permanent bar to the requested employment, or whether the applicant must demonstrate rehabilitation before employment will be approved. The Department of Health and Family Services publishes a list of offenses and their sanctions in its Background Information Disclosure form, HFS-64.

### *Victim and Witness Surcharge*

Though not nearly as far-reaching as the other consequences, the provisions of §938.34(8d), Wis. Stat., establish a \$20 victim and witness surcharge for juveniles found delinquent. If the child fails to pay the surcharge, the child's hunting and fishing or driver's license may be suspended between 30 days and five years.

### *Expungement*

The one bright spot amid the provisions is the creation of statutory expungement proceedings. Children may apply for expungement of their juvenile court records after they turn seventeen. The juvenile must convince the court that he or she has satisfactorily complied with the conditions of the dispositional order and that the juvenile will benefit and society will not be harmed by the expungement. See §938.355(4m), Wis. Stat.

### *Conclusion*

The number of issues created by delinquency adjudication is long and appears likely to grow longer in the coming years. Though attorneys cannot always shield their clients from these consequences, a client who is advised of their existence is better prepared to decide whether to accept a plea bargain or try a case. That same client is also better able to comply with the order and avoid future problems with its effect. ■



*Dave Zerwick is the First Assistant State Public Defender of the SPD's Milwaukee Juvenile/Mental Health Office*

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# Case Digest

Summaries by Kenneth L. Lund

## UNITED STATES SUPREME COURT DECISIONS

Decisions announced February 1, to March 31, 1999.

### CRIMES

#### FEDERAL CARJACKING STATUTE DEFINES THREE DISTINCT OFFENSES RATHER THAN A SINGLE CRIME WITH A CHOICE OF THREE MAXIMUM PENALTIES.

*Jones v. United States*, (No. 97-6203, 3-24-99) 119 S. Ct. \_\_\_\_ (1999)

The federal carjacking statute, 18 U. S. C. §2119, at the time of the offense, provided that a person possessing a firearm who “takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be . . . imprisoned not more than 15 years . . . , “(2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and “(3) if death results, be . . . imprisoned for any number of years up to life.” The indictment made no reference to the numbered subsections, and the defendant was informed at arraignment that he faced 15 years. The jury was not instructed to consider whether death or serious bodily injury resulted. When the presentence report averred that the victims had sustained serious bodily injury, the district court concluded that the degree of injury was a sentencing factor to be proven by a preponderance of the evidence, and the defendant was sentenced accordingly.

Justice Souter’s opinion of the Court holds that the bodily harm determination is an element of the crime, not merely a penalty enhancer, and thus it must be charged and proved beyond a reasonable doubt. A contrary reading, the Court concludes, would raise serious constitutional questions and, therefore, any doubt about proper statutory construction should be resolved in favor of avoiding the constitutional question.

Justice Stevens concurs, saying, “I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Justice Scalia’s concurrence offers a similar view.

Justice Kennedy files a lengthy dissent, joined in by Chief Justice Rehnquist and Justices O’Connor and Breyer, which asserts, “the Court’s sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States.”

#### FEDERAL CARJACKING OFFENSE PROVED WHEN GOVERNMENT ESTABLISHES DEFENDANT’S CONDITIONAL INTENT TO CAUSE DEATH OR SERIOUS BODILY HARM.

*Holloway v. United States*, 119 S. Ct. 966 (1999)

The defendant was charged with the federal offense of carjacking, defined in 18 U.S.C. §2119 as

“tak[ing] a motor vehicle . . . from . . . another by force and violence or by intimidation” and “with the intent to cause death or serious bodily harm.” The evidence established that the defendant and his accomplice planned to steal the cars without harming the drivers, but they would have used their guns if the drivers had given them a “hard time.”

In an opinion by Justice Stevens, a majority of the court concludes that the district court properly instructed the jury that conditional intent established the *mens rea* element. That is, the defendant need not have an unconditional intent to kill or cause serious bodily harm; it is sufficient that he had that intent to kill or harm if necessary to effect the carjacking.

Focussing on the specific words of the statute, Justice Scalia’s dissent argues that the word “intent” does not refer to a purpose subject to a condition that the actor hopes will not occur. In a separate dissent, Justice Thomas likewise rejects the concept of conditional intent.

### EVIDENCE

#### DISTRICT COURT’S “GATE-KEEPING” FUNCTION UNDER DAUBERT APPLIES TO ALL EXPERT TESTIMONY, NOT MERELY SCIENTIFIC TESTIMONY; DISTRICT COURT PROPERLY EXCLUDED EXPERT TESTIMONY AS UNRELIABLE.

*Kumho Tire Co. v. Carmichael*, (No. 97-1709, 3-23-99) 119 S. Ct. \_\_\_\_ (1999)

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*Ken Lund is a Deputy First Assistant State Public Defender in the Madison Appellate office and a member of the WISCONSIN DEFENDER Editorial Advisory Board.*

## POSTCONVICTION AND APPELLATE PROCEEDINGS

### COURT DECLINES TO GRANT STAY OF EXECUTION AT REQUEST OF GERMANY AND INTERNATIONAL COURT OF JUSTICE

*Federal Republic of Germany v. United States*, 119 S. Ct. 1017 (1999)

Two hours prior to the scheduled execution of an Arizona prisoner, who was a German citizen, sought injunctive relief against the United States and the State of Arizona, based on a request from the International Court of Justice for a stay of execution. In a per curiam decision, the Court denies the stay, noting that the application was tardy, the United States had not waived sovereign immunity, it is doubtful that there is a jurisdictional basis for Germany's action, and the Eleventh Amendment probably barred the suit against Arizona. Justices Souter and Ginsburg concur, asserting that their decision is not based on Eleventh Amendment principles.

Justice Breyer dissents, joined by Justice Stevens. They argue that a temporary stay is appropriate because there was adequate reason for the late filing and the merits are arguable.

### COURT DECLINES TO CONSIDER CLAIM THAT EXECUTION BY LETHAL GAS IS CRUEL AND UNUSUAL PUNISHMENT.

*Stewart v. LaGrand*, 119 S. Ct. 1018 (1999)

In a per curiam decision, the Court declines to consider whether execution by gas violates the Eighth Amendment, in a petition involving the same German citizen noted in the case above. The court holds that the petitioner's choice of gas over lethal injection waived his Eighth Amendment claim, and also concludes that he procedurally defaulted on the claim by failing to raise it on

direct appeal or in his original petition for state postconviction relief.

A concurrence by Justice Souter, joined by Justices Ginsburg and Breyer, agrees with the majority's conclusion on waiver with the understanding that the defendant makes no claim that death by lethal injection is cruel and unusual. Finding the merits to be less than clear, Justice Stevens dissents from deciding the case without full briefing and argument.

### FEDERAL DEFENDANT NOT ENTITLED TO HABEAS RELIEF DUE TO DISTRICT COURT'S FAILURE TO ADVISE HIM OF RIGHT TO APPEAL, ABSENT SHOWING OF PREJUDICE.

*Peguero v. United States*, 119 S. Ct. 961 (1999)

At the defendant's sentencing on drug offenses, the district court failed to notify him of his right to appeal as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. Four years later the defendant sought federal habeas relief on the basis of the district court's failure to advise.

Justice Kennedy's opinion for the court holds that habeas relief is not warranted for the Rule 32 violation where, as here, the defendant knew of his right to appeal and thus was not prejudiced by the district court's error. A concurrence by Justice O'Connor, joined by Justices Stevens, Ginsburg and Breyer, emphasizes that, to show prejudice, a defendant need not demonstrate that he or she had a meritorious ground for appeal.

## VENUE

**VENUE IN A PROSECUTION FOR USING OR CARRYING A FIREARM "DURING AND IN RELATION TO**

**ANY CRIME OF VIOLENCE," IN VIOLATION OF 18 U. S. C. §924(C)(1), IS PROPER IN ANY DISTRICT WHERE THE CRIME OF VIOLENCE WAS COMMITTED, EVEN IF THE FIREARM WAS USED OR CARRIED ONLY IN A SINGLE DISTRICT.**

*United States v. Rodriguez-Moreno*, (No. 97-1139, 3-30-99) 119 S. Ct. \_\_\_\_ (1999)

After kidnapping a drug dealer middleman, the defendant transported him from Texas to New Jersey to New York to Maryland. While in Maryland, he threatened to kill the kidnap victim with a pistol he held to the victim's head. Although it was undisputed that he brandished and used the gun only in Maryland, a majority of the Court, in an opinion by Justice Thomas, holds that venue was proper in New Jersey district court. The Court reasons that the statute provides "two distinct conduct elements—as is relevant to this case, the 'using and carrying' of a gun and the commission of a kidnapping" and, under prior holdings, the offense can be charged in any district where one of the two elements occurred.

A dissent by Justice Scalia, joined by Justice Stevens, states, "It seems to me unmistakably clear from the text of the law that this crime can be committed only where the defendant both engages in the acts making up the predicate offense and uses or carries the gun."

*Case Digest continued on next page*

**Don't Forget To Mark Your Calendars!**

**THE SPD'S  
1999 CRIMINAL DEFENSE  
CONFERENCE WILL BE  
HELD  
SEPTEMBER 15-17  
AT THE  
MILWAUKEE HILTON  
HOTEL**

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# WISCONSIN DECISIONS

Decisions announced February 1, to March 31, 1999.

All decisions are recommended for publication unless otherwise noted.

## CRIMES

### SUFFICIENCY OF EVIDENCE JUDGED BY INSTRUCTIONS ACTUALLY GIVEN TO JURY; EVIDENCE SUFFICIENT HERE.

### OUT-OF-STATE CONDUCT THAT HAS IN-STATE CONSEQUENCES CAN BE PROSECUTED AS WISCONSIN CRIME.

*State v. Inglin*, No. 97-3091-CR (Ct. App. Dist. I, 2-16-99)  
For Appellant: Stephen M. Glynn, Milwaukee; Robert R. Henak, Milwaukee  
For Respondent: Robert D. Donohoo, Milwaukee; James H. McDermott, Madison

The defendant was charged with interference with child custody under § 948.031(1)(b) for “intentionally withholding” his son from his mother. With the consent of the mother, the defendant took the son out of state for what was to be a 10-day camping trip to Colorado. Instead, the defendant took his son to Canada, intending never to return. Although charged with intentionally withholding the child, the court mistakenly instructed the jury on a different theory—that he took the child away without consent. The defendant argued on appeal that he had consent to take the child away on the camping trip.

The court of appeals rejects this claim. While agreeing that the sufficiency of the evidence must be judged on the basis of the instructions actually given—and thus the state had to prove lack of consent—the court holds that there was no consent because it was premised on ignorance or mistake of fact caused by the defendant’s fraud. The evidence was, therefore, sufficient under the

instruction given.

The defendant was also charged under § 948.31(3)(a), for “intentionally concealing” a child from the other parent. He argued that because he was in Canada with the child for the entire period charged, the concealment took place outside the state and thus Wisconsin lacked “territorial jurisdiction.”

Because concealment includes “preventing or making more difficult the discovery of the child by the other parent,” and because that consequence occurred in Wisconsin where the mother lived, the out-of-state conduct could be charged in Wisconsin, the court holds.

## DEFENSES

### DEFENDANT’S FAILURE TO PRESENT SUFFICIENT EVIDENCE ON AFFIRMATIVE DEFENSE DOOMS APPELLATE CLAIM THAT HE WAS DENIED OPPORTUNITY TO PRESENT THE DEFENSE.

*State v. Inglin*, No. 97-3091-CR (Ct. App. Dist. I, 2-16-99)  
For Appellant: Stephen M. Glynn, Milwaukee; Robert R. Henak, Milwaukee  
For Respondent: Robert D. Donohoo, Milwaukee; James H. McDermott, Madison

## DISCOVERY

### STATE’S FAILURE TO DISCLOSE THAT DEFENDANT’S HANDS HAD BEEN SWABBED FOR GUNSHOT RESIDUE REQUIRES NEW TRIAL.

*State v. DelReal*, No. 97-1480-CR

(Ct. App. Dist. I, 3-9-99)

For Appellant: Richard D. Martin, Milwaukee  
For Respondent: Robert D. Donohoo, Milwaukee; Jeffrey M. Gabrysiak, Madison

The defendant was arrested in a car, along with others, following a drive-by shooting. Two witnesses identified the defendant as the shooter, although one placed him in the front seat and one in the back. At trial, the detective in charge was asked whether the defendant’s hands had been swabbed to detect gunshot residue and he said that no swabbing had been done. Another detective testified that they had been swabbed, but he did not know the results. The trial court ruled evidence of swabbing to be inadmissible.

Postconviction counsel successfully moved the court to have the swabbings tested, and they were negative for gunshot residue. The circuit court refused to grant a new trial because a negative swabbing does not conclusively show that the subject did not fire a gun. The court of appeals reverses, finding the evidence relevant, with any doubt about its evidentiary value a question of weight, not admissibility. Further, the evidence also called into question the credibility of the detective in charge, who testified at trial that there had been no swabbing. The state’s failure to disclose that a swabbing had occurred, therefore, constituted the withholding of exculpatory evidence. Finding that the error was not harmless, the court orders a new trial.

### ABSENT COMPELLING CIRCUMSTANCES, A NON-PARTY EXPERT HAS A PRIVILEGE TO REFUSE TO ANSWER DEPOSITION QUESTIONS CALLING FOR EXPERT OPINION.

*In re Sanctions in Alt v. Cline*, Nos. 96-3356, 96-3588, 98-0029-W (S. Ct. 2-18 -99)

For Appellant: George Burnett, Green Bay

For Respondent: Thomas Kent Guelzow, Eau Claire

The plaintiffs in this personal injury sued the delivering doctor and his medical clinic for injuries to their baby allegedly suffered during birth. The plaintiffs named as an expert witness another doctor from the clinic who had provided prenatal care to the mother, and who wrote the discharge summary after the delivery. During the deposition of this other doctor, who was not a party to the lawsuit, the doctor refused to answer, "No matter what the cause, a patient with a history of term pregnancy and a gush of blood[,] that's abnormal?" The plaintiffs filed a motion to compel discovery, which was granted by the circuit court. The court also imposed sanctions against the third-party doctor's attorney, who had directed him not to answer the question. The court of appeals affirmed. The supreme court granted petitions for review filed by the third-party doctor and the defendants. The plaintiffs also filed a motion for a supervisory writ in the supreme court.

In a decision written by Justice Bablitch, the court first determines that the question asked for the doctor's expert opinion, rather than his personal observations. The court holds that an expert has a privilege to refuse to answer such questions, finding the privilege implicit in § 907.06, Stats, which deals with a judge's authority to appoint experts. Further, the court dismisses the sanctions because, in light of its conclusion on the privilege, the attorney was substantially justified in directing his client to refuse to answer. The court states, "we hold that absent a showing of compelling circumstances, an expert cannot be compelled to give expert testimony . . . . In addition to demonstrating a compelling need for the expert's testimony, the party seeking the expert's testimony must present a plan of reasonable compensation.

Finally, if the party seeking an expert's opinion is able to show a compelling need for the expert's opinion, an expert can only be compelled to give existing opinions. Under no circumstances can an expert be required to do additional preparation."

The court also concludes that the plaintiff's request for a supervisory writ should be denied, not only because the court's substantive ruling undermined its legal basis, but also because a supervisory writ must first be brought in the court of appeals. The court sets out the standards to be applied to requests for supervisory writs.

A pointed dissent by Justice Bradley, joined by Chief Justice Abrahamson, chastises the majority for "announc[ing] the discovery of an evidentiary privilege previously unheard of in this state."

## DUE PROCESS

### STATUTE FORBIDDING DISTRIBUTION OF SEXUALLY EXPLICIT IMAGES OF CHILDREN UNCONSTITUTIONALLY SHIFTS BURDEN TO DEFENDANT.

*State v. Zarnke*, No. 97-1664-CR (S. Ct. 2-26-99)

For Appellant: Thomas J. Balistreri, Madison

For Respondent: Michael R. Cohen, Eau Claire

Section 948.05, Stats., prohibits a variety of conduct constituting sexual exploitation of children. The defendant was charged under that section after he allegedly captured off the Internet and distributed sexually explicit pictures of young boys. Subdivision (3) of § 948.05 provides an affirmative defense if the defendant has reasonable cause to believe the child was 18 years old and the child exhibited an ID document showing the child to be 18. The defendant argued that the affirmative defense unconstitutionally shifted the burden of proving scienter

(knowledge of the child's age) to the defendant. The trial court agreed and dismissed the charges. The court of appeals interpreted the statute so as to place the burden on the state, thus avoiding the constitutional problem and reinstating the charges.

In a decision written by Justice Steinmetz, a majority of the supreme court reverses the court of appeals. The court states, "We hold that an essential element of the crime specified in Wis. Stat. § 948.05 must be an accused's knowledge of the minority of the child-victim, that the State must bear the burden of proving some level of scienter as to that essential element where an accused's conduct does not entail a personal meeting with the minor, and that as currently drafted, the legislature has not constitutionally allocated that necessary burden." The court declines to "save" the statute, as the court of appeals did, because it would require rewriting the statute contrary to the legislature's express intent. The court quotes the statute with the offending portion of the statute (criminalizing conduct that did not involve a personal meeting with the minor) removed, but explicitly states that it is reserving judgment on the remaining portion's constitutionality.

A dissent by Justice Prosser argues that the court should adopt the saving construction.

## EVIDENCE

### EVIDENCE THAT COMPLETES THE PICTURE OF THE CRIME IS NOT "OTHER ACTS" EVIDENCE REQUIRING CAUTIONARY INSTRUCTION.

### CROSS-EXAMINATION OF DEFENSE WITNESS THAT ASKED WHETHER OTHER WITNESSES WERE LYING WAS IMPROPER, BUT HARMLESS; REPEATED OBJECTIONS NOT REQUIRED.

*State v. Gates*, No. 98-0683-CR (Ct. App. Dist. II, 3-24-99)

For Appellant: Edward J. Hunt,

Madison

For Respondent: William J. Gansner, Madison; Joseph F. Paulus, Oshkosh

The defendant was convicted of being party to the crime of battery to an inmate. Testimony at trial showed that the defendant and other Gangster Disciples unsuccessfully solicited sex from the battery victim three days prior to the attack, the defendant told the victim not to leave the building immediately before the attack occurred outside, and the defendant resisted being handcuffed after the assault. He argued that these were "other acts" evidence under Rule 904.04(2), and thus a cautionary instruction was required. The court of appeals concludes that this evidence "is all part of the panorama of evidence needed to completely describe the . . . crime that occurred." and was, therefore, not "other acts" evidence.

The defendant also objected to the cross-examination questions posed by the prosecutor of a defense witness, another prison inmate. The prosecutor repeatedly referred to prosecution witnesses' testimony and asked the defense witness whether they were lying. The court of appeals holds this line of questioning improper, but harmless, because the testimony concerned the witness' actions, not the defendant's. The court further holds that it was not necessary for defense counsel to continuously object to each cross-examination question after his initial objections were overruled.

**NOTE:** The court decides not only that repeated objections were unnecessary to preserve the issue of improper cross-examination, it further holds "that because the trial court had already ruled that [the cross-examination] testimony was properly admitted, trial counsel was not required to raise an objection when such testimony was commented upon in the prosecutor's closing arguments." This holding may be useful on appeal when the state cries "waiver" due to a failure to object to closing argument.

## INEFFECTIVE ASSISTANCE

### COURT REJECTS NUMEROUS CLAIMS OF INEFFECTIVE ASSISTANCE RELATING TO DEFENDANT'S COMPETENCY CLAIMS AND WITHDRAWAL OF NGI PLEAS.

*State v. Byrge*, No. 97-3217-CR (Ct. App. Dist. II, 3-17-99)

For Appellant: Steven P. Weiss, Madison

For Respondent: Kenneth R. Kratz, Chilton; Sally L. Wellman, Madison

In an opinion too fact-specific to permit summary, the court rejects ineffective assistance of counsel claims that trial counsel 1) was generally ineffective, 2) improperly permitted the defendant to withdraw his not guilty pleas, 3) failed to present available evidence of the defendant's incompetence, 4) inadequately attempted to withdraw no contest pleas, and 5) improperly permitted the defendant to withdraw his NGI pleas.

## JURIES

### IN ABSENCE OF STATISTICAL OR DEMOGRAPHIC EVIDENCE TO SUPPORT CLAIMS THAT BLACK JURORS WERE UNDERREPRESENTED OR THAT THEY ARE SYSTEMATICALLY EXCLUDED FROM JURY POOLS, APPELLATE COURT NEED NOT CONSIDER ARGUMENT THAT CHANGE OF VENUE WAS REQUIRED.

*State v. Gates*, No. 98-0683-CR (Ct. App. Dist. II, 3-24-99)

For Appellant: Edward J. Hunt, Madison

For Respondent: William J. Gansner, Madison; Joseph F. Paulus, Oshkosh

### A JUROR'S FAILURE TO DISCLOSE INFORMATION OVERHEARD ABOUT DEFENDANT DOES NOT SHOW BIAS BECAUSE JUROR WAS NOT ASKED ABOUT EXTRINSIC EVIDENCE ON VOIR DIRE.

## A JUROR'S OVERHEARING OF PREJUDICIAL INFORMATION SATISFIES TEST FOR IMPEACHING VERDICTS, BUT HARMLESS HERE.

*State v. Broomfield*, No. 97-0520-CR (S. Ct. 2-2-99)

For Appellant: Charles Bennett Vetzner, Madison

For Respondent: Paul Lundsten, Madison

Before trial, one of the defendant's jurors overheard two people say that the defendant was "a gangster" and a troublemaker, that he beat up a bunch of kids and that he was involved in "drive-bys." One of the two had served on a jury in an earlier prosecution of the defendant, which ended in a hung jury. The juror who overheard the conversation said he shrugged it off, and had no specific recollection of telling the other jurors.

Justice Wilcox, writing for a unanimous court, holds that the test for juror bias based on giving misleading responses in voir dire does not apply, because neither the judge nor the lawyers asked the jurors if they knew the defendant or anything about him. Without such a question, "his responses could not have been incorrect or incomplete," and thus there is no presumption of bias based on the juror's failure to reveal what he had heard.

The court also considers whether the information constituted prejudicial extrinsic information warranting a new trial. Although the court holds that the information was extrinsic and potentially prejudicial, it concludes that in light of the overwhelming evidence of guilt, there was no reasonable possibility that the extrinsic information would have had a prejudicial effect on the average juror.

## JURY INSTRUCTIONS

### TRIAL COUNSEL'S FAILURE TO OBJECT TO JUDGE'S FAILURE TO READ PTAC INSTRUCTION TO JURY WAS DEFICIENT PERFOR-

**MANCE, BUT NOT PREJUDICIAL BECAUSE JURY WAS INFORMED OF LAW DURING CLOSING ARGUMENT AND FULL INSTRUCTION WAS INCLUDED IN WRITTEN MATERIALS GIVEN TO JURY.**

**TRIAL COUNSEL'S FAILURE TO REQUEST INSTRUCTION ON USE OF DEFENDANT'S CONFESSION WAS NOT DEFICIENT PERFORMANCE, BECAUSE CONFESSION SUPPORTED THEORY OF DEFENSE.**

*State v. Gates*, No. 98-0683-CR (Ct. App. Dist. II, 3-24-99)  
For Appellant: Edward J. Hunt, Madison  
For Respondent: William J. Gansner, Madison; Joseph F. Paulus, Oshkosh

**JUVENILE**

**COURT SETS STANDARD FOR OBTAINING EVIDENTIARY HEARING ON CLAIM THAT STATE DELIBERATELY MANIPULATED SYSTEM TO AVOID JUVENILE COURT JURISDICTION.**

*State v. Velez*, No. 96-2430-CR (S. Ct. 2-12-99)  
For Appellant: Scott B. Taylor, West Allis  
For Respondent: Thomas J. Balistreri, Madison

The defendant sought a "Becker" evidentiary hearing on his claim that the state deliberately manipulated the system to defeat juvenile court jurisdiction by waiting until after he turned 18 to charge him with a homicide allegedly committed while he was a juvenile. The trial court held a non-evidentiary hearing, entertaining offers of proof from both sides. The court then denied the defendant's motion to dismiss.

The supreme court reviewed the defendant's claim that an evidentiary hearing should have been granted. Although the court, in a decision by Justice Steinmetz, holds that the state has the burden of persuasion on the issue of manipulation, the defendant

has the burden of producing some facts which, if true, would entitle him to relief. The trial court must consider "the record, the motion, counsels' arguments and/or offers of proof, and the law" in determining whether an evidentiary hearing is needed. The court holds that the trial court properly considered these sources and correctly determined that the defendant failed to meet his burden of production. The court finds "of particular import" the circuit court's invitation to the defendant to bring before the court additional facts if discovered any time before trial, and approvingly notes that the trial court "took the additional step of ordering discovery on the defendant's allegation."

A concurrence by Justice Bradley, joined by Chief Justice Abrahamson, agrees with the standard articulated by the majority but asserts that the defendant alleged sufficient facts to warrant an evidentiary hearing. Nevertheless, they would affirm because documents produced by the police before trial conclusively showed that the state made a good faith effort to timely pursue the juvenile matter.

**GUILTY PLEA IN ADULT COURT WAIVES CLAIM THAT STATE DELAYED PROSECUTION TO DEFEAT JUVENILE COURT JURISDICTION.**

*State v. Schroeder*, No. 98-1420 (Ct. App. Dist. IV, 2-4-99)  
For Appellant: Patrick C. Brennan, Milwaukee  
For Respondent: David J. Becker, Madison; Lorelee Clark, La Crosse

The defendant was originally charged in juvenile court with several offenses. After turning 18, those offenses, along with several others, were charged in an adult criminal complaint. The defendant pled guilty to five offenses, three of which occurred before he turned 18.

After the direct appeal process was unsuccessfully concluded, the defendant brought a § 974.06 motion alleging that he should be granted a

"Becker" hearing at which the state would bear the burden of showing that the delay in prosecution was not for the purpose of avoiding juvenile court jurisdiction. The circuit court found the claim waived by the guilty plea, and the court of appeals agrees. Contrary to the defendant's assertion and facially consistent language in numerous decisions, the "Becker" claim does not implicate the adult court's subject matter jurisdiction, the court holds, but rather is a due process claim that was waived by the plea.

**PATERNITY**

**UNIFORM CHILD CUSTODY JURISDICTION ACT (UCCJA) DOES NOT PROVIDE STATUTORY BASIS FOR PERSONAL JURISDICTION OVER NON-RESIDENT RESPONDENT IN A PATERNITY ACTION; EXTENDING JURISDICTION OFFENDS DUE PROCESS IN LIGHT OF RESPONDENT'S MINIMAL CONTACTS WITH STATE OF WISCONSIN.**

*In re Paternity of Carlin L.S.*, No. 98-1158 (Ct. App. Dist. IV, 3-25-99)  
For Appellant: William J. Mulligan, Milwaukee; Maria K. Myers, Milwaukee; Patrick J. Anderson, Milwaukee  
For Respondent: Cynthia A. Curtes, Mt. Horeb

**PLEAS**

**GUILTY PLEA COLLOQUY NEED NOT INFORM DEFENDANT OF JUDGE'S POWER TO SET EXTENDED PAROLE ELIGIBILITY UNDER § 973.014(1), ALTHOUGH IT IS RECOMMENDED.**

*State v. Byrge* No. 97-3217-CR (Ct. App. Dist. II, 3-17-99)  
For Appellant: Steven P. Weiss, Madison  
For Respondent: Kenneth R. Kratz, Chilton; Sally L. Wellman, Madison

## POSTCONVICTION AND APPELLATE PROCEEDINGS

### PRISONER LITIGATION REFORM ACT APPLIES TO HABEAS PETITIONER CHALLENGING CALCULATION OF RELEASE DATE FOLLOWING PAROLE REVOCATION.

*State ex rel. Stinson v. Morgan*, No. 98-2971 (Ct. App. Dist. IV, 3-25-99)

For Appellant: Joe Stinson, Sturtevant

For Respondent: Matthew J. Frank, Madison

The Prisoner Litigation Reform Act (PLRA) imposes numerous obligations on "prisoner" court filings, including prepayment of fees, or reporting of funds in corrections trust accounts and authorization for fee withdrawal. The PLRA provides that an inmate is not a "prisoner" if he or she seeks relief from a judgment of conviction or sentence of a court, "including an action for an extraordinary writ or supervisory writ seeking relief from a judgment of conviction or sentence of a court." Because the court determines that the defendant is not challenging his sentence, but rather the calculation of his mandatory release date, it concludes that he is a "prisoner" and is thus subject to PLRA requirements.

### SUPERVISORY WRIT MUST BE FILED IN COURT OF APPEALS BEFORE FILING IN SUPREME COURT, UNLESS IT IS IMPRACTICAL; STANDARDS FOR SUPERVISORY WRIT DETAILED.

*In re Sanctions in Alt v. Cline*, Nos. 96-3356, 96-3588, 98-0029-W (S. Ct. 2-18 -99)

## PRETRIAL PROCEEDINGS

### NO HIGHER STANDARD OF COMPETENCY NEED BE APPLIED WHEN COMPETENCY IS MEASURED AT TIME OF WITHDRAWAL OF NGI PLEA.

*State v. Byrge*, No. 97-3217-CR (Ct.

App. Dist. II, 3-17-99)

For Appellant: Steven P. Weiss, Madison

For Respondent: Kenneth R. Kratz, Chilton; Sally L. Wellman, Madison

### CIRCUIT COURT HAS NO INHERENT POWER TO DISMISS A CRIMINAL PROCEEDING WITH PREJUDICE PRIOR TO THE ATTACHMENT OF JEOPARDY UNLESS THERE IS A SPEEDY TRIAL CLAIM.

*State v. Krueger*, No. 97-2663-CR (S. Ct. 2-16-99)

For Appellant: Sandra L. Tarver, Madison

For Respondent: Gary S. Cirilli, Rhinelander

In the defendant's 1996 trial for indecent exposure, the state moved to admit other crimes evidence of another incident of exposure. The trial court allowed the other crimes evidence, but commented that if the state chose to use the other crimes evidence in that way, it could not later charge the defendant for the other crime. The defendant was acquitted in the first trial, the state brought charges based on the other incident, and the court kept its promise by dismissing the case with prejudice.

Chief Justice Abrahamson's opinion for a unanimous court upholds the rule of *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980): "the trial courts of this state do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial."

## COMPETENCY STATUTE CONSTITUTIONAL

### VENUE CLAIM, RAISED PRO SE BY REPRESENTED DEFENDANT, CONSIDERED WAIVED BECAUSE IT WAS NOT RAISED BY COUNSEL.

### TRIAL COURT PROPERLY EXERCISED DISCRETION IN REFUSING REQUEST FOR SUBSTITUTE COUNSEL.

*State v. Wanta*, No. 98-0318-CR (Ct. App. Dist. IV, 2-4-99)

For Appellant: James M. Shellow, Milwaukee; Craig Albee, Milwaukee  
For Respondent: Diane M. Nicks, Madison; William C. Wolford, Madison; Douglas Haag, Madison

The defendant raised an equal protection claim challenging § 971.14(4)(b), the competency statute. The court finds that two competing fundamental rights are implicated: the right not to be prosecuted when incompetent, and the right not to be found incompetent (and thereby deprived of liberty) without due process. Although applying a strict scrutiny test, the court has no trouble upholding the statutory scheme which imposes different burdens of proof: If a defendant maintains he is incompetent, the state must prove competence by the greater weight of the evidence, but if a defendant maintains he is competent, the state must prove incompetence by clear and convincing evidence. The court concludes, "The statute is narrowly tailored to achieve the State's interest in prosecuting competent criminal defendants and in restoring the competency of those who are incompetent as soon as practicable," while protecting the fundamental rights noted above.

While represented by counsel, the defendant filed a pro se motion challenging venue in the circuit court. Noting that there is no constitutional right to concurrent self-representation and representation by counsel, the court of appeals finds the issue waived because it was not raised by the lawyer.

The court of appeals also determines that the trial court did not erroneously exercise discretion by refusing to permit withdrawal of counsel unless substitute counsel was available, and then refusing to allow substitute counsel to take over the case shortly before trial when the substitution would have required a continuance of an already much-delayed trial.

## PRISONER RIGHTS

### INMATE WAIVES RIGHT TO RAISE LACK OF NOTICE OF DISCIPLINARY HEARING BY FAILING TO OBJECT AT TIME OF HEARING OR IN ADMINISTRATIVE APPEAL.

*State ex rel. Anderson-Elv. Cooke*, No. 98-0715 (Ct. App. Dist. II, 3-10-99)

For Appellant: Robert D. Repasky, Madison

For Respondent: Ira Lee Anderson, Plymouth

### BEFORE FILING COURT CHALLENGE TO PROCEDURES USED IN DISCIPLINARY PROCEEDINGS, INMATE MUST EXHAUST ADMINISTRATIVE REMEDIES THROUGH INMATE COMPLAINT REVIEW SYSTEM (ICRS).

*State ex rel. Frasch v. Cooke*, No. 98-1786 (Ct. App. Dist. II, 2-17-99)

For Appellant: David E. Hoel, Madison

For Respondent: Daniel Frasch, Plymouth

## RIGHT TO COUNSEL

### DEFENDANT DOES NOT FORFEIT HIS RIGHT TO APPELLATE COUNSEL BY HIS ACTIONS UNLESS HE HAS BEEN WARNED OF CONSEQUENCES OF HIS ACTIONS AND OF DIFFICULTY OF SELF-REPRESENTATION.

*State v. Karls*, No. 98-0695 (Ct. App. Dist. IV, 3-25-99)

For Appellant: James F. Karls, Whiteville, TN

For Respondent: Michael R. Klos, Madison; Diane M. Nicks, Madison

The defendant went through a succession of SPD-appointed attorneys, who withdrew because of asserted conflicts of interest. Although the defendant had been told by the SPD that he would not receive additional counsel if he caused his third lawyer to withdraw, he was not so warned by the court. After the

third lawyer withdrew with court permission, the defendant continued to request that he be represented by counsel.

The court of appeals holds that, before concluding that the right to counsel has been relinquished, a court must engage in a colloquy that warns the defendant that behavior could forfeit the right to counsel and sets out the dangers of self-representation. The court concludes that it erred in releasing appointed counsel without undertaking this duty and, as a result, the court concludes that the defendant retained his right to counsel.

## SEARCH AND SEIZURE

### EXTENSION OF LAWFUL DETENTION MUST BE BASED ON PARTICULARIZED OBJECTIVE SUSPICION.

*State v. Betow*, No. 98-2525-CR (Ct. App. Dist. IV, 3-25-99)

For Appellant: James C. Murray, Madison

For Respondent: Thomas J. Balistreri, Madison; Gilbert G. Thompson, Juneau

The defendant was lawfully stopped for speeding. As he produced his driver's license, the officer noticed that the defendant's wallet had a picture of a mushroom on it. Believing the mushroom to be a sign of drug activity, the officer detained the defendant until a drug-dog alerted and found marijuana in the car.

The court of appeals holds that expanding the scope of a lawful stop requires additional suspicious factors which must be "particularized" and "objective." The court rejects the state's claim that this test is met by the mushroom wallet, the late-night hour, the defendant's nervousness, or the defendant's point of departure (Madison, alleged by the state to be "a city regrettably well known as a place where drugs may readily be obtained").

### COURT FINDS REASONABLE SUSPICION FOR STOP AND FRISK IN HIGH CRIME AREA.

*State v. Allen*, No. 98-1690-CR (Ct. App. Dist. II, 3-24-99)

For Appellant: Steven D. Phillips, Madison

For Respondent: Robert S. Flancher, Racine; Stephen W. Kleinmaier, Madison

The court summarizes its own holding on the defendant's attempt to suppress evidence obtained following a stop and frisk: "Allen and his companion being in a high-crime area, standing alone, would not be enough to create reasonable suspicion. A brief contact with a car, standing alone, would not be enough to create reasonable suspicion. Hanging around a neighborhood for five to ten minutes, standing alone, would not be enough to create reasonable suspicion. On the other hand, when these three events occur in sequence and are combined with the officers' experience and training, the reputation of the area and the time of day are considered, there is enough to create a reasonable suspicion to justify a *Terry* stop." The same factors also lead the court to conclude that the officer had reason to believe the defendant might be armed and dangerous, thus justifying the frisk.

**NOTE:** This case must be carefully compared with *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997), which held that "short term contact" between two individuals in high drug trafficking area does not give rise to reasonable suspicion to stop.

### WARRANTLESS ENTRY INTO TRAILER HOME NOT JUSTIFIED BY EXCEPTIONS; SUBSEQUENT CONSENT TO SEARCH TAINTED.

*State v. Richter*, No. 98-1332-CR (Ct. App. Dist. III 2-23-99)

For Appellant: David G. Miron, Marinette; Susan M. Crawford, Madison

For Respondent: Charles K. Kenyon, Jr., Marinette

Responding to a complaint about a burglary of a trailer home in progress, a police officer learned that the suspect had fled across the street and gone into another trailer. After shining his flashlight in the window of the trailer and waking two guests of the owner, the officer entered the trailer, woke the owner, and asked for consent to search the trailer. The search revealed not only the suspected burglar, but also drugs and paraphernalia. The owner of the trailer moved to suppress statements and evidence seized, and the trial court granted the motion.

The court of appeals affirms, rejecting the state's claim that the warrantless entry was justified by exigent circumstances, the emergency doctrine, or the community caretaker function. The court also holds that the owner's consent to search was not sufficiently attenuated from the illegal entry to remove the taint.

**AN OFFICER DOES NOT HAVE PROBABLE CAUSE TO BELIEVE A LAW HAS BEEN BROKEN IF THE OFFICER'S INTERPRETATION OF THE LAW IS INCORRECT.**

*State v. Longcore*, No. 98-2792-CR (Ct. App. Dist. III, 2-23-99)  
For Appellant: William E. Schmaal, Madison  
For Respondent: Steven J. Madson, Green Bay

The defendant was convicted of OAR following a traffic stop due to his having a plastic sheet in one of his rear windows. The stopping officer concluded he had probable cause for the stop because § 347.43, Stats., makes it unlawful to operate a vehicle "unless such motor vehicle is equipped with safety glass wherever glass is used thereon in partitions, doors, windows or windshields." The state and the defendant disagreed about whether this statute required glass for all windows, or merely mandated that all glass windows be safety glass. The circuit court concluded that the officer's interpretation of the statute was reasonable, even if mistaken, and thus refused to suppress the fruits of the stop (the defendant's ID).

The court of appeals reverses and remands, holding that the question is not whether the officer's belief was reasonable, since the reasonable belief standard applies only to a brief investigatory stop. Here, the stop was for the purpose of making a traffic arrest, and thus the officer had to have probable cause to believe the law has been broken. The court states, "If the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred." Rather than suppress the evidence, however, the court remands to the circuit court for a determination of whether the defendant's or the state's statutory interpretation is correct (*i.e.*, whether all window openings must be covered with safety glass or whether all glass windows must be safety glass). The court declines to decide that admitted question of law because the state's brief does not adequately develop the issue.

**THE ODOR OF MARIJUANA COMING FROM A CAR MAY ESTABLISH PROBABLE CAUSE TO ARREST THE SOLE OCCUPANT.**

*State v. Secrist*, No. 97-2476-CR (S. Ct. 3-3-99)  
For Appellant: Patrick M. Donnelly, Madison  
For Respondent: Thomas J. Balistreri, Madison

The defendant drove his car up to an officer to ask for directions. The officer detected a strong odor of marijuana coming from the car, ordered the defendant to pull over, arrested him, and searched the car. He found marijuana and a roach clip. The defendant argued that the search was unlawful because, although the odor of marijuana may have provided probable cause to believe a crime had been committed, there was no cause to believe that he had committed it.

In an opinion by Justice Prosser, a unanimous court finds probable cause to arrest: "We hold that the odor of a controlled substance may provide probable cause to arrest when the

odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered or because other evidence at the scene or elsewhere links the odor to the person or persons."

**SENTENCING**

**FEDERAL EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) PROHIBITS SENTENCING COURT FROM ORDERING DEFENDANT TO USE PENSION FUNDS TO PAY RESTITUTION.**

*State v. Kenyon*, No. 98-1421-CR (Ct. App. Dist. IV, 3-11-99)  
For Appellant: Rex Anderegg, Milwaukee  
For Respondent: William C. Wolford, Madison; Tim Gruenke, La Crosse

**DEFENDANT ENTITLED TO SENTENCE CREDIT FOR PRESENTENCE INCARCERATION IN JUVENILE INSTITUTION.**

*State v. Thompson*, No. 97-3245-CR (Ct. App. Dist. I, 3-9-99)  
For Appellant: Richard D. Martin, Milwaukee  
For Respondent: Robert D. Donohoo, Milwaukee; Gregory M. Posner-Weber, Madison

While on juvenile aftercare parole, the defendant was charged with new crimes as an adult. After pleading guilty to the new charges, the defendant was transferred to Ethan Allen as a result of his juvenile parole revocation (which, in turn, was due to the new crimes). He remained at Ethan Allen for several months while his sentencing was repeatedly adjourned, through no fault of his.

The court holds that the defendant is entitled to sentence credit for the time spent at Ethan Allen. Even though he was "serving" the juvenile disposition at the time, the rule of *State v. Beets*, 124 Wis. 2d 372, 369

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felony offenses, such as chapter 948 offenses brought against children and delivery of drugs for passing a pipe or joint. The subcommittee is reluctant to recommend redefinition of these types of offenses, but may recommend that the full committee identify problems of this nature for possible legislative attention.

### Sentencing Guidelines Subcommittee

This subcommittee is possibly the most significant in terms of the future sentencing policy of the State (if the committee's general approach is ratified by the legislature). The subcommittee has studied the models of many other states and has debated philosophical approaches to sentencing. On March 19, the subcommittee presented three alternative models to the full committee for a vote.

All three models preserved a great amount of judicial discretion to impose a sentence tailored to the individual case. The models differed primarily in terms of whether prior criminal record is highlighted as one of two factors (the other being offense severity) that determine the presumptive sentence range within a grid system.

A majority of the committee approved a system that includes prior history as a grid-determinative factor, but with the discretion for the court to increase or decrease the criminal history score on the basis of individualized consideration of the offender's history. The ranges within the grid will largely reflect past history in Wisconsin regarding whether prison has been imposed and, if so, the amount of time served. This model is similar to the guidelines system previously used in Wisconsin before 1995.

The committee's vote rejected a model that was referred to as "rule of law," which would provide judges (and litigants) with a series of general questions to answer, some of which would apply to all offenses and some of which would be offense specific. This model would represent more of a departure from the previous guideline format and would arguably require more detailed findings by the sentencing judge.

### Extended Supervision Revocation Subcommittee

This subcommittee has devoted considerable attention to the goal of completing the revocation process more quickly in ES revocation cases than the time period that presently applies in revocation hearings. The subcommittee has also considered the division of labor between the administrative law judge (ALJ) and the trial court in revocation proceedings.

The most problematic issue for the State Public Defender (SPD) may be the subcommittee's recommendation that revocation hearings be held (on average) within 20 days of issuance of the hearing notice (35 days after the ES hold is placed). The subcommittee

and the Department of Corrections seem receptive to procedural suggestions to furnish defense counsel with notice and discovery within that time frame, but strongly recommends holding the hearings as soon as possible. The SPD will submit a memorandum summarizing the major impediments to preparing revocation cases within such a short time frame.

Another major recommendation of this subcommittee is that the DOC administrative rules be amended to foreclose the consideration of alternatives to revocation at the hearing. The ALJ would decide whether the agent considered alternatives, but would not decide the appropriateness of specific alternatives. This recommendation is based on DOC's interpretation of the *Plotkin* case (also, see next paragraph regarding ability to argue alternatives at sentencing hearing).

The trial court, rather than the ALJ, will impose the sentence following ES revocation (if the subcommittee's recommendations are approved). The ALJ would recommend a sentence, but the court would preside over a sentencing hearing. Since the court could decide to sentence the offender to time served and could modify the conditions of the remaining ES term, the defense could in effect argue for alternatives at the sentencing hearing.

Finally, the subcommittee recommends no preliminary revocation hearing unless DOC or the ALJ requests an adjournment of the revocation hearing (and, even in that situation, the "hearing" may be a paper review).

### Committee Deadline and Summary

The committee asked the legislature in February for an extension of its deadline from the end of April until the end of August. The state assembly approved the extension, but the senate has referred the request to the Judiciary Committee. It appears that the committee will receive an extension of time, but not necessarily as long as requested.

The committee still awaits more definitive data on the projected costs of the Department of Corrections under the Truth in Sentencing law. This data will assist the committee in estimating the cost of different guideline ranges for the most common offenses. The committee is also likely to recommend appropriation of greater resources for community supervision (for example, to permit a 1:20 ratio of ES agents to offenders).

The SPD will present extensive training on Truth in Sentencing at the Fall Conference in September. Although the legislation implementing the law may not be passed by then, we will prepare and distribute materials on the basis of the information available at that time. Please keep in mind that regardless of whether further implementing legislation is approved, Truth in Sentencing will apply to prison sentences imposed for all crimes committed on or after December 31, 1999. ■

# Review granted in Wisconsin Supreme Court

The following pending cases in the Wisconsin Supreme Court are relevant to public defender practice. The list is current through March 26, 1999.

**State v. J. Bodoh**, 97-0495-CR. Review granted September 15, 1998. Court of Appeals, Dist. II, decision published 220 Wis 2d 0102, 582 NW2d 0440.

Issues: What is the proper interpretation and application of Wis. Stat. § 940.24 in this case where defendant's two dogs escaped from their fenced enclosure and attacked a 14 year old boy riding by on a bicycle?

**State v. Y. Spears**, 97-0536-CR. Review granted October 14, 1998. Court of Appeals, Dist. I, decision published 220 Wis 2d 0720, 585 NW2d 0161.

Issues: What are the limits to which a victim's actual criminal record can be considered to be relevant at a defendant's sentencing?

**State v. R. Mendoza**, 97-0952-CR. Review granted August 24, 1998. Court of Appeals, Dist. I, decision published 220 Wis 2d 0803, 584 NW2d 0174.

Issues: Did the court of appeals err as a matter of law when it concluded that automatic reversal is required when a circuit court errs in granting the state's motion to strike a prospective juror for cause?

**In re Commitment of Peter Kienitz: State v. Kienitz**, 97-1460. Review granted October 14, 1998. Court of Appeals, Dist. IV, decision published 221 Wis 2d 0275, 585 NW2d 0609.

Issues: Does the dangerousness standard under ch. 980, which requires proof that the person is "substantially probable" to reoffend, require definition and, if so, should it, consistent with ch. 51, be defined as

an extreme likelihood of reoffense?

**State v. J. Kiernan**, 97-2449-CR. Review granted December 8, 1998. Court of Appeals, Dist. II, decision published 221 Wis 2d 0126, 584 NW2d 0203.

Issues: Is the trial court obligated to grant a requested strike for cause when a prospective juror is not actually biased but the juror's participation may create the appearance of bias?

**State ex rel. Luedtke v. Bertrand**, 97-3238-W. Review granted October 5, 1998. Court of Appeals, Dist. IV, decision published 220 Wis 2d 0574, 583 NW2d 0858.

Issues: What are the pleading requirements for a person seeking a waiver of costs and fees under Wis. Stat. § 814.29, in order to bring a certiorari action challenging a prison disciplinary decision?

**County of Jefferson v. C. Renz**, 97-3512. Review granted December 17, 1998. Court of Appeals, Dist. IV, decision published 222 Wis 2d 0424, NW2d Pending.

Issues: Is the probable cause required for a preliminary breath test (PBT) under Wis. Stat. § 343.303, the same probable cause as that required to arrest for violation of the OWI statute, Wis. Stat. § 346.63(1)(a)?

**In re Commitment of Larry J. Sprosty: State v. Sprosty**, 97-3524. Review granted October 14, 1998. Court of Appeals, Dist. IV, decision published 221 Wis 2d 0401, 585 NW2d 0637.

Issues: Does a circuit court have authority to order a county to create programs or facilities to accommodate an order for supervised release under ch. 980, and, if so, who should bear the cost of the programs or facilities?

**State v. J. Erickson**, 98-0273-CR. Certification granted October 14, 1998. Court of Appeals, Dist. III, decision unpublished.

Issues: Should prejudice be presumed where the trial court fails to grant the parties all of the peremptory strikes allowed under Wis. Stat. § 972.03, and trial counsel fails to object?

**State v. D. Reitter**, 98-0915. Certification granted December 8, 1998. Court of Appeals, Dist. II, decision unpublished.

Issues: When a custodial defendant charged with operating while intoxicated invokes the right to counsel in an implied consent setting, must the police advise the suspect that the right to counsel does not apply in such a setting? ■

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## Revocation Litigation Alert

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The court of appeals, as noted, independently applies PLRA restrictions, even if there was full PLRA compliance in the circuit court. Thus, upon filing a notice of appeal, the PLRA litigant will have to jump through the same hoops. Though a bit trickier, mandamus in the supreme court directed to the court of appeals rather than to the trial court might lie when the notice of appeal is filed. *Marth* requires that a PLRA appellant provide the necessary documentation and agree to pay \$150 in filing fees, Wis. Stat. (Rule) § 809.25(2), despite indigency. Such an order is not reviewable by the supreme court on direct review because it is a mere procedural order, not an "adverse decision" on the merits of the case necessary to trigger jurisdiction under Wis. Stat. § 809.62(1). Therefore, it might be argued that mandamus is appropriate because no adequate legal remedy exists to remedy the problem.

The potential risk is that the court of appeals would dismiss the appeal if you don't comply with the PLRA non-compliance, and if the supreme court refuses to intervene, you'll be stuck with an appeal dismissed on procedural grounds. ■

# Recent law review articles

*This is a list of selected law review articles, published within the last few months, that are relevant to public defender practice.*

## CIVIL RIGHTS

Baldus, David C. et al. Racial discrimination and the death penalty in the post-Furman era: an empirical and legal overview, with recent findings from Philadelphia. 83 Cornell L. Rev. 1638-1770 (1998).

Goldberg, Seth A. Note. Unconstitutional death sentence affirmed on a technicality. (*O'Dell v. Netherland*, 117 S.Ct. 1969, 1997.) 8 Temp. Pol. & Civ. Rts. L. Rev. 169-191 (1998).

Crime, Recidivism, Public Perception and the Media. Panel discussion #1. Moderator: Wenona Whitfield; Panelists: Thomas C. Castellano, Hon. Phil Gilbert, Christi Parsons, Howard Peters and Dan Rostenkowski. 23 S. Ill. U. L.J. 297-317 (1999).

## CONSTITUTIONAL LAW

Bjerregaard, Beth. The constitutionality of anti-gang legislation. 21 Campbell L. Rev. 31-47 (1998).

Blume, John H., Theodore Eisenberg and Sheri Lynn Johnson. Post-McCleskey racial discrimination claims in capital cases. 83 Cornell L. Rev. 1771-1810 (1998).

Goldberg, John C.P. and Benjamin C. Zipursky. The moral of MacPherson. 146 U. Pa. L. Rev. 1733-1847 (1998).

Logan, Wayne A. The Ex Post Facto Clause and the jurisprudence of punishment. 35 Am. Crim. L. Rev. 1261-1318 (1998).

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Pittard, Kirk. Comment. Withstanding Batson muster: what constitutes a neutral explanation? 50 Baylor L. Rev. 985-1006 (1998).

Rudof, Paul R. Note. Throwing out the baby with the bathwater: Utah's Serious Youth Offender statute. 1998 Utah L. Rev. 443-464.

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Bowers, William J., Marla Sandys and Benjamin D. Steiner. Foreclosed impartiality in capital sentencing: jurors' predispositions, guilt-trial experience, and premature decision making. 83 Cornell L. Rev. 1476-1556 (1998).

Chodosh, Hiram E., et al. Indian civil justice system reform: limitation and preservation of the adversarial process. 30 N.Y.U. J. Int'l L. & Pol. 1-78 (1997-98).

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Gender, Racial, and Ethnic Fairness in the Courts. 1997 Ann. Surv. Am. L. 1-627 (1997).

Sundby, Scott E. The capital jury and absolution: the intersection of trial strategy, remorse, and the death penalty. 83 Cornell L. Rev. 1557-1598 (1998).

## CRIMINAL LAW AND PROCEDURE

Anderson, Arleen. Responding to the challenge of actual innocence claims after *Herrera v. Collins*. 71 Temp. L. Rev. 489-519 (1998).

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Bartlett, Melissa. Note. The use of "statutory" aggravating circumstances in Kentucky's sentencing procedure. (*Harris v. Commonwealth*, 793 S.W.2d 802, Ky. 1990.) 87 Ky. L.J. 203-229 (1998-99).

Bentele, Ursula. Back to an international perspective on the death penalty as a cruel punishment: the example of South Africa. 73 Tul. L. Rev. 251-304 (1998).

Brand, Lori L. Case note. Criminal law—Wyoming's indecent liberties statute—victim consent is now a "relevant fact for jury deliberation;" did Pierson put a bandage on Wyoming's Criminal Code bullet wound? (*Pierson v. State*, 956 P.2d 1119, Wyo. 1998.) 34 Land & Water L. Rev. 187-211 (1999).

Brennan, Lynne M. Comment. Drug courts: a new beginning for non-violent drug addicted offenders—an end to cruel and unusual punishment. 22 Hamline L. Rev. 355-397 (1998).

Brelvi, Farah Sultana. Student article. "News of the Weird": specious normativity and the problem of the cultural defense. 28 Colum. Hum. Rts. L. Rev. 657-683 (1997).

Caden, Colleen. Comment. Upholding district courts' statutory habeas power under the Immigration Laws of 1996. (*Mojica v. Reno*, 970 F. Supp. 130, E.D.N.Y. 1997, *aff'd* in part, dismissed in part, question certified sub nom. *Henderson v. INS*, 157 F.3d 106, 2d Cir. 1998.) 7 J.L. & Pol'y 169-208 (1998)

Chronakis, Philip C. Cold comfort for change: trends of preclusion in habeas corpus litigation. 76 U. Det. Mercy L. Rev. 17-44 (1998).

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- Courteau, Candace. Comment. The mental element required for accomplice liability: a topic note. 59 *La. L. Rev.* 325-346 (1998).
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- Eskow, Lisa R. and Kevin W. Cole. The unqualified paradoxes of qualified immunity: reasonably mistaken beliefs, reasonably unreasonable conduct, and the specter of subjective intent that haunts objective legal reasonableness. 50 *Baylor L. Rev.* 869-919 (1998).
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- Horwitz, Andrew. Taking the cop out of copping a plea: eradicating police prosecution of criminal cases. 40 *Ariz. L. Rev.* 1305-1378 (1998).
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### *Evidence from page 8*

that the trial court either grant or deny, on the record, that form of relief.

10. RULING ON RELIEF. Here again a failure of counsel to insist that the trial judge either grant or deny the requested relief will undoubtedly waive the issue of whether the defense was entitled to the specific relief requested.

11. RENEWAL. Even though an objection was previously overruled by the trial judge, defense counsel should renew the objection at every subsequent point in the proceedings where the challenged evidence is reiterated or discussed. Example: The defense renews its prior objection to the admission of this evidence and moves this Court to reconsider its prior ruling holding this evidence admissible.

Once the component parts of the oral objection are known and appreciated, a trial lawyer is able to fashion those separate parts into a procedural device with offensive and defensive capabilities which can pierce the adversary's suspect proof or shield the defense case from the adversary's improper or illegal tactics. The often overlooked vehicle of the oral objection is a complex tool which should be artfully employed initially to persuade the trial court to rule in the objector's favor, or failing that, to preserve the trial court's error. ■

### *Case Digest from page 27*

N.W.2d 382 (1985) does not apply because a juvenile commitment may be extended and time is not credited against it in the same way as toward an adult sentence.

### **ACCORD AND SATISFACTION NOT DEFENSE TO RESTITUTION CLAIM; DEFENDANT BEARS BURDEN OF PROVING THAT SETOFF FOR PRIOR PAYMENTS IS WARRANTED.**

*State v. Walters*, No. 98-0828-CR (Ct. App. Dist. IV, 2-25-99)  
For Appellant: Todd W. Bennett, Portage  
For Respondent: Jonathon G. Kaiser, Madison

The defendant was convicted of causing injury while intoxicated as a result of a crash in which she rear-ended the victim. Prior to sentencing, the defendant's insurance company paid the victim \$25,000 in exchange for a release of "all claims and damages." At the subsequent restitution hearing, the evidence showed that the victim suffered nearly \$41,000 in special damages—medical expenses and lost wages. The trial court determined that the defendant had the ability to pay \$24,000 and ordered that amount of restitution.

The court of appeals rejects the defendant's claim that restitution was barred by accord and satisfaction. Although the supreme court recently stated that accord and satisfaction is a defense to a restitution claim in *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997), the court of appeals finds that comment to be dicta. "Because restitution is not a claim belonging to the victim which he or she can release," the court concludes, "the settlement in the civil case was not an absolute bar to the circuit court's consideration of restitution in this companion criminal case."

The court also rejects the defendant's argument that his restitution obligation should be reduced by the amount previously paid. Although setoff principles apply to restitution, the court holds, the defendant here cannot rely on that doctrine because he produced no evidence about what portion of the \$25,000 paid was for special damages and what part was for general damages, which are not compensable through restitution. The defendant bears the burden of proof on that issue, the court concludes, and in the absence of evidence no part of the previous payment may be set off against the restitution. □

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### **Someone You Should Know...** *continued from page 12*

The improv group was a lot of fun. We did all kinds of things. Actually when we did the shows in Manhattan one of the guards talked to us after one of the shows and said, "This is a prison" and basically communicating to us that we didn't have to say "shucks" and "golly" and that we could actually use the real words. We were received very well. Actually one of the New York TV stations came and interviewed us and there was a little blurb on the news about us. We made it big in New York."

Deb's other passion is fine dining. She is a gourmet cook who likes to experiment with new recipes when she entertains friends. And, if you are going on a trip and want to know the best places to eat, give her a call. "By the beginning of my second year in law school, I was already getting a little tired of law students so I decided to bartend instead of being a law clerk."

Deb started hanging around with restaurant people and discovered the joy of cooking and fine dining. "I think I learned more of value from my restaurant friends than I did in law school that year."

*-This article was compiled by  
Paralegal Tracey J. Lencioni*

# Training Calendar

May 23-28, 1999  
Lake Lawn Lodge

SPD Trial Skills Academy

Contact: Deb Smith  
(608)267-0299

July 21-24, 1999  
Grand Hyatt, Washington, D.C.

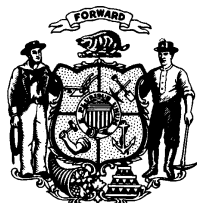
Pre- and Post-Trial Advocacy

Contact: Kate Carroll at NACDL  
(202)872-8600, ext. 221

September 15-17, 1999  
Hilton Hotel  
Milwaukee, WI

SPD Criminal Defense Conference

Contact: Deb Smith  
(608)267-0299



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