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

Office of the Wisconsin State Public Defender
315 North Henry Street
2nd Floor
Madison, WI 53703
Tel 608.266.0087
Fax 608.267.0584
Web www.wisspd.org

Wisconsin Defender

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From the Editor...

Attorneys who handle appeals in Wisconsin will find this issue of the *Wisconsin Defender* particularly useful. Marla Stephens, Director of the SPD's Appellate Division, has prepared a detailed summary of the new appellate rules that go into effect on July 1st. The new rules are the result of several years of hard work by the Wisconsin Judicial Council and many others who drafted, reviewed or suggested changes to the appellate rules.

This issue of the *Wisconsin Defender* also explains how attorneys can now access SPD Appellate Division briefs on-line from the SPD's web site, wisspd.org.

In addition, this issue contains an article about the appellate litigation in *State v. Thiel*, an update on legislation recently passed by the Wisconsin Legislature, and a report about changes made to various jury instructions by the Criminal Jury Instructions Committee.

Finally, this issue has its usual features including announcements of upcoming training events, summaries of cases recently decided in the Wisconsin appellate courts, and recent law review articles.

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

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NEW RULES OF APPELLATE PROCEDURE

By: Marla J. Stephens*

On April 30, 2001, the Wisconsin Supreme Court entered an order amending the rules of appellate procedure upon the petition of the Wisconsin Judicial Council.¹ Beginning in 1997, the Judicial Council's Appellate Procedure Committee solicited and reviewed suggestions for changes to the appellate rules. After numerous drafts of proposals were circulated among *ad hoc* committee members for comment, the full Council unanimously approved the rule change petition that was filed with the court in February 2000.

In an effort to make the rules easier to find and understand, subsections and titles were created and unnecessary language was deleted. In addition, case law affecting appellate procedure was incorporated into the rules. Judicial Council Notes explaining the changes are contained in the order for informational purposes. This article will summarize the amendments to existing rules and highlight the new rules that are effective on July 1, 2001. Changes that apply to all appeals will be noted first, followed by changes to the rules governing termination of parental rights appeals² and the rules governing criminal, civil commitment, protective placement, children's code and juvenile justice code appeals.³ Finally, the status of several proposals in the Judicial Council's petition that are still pending will be discussed.

Summary of Changes to Rules 808 and 809

Time limits. Most time limits that were 7 days are now 11 days, and most time limits that were 10 days are now 14 days.⁴ The new time limits remove the impact of WIS. STAT. § 801.15(5)(a) (when calculating time limits of less than 11 days, Saturdays, Sundays and holidays are excluded) and assist the court in automating its calculations of accurate deadlines.⁵ The time limits in WIS. STAT. §§ 809.105 (parental consent to abortion appeal) and 809.107 (termination of parental rights appeal) have not been enlarged.

Defect in notice of appeal. An inconsequential error in the content of the notice of appeal is not a jurisdictional defect.⁶ This rule codifies existing caselaw.⁷

***Marla J. Stephens** is Director of the SPD's Appellate Division. She received her undergraduate degree from the University of Wisconsin-Milwaukee in 1978 and her law degree from Marquette University in 1981. Prior to becoming Director, she litigated criminal appeals as an Assistant and First Assistant State Public Defender in the Milwaukee Appellate Office. Marla serves as vice-chair of the Wisconsin Judicial Council and is also a member of the Council's Criminal Procedure committee and co-chair of the Appellate Issues Committee.

Transcript preparation time limits and requests. Former WIS. STAT. §§ 809.11(4) and 809.16 contained the rules governing requests for transcripts and preparation of transcripts. Former rule 809.16 has been repealed, and its contents can now be found in rule 809.11(4)-(7). The appellant now has 14 days (increased from 10 days) after filing the notice of appeal to request transcripts for the other parties to the appeal and to file and serve the statement on transcript.⁸ A court reporter has 5 days within which to sign and return to the appellant a certification that the appellant has requested transcripts for the other parties to the appeal and arranged to pay for the copies.⁹ Within 14 days (increased from 10 days) of the filing of the statement on transcript, any other party to the appeal may file and serve a designation of additional transcripts to be included in the record on appeal. The appellant must then file a supplemental statement on transcript, or the other party may move the circuit court for an order requiring the appellant to do so.¹⁰ These requirements also apply to a cross-appellant.¹¹ Court reporters have 60 days to file and serve the transcripts identified in the appellant's statement on transcript and 20 days to file and serve transcripts following a request or order for supplementation.¹² WIS. STAT. §§ 809.11(4)-(7) do not apply in parental consent to abortion and termination of parental rights appeals.¹³

Alternative dispute resolution in the court of appeals. The court of appeals is authorized to establish an appellate mediation program.¹⁴ Participation in the appellate mediation program is voluntary, but participation in presubmission conferences may be mandatory.¹⁵ Only cases in which a docketing statement is required under WIS. STAT. § 809.10(1)(d) are eligible to participate in the program.¹⁶ Mediation is therefore not available in appeals brought under WIS. STAT. § 809.105 (parental consent to abortion), § 809.107 (termination of parental rights), § 809.32 (no merit report), or in criminal cases. The parties to the appeal shall pay the fees of a mediator providing services under the program, unless the fees are waived or deferred by the court.¹⁷ The rules and procedures governing the program shall be set forth in the court of appeals internal operating procedures.¹⁸ Any form of alternative dispute resolution, as defined in WIS. STAT. § 802.12(1), may be utilized.

Time limits tolled pending resolution of motions. The following motions toll the time for performing any act under the rules of appellate procedure from the date the motion is filed until the date the motion is decided by an order: a motion seeking an order affecting the disposition of an appeal or the content of a brief, a motion seeking to supplement or correct the record on appeal, and a motion seeking consolidation of cases.¹⁹ If a motion to supplement or correct the record is filed in circuit court, the clerk of circuit court may not transmit the record until the motion has been decided.²⁰ The motion to supplement or correct the record is deemed denied if not decided within 14 days after it is filed.²¹ If a motion to supplement or correct the record is granted, time limits

continue to be tolled until the supplemental record return is filed.²² A copy of any motion to supplement or correct the record filed in circuit court must be served on the clerk of the court of appeals.²³ The clerk of circuit court must be served with a copy of any motion filed under § 809.14 in the court of appeals because the motion tolls time limits.²⁴

Number of briefs. The number of briefs to be filed in the supreme court remains at 22, the number of briefs to be filed in the court of appeals remains at 10, and the number of copies of briefs that must be served on the other parties to the appeal remains at 3.²⁵ An indigent party appearing without an attorney, or a prisoner appearing without an attorney allowed to proceed without prepayment of fees under § 814.29(1m)(Prisoner Litigation Reform Act), must file 5 briefs in the court of appeals and serve one copy on the other parties in a three-judge appeal, and must file 3 briefs in the court of appeals and serve one copy on the other parties in a one-judge appeal.²⁶

Brief covers. Brief captions must include the names of all parties in the circuit court and indicate the status of the party in the circuit court and the court of appeals, if any.²⁷ For example, supreme court briefs should state party designations from the circuit court, court of appeals and supreme court, if applicable: Jane Doe, Defendant-Appellant-Petitioner.

Confidentiality. If a person is entitled to confidentiality under the law, the person must be identified by first name and last initial in all documents filed with the court.²⁸ The subjects of proceedings under chapters 48 (Children's Code), 51 (civil commitment), 55 (protective placement), 938 (Juvenile Justice Code) and in paternity cases are entitled to confidentiality. Different confidentiality and anonymity requirements apply in parental consent to abortion appeals.²⁹

Signature on briefs. An attorney who files a brief must sign it. If an attorney does not represent a party, that party must sign the brief.³⁰

References to parties within the brief. Parties must be referred to by name throughout the argument section, not by their status on appeal or their party designation.³¹

Reply briefs. Reply briefs must contain citations to the record and a conclusion.³²

Authorized methods of brief binding. Velobinding is added to stapling and hot glue (or "perfect" binding) as an authorized binding method. The clerk of court must authorize any other binding method before the brief is filed.³³

Time limits for respondent's brief and reply brief. The respondent's brief must be filed within the later of: 30 days after service of the appellant's brief, plus 3 days if service is by mail; or 30 days after the appellant's brief is accepted for filing by the clerk of the court of appeals.³⁴ The appellant's

reply brief is due on the later of: 15 days after service of the respondent's brief, plus 3 days if service is by mail; or 15 days after the respondent's brief is accepted for filing by the clerk.³⁵

Briefing cross-appeals. The cross-appeal briefing requirements have been rewritten for clarification.³⁶

Limitation of issues in appeal of non-final order. If a petition for leave to appeal a non-final order is granted, the court of appeals may specify the issue or issues it will review.³⁷

Citation of supplemental authority. If new authority is issued after briefing or after oral argument, but before decision, a party may notify the court by sending a letter to the clerk with a copy to the other parties to the appeal.³⁸ The letter must state the citation for the new authority, identify the page of the brief or point of oral argument to which it pertains, and briefly discuss the proposition that the authority supports.³⁹ If the new authority is a court of appeals opinion, it is considered issued on the date that publication of the opinion is ordered.⁴⁰ A response letter may be sent to the clerk, with copies to the other parties to the appeal, within 11 days after the supplemental authority letter is served.⁴¹ The response letter must briefly discuss why the supplemental authority does not support the stated proposition.⁴²

Objections to circuit court judgment or order entered after remand. If an appellate court remands the record to the circuit court for action upon specific issues, or for additional proceedings while the appeal is pending, the appellate court, in the pending appeal, may review the judgment or order that the circuit court entered following the remand.⁴³ A party must file in the appellate court a written statement of objections to the circuit court judgment or order within 14 days after the record is returned to the appellate court.⁴⁴ A party that files a written statement of objections need not file a notice of appeal or cross-appeal.⁴⁵ The obligations of a person filing a statement of objections are the same as those of a cross-appellant.⁴⁶ The statement of objections should advise the court whether and how the issues have changed after the remand.

Reconsideration of a court of appeals opinion or order. A party may file a motion for reconsideration in the court of appeals within 20 days after the date of a decision or order.⁴⁷ The motion must state with particularity the points of law or fact alleged to be erroneously decided and must include a supporting argument.⁴⁸ No response to the motion may be filed unless ordered by the court.⁴⁹ An amended decision or order will not be issued unless the court first orders a response.⁵⁰ The motion and any response shall not exceed 5 pages in monospaced font or 1,100 words in proportional serif font.⁵¹ In response to a motion for reconsideration, the court shall either issue an amended decision or order, or the court shall issue an order denying the motion.⁵² The court

may also reconsider a decision or order on its own motion at any time prior to remittitur if no petition for review is filed, or within 30 days after a petition for review is filed in the supreme court.⁵³ No motion for reconsideration is permitted in a § 809.105 (parental consent to abortion) case.⁵⁴ The time limit for filing a motion for reconsideration may not be enlarged.⁵⁵ Remittitur is stayed pending resolution of the motion for reconsideration.⁵⁶ Warning: the time limit for filing a petition for review in the supreme court is not tolled by filing a motion for reconsideration.

Petition for Review. Both the petition for review and the response to the petition for review must have white covers.⁵⁷ Ten copies of each must be filed with the clerk of the supreme court.⁵⁸

Sanctions. The court of appeals may sanction a party who violates an order of the court.⁵⁹

Termination of Parental Rights (TPR) Appeals - transcript and circuit court case record request, transcript preparation, notice of appeal and transmittal of record. The circuit court case record and the transcript of the reporter's notes must be requested by a person who files a Notice of Intent to Appeal within 15 days after filing the Notice of Intent to Appeal.⁶⁰ The transcript must be served on that person and filed in circuit court, and the circuit court case record must be served on that person, within 30 days after the request.⁶¹ The person must file and serve a notice of appeal within 30 days after service of the transcript.⁶² The clerk of circuit court must transmit the record on appeal to the court of appeals within 15 days after the notice of appeal is filed.⁶³

TPR appeals - statement on transcript. The appellant must request copies of the transcript for the other parties to the appeal, and make arrangements to pay for the copies, within 5 days after filing the notice of appeal.⁶⁴ The appellant's statement on transcript, containing the court reporter's certification that the appellant ordered transcript copies for the other parties to the appeal and made arrangements to pay for the copies, must be filed in the court of appeals and served on the other parties to the appeal and the clerk of the circuit court within 5 days after filing the notice of appeal.⁶⁵ The court reporter must serve copies of the transcript on the other parties to the appeal within 5 days after the appellant's request.⁶⁶

TPR appeals – no-merit procedure. A no-merit report, response to no-merit report and supplemental no-merit report under WIS. STAT. § 809.32 may be filed in a TPR appeal.⁶⁷ The no-merit time limits track the briefing time limits in WIS. STAT. § 809.107(6). The appointed attorney must file the no-merit report and certification, and serve copies of the no-merit report, certification and the record on appeal on the client-parent within 15 days after the record on appeal is filed.⁶⁸ The client-parent may file a response to the no-merit

report within 10 days after service of the no-merit report.⁶⁹ Within 5 days after a response to the no-merit report is filed, the clerk of the court of appeals must send a copy of the response to the appointed attorney.⁷⁰ The appointed attorney may file a supplemental no-merit report and affidavits within 10 days after receiving the response to the no-merit report.⁷¹

TPR appeals - ineffective assistance of counsel claims, and other claims requiring post-judgment fact-finding. If the appellant intends to appeal on any ground that requires fact-finding after entry of the final judgment or order in the circuit court, the appellant must file a motion in the court of appeals raising the issue and asking the court to retain jurisdiction over the appeal and remand the case to the circuit court to hear and decide the issue.⁷² The motion must be filed within 15 days after the record on appeal is filed.⁷³ If the court of appeals grants the motion, it shall set time limits for the circuit court to hear and decide the issue, for the appellant to request a transcript of the remand proceedings, and for the court reporter to file and serve the transcript of the remand proceedings, and extend the time limit for the appellant to file a brief presenting all grounds for relief in the pending appeal.⁷⁴

Rule 809.30 appeals – time limit for state public defender's appointment of counsel and requests for circuit court case record and transcript. The state public defender must appoint counsel and request a transcript of the reporter's notes and a copy of the circuit court case record within 30 or 50 days after the state public defender receives from the clerk of the circuit court a file-stamped copy of the notice of intent to pursue postconviction relief, a file-stamped copy of the judgment or order specified in the notice of intent, a list of court reporters for the circuit court proceedings and a list of any transcripts in the circuit court file.⁷⁵ The state public defender must appoint counsel within 30 days after receipt of the clerk's materials if indigence does not need to be re-determined, and within 50 days after receipt of the clerk's materials if indigence must be determined or re-determined.⁷⁶

Rule 809.30 appeals – time limit for person denied state public defender representation to request circuit court case record and transcript. A person who is denied representation by the state public defender must request a transcript of the reporter's notes, and may request a copy of the circuit court case record, within 90 days after filing the notice of intent to pursue postconviction relief.⁷⁷

Rule 809.30 appeals – service of circuit court case record and transcript. The clerk of circuit court must serve a copy of the circuit court case record, and the court reporter must file and serve the transcript, within 60 days of a request to do so.⁷⁸

Rule 809.30 appeals – notice of appeal. The notice of appeal must state the last date of service of the copy of the transcript or the circuit court case record if no postconviction motion

is filed, the date of the order determining the postconviction motion, or the date of any other notice of appeal deadline that was set by the court of appeals.⁷⁹ A copy of the order appointing counsel must be attached if counsel was appointed by the state public defender.⁸⁰

Rule 809.30 appeals – postconviction motion. A notice of motion should not be filed with a postconviction motion.⁸¹ A postconviction motion is deemed denied if it is not determined by the circuit court within 60 days after it is filed, unless the court of appeals extends the time limit for decision at the request of the defendant or the circuit court.⁸²

Rule 809.30 appeals – motion to withdraw as appointed counsel. An attorney appointed by the state public defender who seeks to withdraw from the case must file a motion to withdraw and serve a copy of the motion on the client and on the state public defender appellate intake unit in the Madison appellate office.⁸³ The motion must be filed in the circuit court if no notice of appeal has been filed.⁸⁴ If a notice of appeal has been filed, the motion must be filed in the court of appeals.⁸⁵ Within 20 days after the motion is served, the state public defender must determine whether successor counsel will be appointed for the client, and notify the court of its determination.⁸⁶ Before granting the motion to withdraw, the court shall consider the state public defender's determination and whether the client waives the right to counsel.⁸⁷ Ordinarily, a disagreement between the client and appointed counsel about the merits of an appeal will not present grounds for withdrawal.⁸⁸ When the motion to withdraw is filed in circuit court, the attorney must prepare and serve a copy of the order determining the motion to withdraw upon the client and the appellate intake unit in the Madison appellate office of the state public defender.⁸⁹ The order must be served within 14 days after the circuit court decides the motion to withdraw.⁹⁰ The withdrawal procedure is not intended to change existing law concerning when a withdrawal motion is required.⁹¹

Review of circuit court order determining release from custody pending appeal. The defendant or the state may seek review of a circuit court order concerning release on bond pending seeking postconviction relief or pending appeal.⁹² The motion must be filed within 14 days after the entry of the circuit court order.⁹³ The party seeking review must attach to the motion: a copy of the judgment of conviction or other final judgment or order, a copy of the order regarding release, the circuit court's statement of reasons for its release decision, and the transcript of any release proceedings in the circuit court or a statement explaining why no transcript is available.⁹⁴ The opposing party may file a response to the motion within 14 days after the motion is filed.⁹⁵

No-merit procedure – when applicable. The no-merit procedures are required only on direct appeal.⁹⁶ A no-merit report must be filed when the client requests a no-merit report

or when the client declines to consent to have the appointed attorney close the file without further representation by the attorney.⁹⁷

No-merit procedure – notice of appeal, statement on transcript and no-merit report. The notice of appeal must be identified as a no-merit notice of appeal and must state the date on which the no-merit report is due and how the date has been calculated.⁹⁸ The no-merit notice of appeal, statement on transcript and no-merit report must be filed either 180 days after the last transcript is received,⁹⁹ or 60 days after the entry of an order determining a postconviction motion.¹⁰⁰ Copies of the transcript are not required for the other parties to the appeal.¹⁰¹ Copies of the notice of appeal and statement on transcript must be served on the state.¹⁰²

No-merit procedure – copies of transcript and circuit court case record for client. If a no-merit report is filed, the attorney must serve copies of the transcript and the circuit court case record on the client within 14 days after receiving a request from the client for the copies.¹⁰³ The attorney must file a statement in the court of appeals that service of the copies has been made upon the client.¹⁰⁴

No-merit procedure – client counseling and notification requirements, certification of compliance. Before filing a no-merit report, the attorney must discuss with the client all potential issues identified by the attorney and by the client, and the merit of an appeal on these issues.¹⁰⁵ The attorney must inform the client that the client has three options: to have the attorney file a no-merit report, to have the attorney close the file without an appeal, or to have the attorney close the file and to proceed with an appeal without an attorney or with another attorney retained at the client's expense.¹⁰⁶ The attorney must inform the client that a no-merit report will be filed if the client requests it or if the client does not consent to have the attorney close the file without further representation by the attorney.¹⁰⁷ The attorney must inform the client that, if a no-merit report is filed, the attorney will serve a copy of the transcripts and the circuit court case record on the client if the client so requests.¹⁰⁸ The attorney must inform the client that, if the client chooses to proceed with an appeal or if the client chooses to have the attorney close the file without an appeal, the attorney will forward the attorney's copies of the transcripts and the circuit court case record to the client if the client so requests.¹⁰⁹ The attorney must inform the client that the client may file a response to the no-merit report, and that if the client files a response, the attorney may file a supplemental no-merit report, and affidavit or affidavits containing facts outside the record, possibly including confidential information, to rebut allegations in the client's response to the no-merit report.¹¹⁰ Finally, the attorney must append to the no-merit report a signed certification that the attorney has complied with these counseling and notification requirements.¹¹¹ A form for the certification is contained in the new rule.¹¹²

No-merit procedure – response to no-merit report. If a client files a response to the no-merit report, the clerk of the court of appeals shall, within 5 days after the response is filed, send a copy of the response to the attorney.¹¹³

No-merit procedure – supplemental no-merit report. If the attorney is aware of facts outside the record that rebut allegations in the client's response to the no-merit report, the attorney may file a supplemental no-merit report and affidavit or affidavits including facts outside the record.¹¹⁴ A supplemental no-merit report and affidavit or affidavits must be filed and served on the client within 30 days after the attorney receives a copy of the client's response to the no-merit report.¹¹⁵ The attorney must file a statement in the court of appeals that service has been made upon the client.¹¹⁶

No-merit procedure – remand to circuit court for fact-finding prior to decision. If the client and the attorney allege disputed facts regarding matters outside the record, and if the court of appeals determines that the client's version of the facts, if true, would raise an arguably meritorious issue for appeal, the court of appeals must remand the case to the circuit court for an evidentiary hearing and fact-finding on the disputed facts before deciding whether to accept or reject the no-merit report.¹¹⁷

Summary of pending proposals

Appeal in ch. 980 (sexually violent person commitment) and § 971.17 (not guilty by reason of mental disease or defect commitment) proceedings. The Judicial Council petitioned for a rule change allowing these appeals to proceed under the criminal appellate rules set forth in WIS. STAT. §§ 809.30-.32, which govern other appeals (under ch. 48, 51, 55 and 938 and in criminal cases) in which the state public defender provides representation. The supreme court determined that this proposal exceeds its rule making authority, and the Judicial Council has requested legislation to enact this proposal. The Council's request for legislation would affect §§ 808.04(3) and (4), 809.30(1) and (2), 809.40(1) and create §§ 971.17(7m) and 980.061. The supreme court has taken this proposal under advisement pending legislative action.

Suppression issues in ch. 48 and 938 cases. The Judicial Council petition requested a rule allowing suppression of evidence issues to be raised on appeal following an admission to a petition in a ch. 48 or 938 case. Under current law, these issues are waived by the entry of an admission and must be preserved by taking the case to trial. The proposal would extend the exception to the waiver rule in criminal cases to cases under the children's and juvenile justice code. The supreme court determined that this proposal exceeds its rule making authority, and the Judicial Council has requested legislation to enact it. The legislation request would create § 809.40(4). The supreme court has taken this proposal under advisement pending legislative action.

Tolling the time limit for filing a petition for review in the supreme court while a motion for reconsideration is pending in the court of appeals. The Judicial Council petition proposed a rule that would toll the time limit for filing a petition for review until the court of appeals disposes of a timely filed motion for reconsideration of its opinion or order. The supreme court determined that this proposal exceeds its rule making authority, and the Judicial Council has requested legislation to enact it. The legislation request proposes amendments to §§ 808.10, 809.62(1) and 809.32(4) and the creation of § 808.10(2). The supreme court has also taken this proposal under advisement pending legislative action.

Mailbox rule – briefs deemed filed upon mailing. The supreme court has deferred a decision on this Judicial Council proposal until it decides *State ex rel. Nichols v. Litscher*, case no. 00-0853-CR (Issue: should Wisconsin adopt a "mailbox rule" whereby a petition for review from a pro se prisoner would be deemed filed when the petition is delivered to the prison authorities for mailing?). The Council's petition proposed the creation of §§ 809.80(3)(b)-(5): a brief would be timely filed if, on or before the last day for filing, the brief was deposited in the U.S. mail for first class delivery or more expeditious means, or if the brief was dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days. An affidavit of mailing or dispatch would be required. A brief from a person in an institution would be timely filed if, on or before the last day for filing, it was deposited in the institution's internal mail system. An affidavit or certification of mailing would be required. The proposed rule would not apply to petitions for review.

Additional resources and acknowledgements

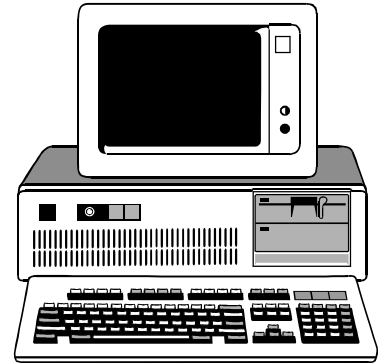
Additional materials and information about the revisions to the appellate rules can be found at the State Bar of Wisconsin's Appellate Practice Section web site: <http://www.wisbar.org/sections/appelprac/>.

The Judicial Council Appellate Procedure Committee members included the Hon. Ted E. Wedemeyer, Jr., Presiding Judge, Court of Appeals, District I, co-chair; Marla J. Stephens, Director, Wisconsin Public Defender Appellate Division, co-chair; Mary E. Burke, Assistant Attorney General, Wisconsin Department of Justice Criminal Appeals Unit; and Margaret Carlson, Chief Staff Attorney, Court of Appeals. Advisory committee members, who drafted, reviewed or suggested changes in the rules, were: Shelley A. Grogan, Judicial Clerk to Judge Wedemeyer; Hon. Daniel P. Anderson, Judge, District II Court of Appeals; Marilyn L. Graves, Clerk of Supreme Court and Court of Appeals; Cornelia G. Clark, Clerk of Supreme Court and Court of Appeals; Joseph M. Wilson, Supreme Court Commissioner; Matthew J. Frank, Administrator, Wisconsin Department of

Please see "Rules" on Page 12

SPD's On-Line Brief Bank Now Up and Running

State Public Defender Appellate Division briefs are now available on-line. Developed in support of the agency's strategic objectives to continuously improve client representation and to leverage information technology to improve communication and efficiency, the brief bank is located on the new SPD website [wisspd.org]. The brief bank contains more than 300 briefs filed by Appellate Division staff attorneys in the Wisconsin Supreme Court and courts of appeal.



The brief bank was created with both "browse" and "search" functions. The search option supports two types of search requests—a natural language search or a boolean search. A natural language search allows entry of any sequence of text (like a sentence, phrase, or question) and then retrieves and sorts the briefs by their relevance to the search request. A boolean search allows entry of words or phrases linked by connectors such as *and*, *or*, or *w/5* that indicate a relationship between the search terms. [e.g. evidence *and* gun (both terms will appear in the brief); gun *or* pistol (either term will appear in the brief); or evidence *w/5* gun (*evidence* must occur within 5 words of *gun*).

In the browse section, the briefs are organized by topic. There is a table listing general topics (e.g. APPEALS AND POSTCONVICTION PROCEEDINGS; BAIL/BOND; CIVIL COMMITMENTS; CONFESSIONS; CONSTITUTION etc.). Most categories also list subtopics (e.g. CONFESSIONS, lists subtopics: Interrogation After Rights Attach; Voluntariness; Miranda Issues; and Other). Selecting a topic or subtopic produces a list of cases and issue headnotes with links to the brief and decision in each case.

The briefs are in PDF format and you must have Adobe Acrobat Reader to view them. Acrobat Reader may be downloaded free of charge (there is a link to do so on the first page of the brief bank). The brief bank format was designed by Madison Appellate First Assistant State Public Defender Joseph Ehmann and implemented with the help of SPD IT support staff, in particular Ron Porter.



In addition to the brief bank, the new SPD website contains other valuable information for the practitioner. Case summaries of recent appellate decisions prepared by Assistant Legal Counsel Bill Tyroler are listed with links to the decisions. The SPD Training, Assigned Counsel, and Appellate Divisions each have linked pages with useful information such as outlines, forms, and upcoming training or certification opportunities. There is a specialty practice section that currently contains information for Chapter 980 (sexually violent persons) cases. The site also contains a personnel and employment link, an agency directory, the SPD Wisconsin Forward application, information about the Justice Without Borders initiative, and much more.

Both the brief bank and the SPD webpage are works in progress. The Public Defender hopes the information contained therein is useful. If you have questions or comments, please let us know by using the e-mail link on the bottom of the front page of the site—wisspd.org.

APPELLATE NEWS

In this issue's Appellate News, Assistant State Public Defender John Lubarsky* provides a synopsis of the appellate litigation in *State v. Thiel*. Attorney Lubarsky explains the issues and the courts' decisions in Thiel's three separate appellate cases.

Few cases have resulted in the destruction of more trees than those of *State v. Dennis Thiel*. Of all the cases I've litigated on the appellate level none has had as many procedural twists and turns. The litigation in *State v. Thiel* has resulted in three published decisions, one by the Wisconsin Supreme Court (*Thiel I*)¹, and two by the District II Court of Appeals (*Thiel II*)², and *Thiel III*)³. What follows is a history of litigation efforts on behalf of Mr. Thiel. Hopefully contained within are some practice pointers for attorneys involved in the defense of Ch. 980 cases.

The first Thiel case at first blush seemed destined for a no-merit report (a thorny problem in and of itself since Ch. 980 contains no no-merit procedure). As part of that process, I considered whether the evidence presented at Thiel's trial was sufficient to support his commitment. I looked at Wis. Stat. §980.05(3), which sets forth the requirement that the state prove the allegations in the petition beyond a reasonable doubt. I next looked to Wis. Stat. §980.02(2) to see what allegations were required in the petition. Section 980.02(2), requires *inter alia* that a petition pursuant to Ch. 980 allege that the subject of the petition is within 90 days of his/her discharge or release on parole at the time the petition is filed. Comparing the language of §980.05 and §980.02(2), it appeared that the 90-day requirement was an essential allegation of the petition and therefore a fact the state was required to prove at trial.

In Mr. Thiel's trial, the state never directly proved the fact of his release date. Arguably, however, there was some evidence from which the court could infer a release date.

While this issue of arguable merit took Mr. Thiel's case off the no-merit track, I certainly was not optimistic Mr. Thiel would get anywhere. His trial lawyer never raised the issue and the record of his trial arguably

*John Lubarsky has worked for the State Public Defender's Office as both a trial attorney and an appellate attorney since 1979. He figures the litigation in the Thiel case will take him to retirement.



contained enough evidence from which the trier of fact could infer that Mr. Thiel was within 90 days of his release at the time the petition was filed.

The court of appeals granted leave to raise the issue and certified the claim to the Wisconsin supreme court. In the Wisconsin supreme court, Thiel claimed: (1) that the state was required to prove proximity to discharge date at the time the petition was filed, (2) that the issue could be raised for the first time on appeal, and (3) that the record contained insufficient evidence of proximity to discharge to support his commitment.

By the time the case was argued I thought there was at least a chance the court would accept the argument that the state was required to prove Mr. Thiel's proximity to his discharge date at the time the petition was filed. It was an argument based on a strict construction of the statute and I thought for that reason, the argument would have some appeal to the conservative members of the court. No way, I thought, would the court buy my entire argument and let Mr. Thiel out from under his commitment⁴. I was both right and wrong.

The Wisconsin supreme court held that the state was required to prove that the respondent in a 980 petition was within 90 days of his discharge at the time the petition was filed, and that in Mr. Thiel's case, it failed to do so. Moreover, the court held that Mr. Thiel was entitled to raise his claim for the first time on appeal. But having said all that, the court raised the question of the remedy for the state's failure to meet its burden. The court found that neither side had addressed the remedy issue and that significant questions remained unanswered in that regard. The supreme court then remanded the case back to the District II Court of Appeals to consider the remedy issue.

Back now in the court of appeals, Mr. Thiel argued he was entitled to have his commitment vacated. Just as a defendant in a criminal case is entitled to a judgment of acquittal in the event the state fails to meet its evidentiary burden, the respondent in a 980 case should be entitled to the same remedy. Further because Thiel is entitled to the same constitutional rights provided to criminal defendants at trial by virtue of Wis. Stat.

— Please see "Thiel" on Page 14

NEWS BRIEFS

A recent study of newspaper and television crime coverage prepared by the Justice Policy Institute and the Berkeley Media Studies Group found that depictions of crime in the news are not reflective of the rate of crime generally, the proportion of crime which is violent, the proportion of crime committed by people of color, or the proportion of crime committed by youth. The problem is not the inaccuracy of individual stories, but that the cumulative choices of what is or is not reported in the news gives the public a false picture of higher frequency and severity of crime than is actually the case.

Specific findings from the study include:

1. The news media report crime, especially violent crime, out of proportion to its actual occurrence.

- ◆ *Although homicides made up from .1% to .2% of all arrests, homicides made up 27% to 29% of the crimes reported on the evening news.*
- ◆ *Nationally, crime dropped by 20% from 1990 to 1998 while network TV showed an 83% increase in crime news. Homicide coverage increased 473% from 1990 to 1998 while actual homicides were down 33% during the same time period.*

2. The news media report crime as a series of individual events without adequate attention to its overall context.

- ◆ *The lack of explanations for crime and violence complicates the problem of exaggerated frequency in news stories by leaving the impression that violence is inevitable.*

3. The news media, particularly television news, unduly connect race and crime, especially violent crime.

- ◆ *6 out of 7 studies that clearly identify the race of victims found more attention was paid to white victims than to black victims.*
- ◆ *In 75% of the studies, minorities were overrepresented as perpetrators of crime.*

4. Few studies examine portrayals of youth on the news. Those that do find that youth rarely appear in the news and when they do, it is connected to violence.

- ◆ *An analysis of Hawaii's major dailies over 10 years showed a 30-fold increase in coverage of youth crime, despite declining rates of youth crime.*
- ◆ *Education stories comprised 26% of all stories involving youth. This is appropriate given that the majority of youth between the ages of 5 and 17 attend school. However, even though only 3 out of 100 youth are either a victim or a perpetrator of violence, violence stories made up 25% of all youth coverage.*

- 76% of the public say they form their opinions about crime from what they see or read in the news



- In a *Los Angeles Times* poll, 80% of respondents stated that the media's coverage of violent crime had increased their personal fear of being a victim



- Although violent crime by youth in 1998 was at its lowest point in the 25-year history of the National Crime Victimization Survey, 62% of poll respondents felt that juvenile crime was on the rise.
- During the 1998-99 school year, there was less than a 1 in 2 million chance of being killed in a school in America, yet 71% of respondents to an *NBC/Wall Street Journal* poll felt that a school shooting was likely in their community.
- Despite a 40% decline in school-related deaths between 1998 and 1999 and declines in other areas of youth violence, respondents to a *USA Today* poll were 49% more likely to express fear of their schools in 1999 than in 1998.



What can we do to help generate a fairer depiction of youth crime?

- Work with the media to give a more accurate picture of youth crime.
- Engage the media in a dialogue about their coverage.
- Make data available.
- Prepare young people to speak for themselves, then give them the opportunity to do so.
- Make yourself available to the media.

"Rules" continued from Page 8

Justice Legal Services Division; Kenneth Lund, Deputy First Assistant, Wisconsin Public Defender Appellate Division; Keith A. Findley, University of Wisconsin Law School; Robert R. Henak, Henak Law Offices, S.C., for the Wisconsin Association of Criminal Defense Lawyers; Patrick K. Stevens, Wisconsin Manufacturers & Commerce; Lynn R. Laufenberg, Laufenberg Law Offices; Charles H. Barr, Croen & Barr, for Milwaukee Bar Association Bench & Bar Court of Appeals Committee; Thomas McAdams, Assistant District Attorney for Milwaukee County, for Wisconsin District Attorney's Association; Robert D. Donohoo, Deputy District Attorney for Milwaukee County; Werner E. Scherr, Kasdorf, Lewis & Sweitlik, S.C.; Thomas M. Olson, S.C., The Law Center; Elizabeth Ewald Herrick, Attorney at Law; and Donald L. Romundson, Godfrey & Kahn, S.C., for the Appellate Practice Section, State Bar of Wisconsin. The Judicial Council gratefully acknowledges their contributions.

Endnotes

¹Order No. 00-02, 2001 WI 39.

²Wis. Stat. § 809.107.

³Wis. Stat. §§ 809.30-32.

⁴Wis. Stat. §§ 808.07(6)(motion objecting to sufficiency of surety for undertaking costs due 14 days after service of copy of undertaking), 809.11(4) and (5)(appellant's request for copies of transcript for other parties to appeal and statement on transcript due 14 days after filing notice of appeal), 809.13(party's response to petition for leave to intervene in appeal due 11 days after service of petition), 809.14(1) and (2)(response to motion seeking an order or other relief due 11 days after service of motion, and motion for reconsideration of procedural order due 11 days after service of order), 809.19(7)(c)(non-party motion requesting permission to file brief due 14 days after filing of respondent's brief), 809.25(1)(c)(motion objecting to statement of costs due 11 days after service of statement), 809.32(4)(response to no-merit petition for review due 14 days after service of supplemental petition), 809.41(1) and (4)(respondent's motion for three-judge panel due 14 days after service of notice of appeal or with the response to a petition for leave to appeal a non-final order, attorney general may file response to motion for three-judge panel within 11 days after service in any case in which the state is a party, respondents motion for hearing in county of origin due 14 days after service of notice of appeal), 809.50(1) and (2)(petition for leave to appeal non-final judgment or order due 14 days after entry of judgment or order, opposing party's response to petition due within 14 days after service of petition), 809.51(2)(response to request for court to exercise supervisory jurisdiction or original jurisdiction to issue a prerogative writ), 809.60(1) and (2)(petition to bypass court of appeals and response to same), 809.62(3)(response to petition for review), 809.70(2)(response to petition requesting that supreme court take jurisdiction over original action due 14 days after service of court order to file response).

⁵Wisconsin Judicial Council Note, 2001 following Wis. Stat. §§ 808.07(6).

⁶Wis. Stat. § 809.10(1)(f).

⁷*Northridge Bank v. Community Eye Care Ctr.*, 94 Wis. 2d 201, 203, 287 N.W.2d 810, 811 (1980) and *Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267, 269 n.2 (1992).

⁸Wis. Stat. § 809.11(4)(a) and (b).

⁹Wis. Stat. § 809.11(7)(b).

¹⁰Wis. Stat. § 809.11(5).

¹¹Wis. Stat. § 809.11(6).

¹²Wis. Stat. § 809.11(7)(a).

¹³Wis. Stat. §§ 809.105 and 809.107.

¹⁴Wis. Stat. § 809.17(2m).

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸*Ibid.*

¹⁹Wis. Stat. § 809.14(3)(a) and (b).

²⁰Wis. Stat. § 809.15(4)(c).

²¹*Ibid.*

²²Wis. Stat. § 809.14(3)(b).

²³Wis. Stat. § 809.15(4)(c).

²⁴Wis. Stat. §§ 809.14(3)(c) and 809.82(2)(d).

²⁵Wis. Stat. § 809.19(8)(a)1. and 2.

²⁶Wis. Stat. § 809.19(8)(a)3 and 809.43(2)

²⁷Wis. Stat. § 809.19(9).

²⁸Wis. Stat. § 809.81(8).

²⁹Wis. Stat. § 809.105(12).

³⁰Wis. Stat. § 809.19(1)(h).

³¹Wis. Stat. § 809.19(1)(i).

³²Wis. Stat. § 809.19(4).

³³Wis. Stat. § 809.19(8)(b)4.

³⁴Wis. Stat. § 809.19(3)(a).

³⁵Wis. Stat. § 809.19(4)(a).

³⁶Wis. Stat. § 809.19(6).

³⁷Wis. Stat. § 809.50(3).

³⁸Wis. Stat. § 809.19(10).

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹Wis. Stat. § 809.19(11).

⁴²*Ibid.*

⁴³Wis. Stat. § 808.075(8).

⁴⁴*Ibid.*

⁴⁵*Ibid.*

⁴⁶See Judicial Council Note, 2001 to Wis. Stat. § 808.075.

⁴⁷Wis. Stat. § 809.24(1).

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹*Ibid.*

⁵²Wis. Stat. § 809.24(2).

⁵³Wis. Stat. § 809.24(3).

⁵⁴Wis. Stat. § 809.24(4).

⁵⁵Wis. Stat. § 809.82(2)(e).

⁵⁶Wis. Stat. § 809.26(1).

⁵⁷Wis. Stat. § 809.62(4).

⁵⁸*Ibid.*

⁵⁹Wis. Stat. § 809.83(2).

⁶⁰Wis. Stat. § 809.107(4).

⁶¹*Ibid.*

⁶²Wis. Stat. § 809.107(5)(a).

⁶³Wis. Stat. § 809.107(5)(b).

⁶⁴Wis. Stat. § 809.107(5)(c).

⁶⁵Wis. Stat. § 809.107(5)(d).

⁶⁶Wis. Stat. § 809.107(5)(e).

⁶⁷Wis. Stat. § 809.107(5m).

⁶⁸*Ibid.*

⁶⁹*Ibid.*

⁷⁰*Ibid.*

⁷¹*Ibid.*

⁷²Wis. Stat. § 809.107(6)(am).

⁷³*Ibid.*

⁷⁴*Ibid.*

⁷⁵Wis. Stat. § 809.30(3)(e).

⁷⁶*Ibid.*

⁷⁷Wis. Stat. § 809.30(3)(f).

⁷⁸Wis. Stat. §§ 809.30(2)(g) and 967.06.

⁷⁹Wis. Stat. § 809.10(1)(b)5.

⁸⁰Wis. Stat. § 809.10(1)(b)6.

⁸¹Wis. Stat. § 809.30(2)(h).

⁸²Wis. Stat. § 809.30(2)(i).

⁸³Wis. Stat. § 809.30(4)(a).

⁸⁴*Ibid.*

⁸⁵*Ibid.*

⁸⁶Wis. Stat. § 809.30(4)(b).

⁸⁷Wis. Stat. § 809.30(4)(c).

⁸⁸See Judicial Council Note, 2001 following Wis. Stat. § 809.30(4):

Judicial Council Note, 2001:

...

Subsection (4) establishes a procedure for making and determining motions to withdraw by appointed counsel. This rule does not change existing law concerning when a withdrawal motion is necessary. See e.g. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 622-24, 516 N.W.2d 362 (1994).

Often motions to withdraw are the result of a disagreement between appointed counsel and the defendant, sometimes inaccurately called a “conflict,” about the existence of a meritorious issue for appeal, or about the manner in which any such issue should be raised. It is counsel’s duty to decide what issues in a case have merit for an appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). Postconviction counsel is entitled to exercise reasonable professional judgment in winnowing out even arguable issues in favor of others perceived to be stronger. *Id.* Counsel’s failure to raise an issue on direct appeal may prevent the defendant from raising it in a subsequent s. 974.06 collateral review proceeding, absent “sufficient reason.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

The rules of appellate procedure require that a defendant choose whether to proceed with the assistance of appointed counsel or proceed *pro se*. *State v. Redmond*, 203 Wis. 2d

13, 552 N.W.2d 115 (Ct. App. 1996). A defendant has neither the right to appointed counsel of choice nor the right to insist that a particular issue be raised. *Oimen v. McCaughtry*, 130 F.2d 809 (7th Cir. 1997). “The defendant may terminate appellate counsel’s representation and proceed *pro se* or the defendant may allow postconviction relief to continue based on counsel’s brief and then seek relief on the grounds of ineffective assistance of appellate counsel.” *State v. Debra A.E.*, 188 Wis. 2d 111, 137-39, 523 N.W.2d 727 (1994). On ineffective assistance of appellate counsel claims, the court will determine whether counsel’s choice of issues met the objective standard of reasonableness. *Gray v. Greer*, 778 F.2d 350 (7th Cir. 1985).

The state public defender will not appoint successor counsel where a defendant disagrees with the legal conclusions of appointed counsel or when a defendant wants a second opinion as to the merits of an appeal. To do so would unduly delay the disposition of the appeal, and would be contrary to the interests of justice. WIS. ADMIN. CODE § PD 2.04.

If a defendant elects to waive counsel and proceed *pro se*, the court must find that the defendant has been provided with clear warnings with respect to forfeiture of the right to counsel and the dangers of self-representation. *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

⁸⁹Wis. Stat. § 809.30(4)(d).

⁹⁰*Ibid.*

⁹¹See Judicial Council Note, 2001 following Wis. Stat. § 809.30(4) and *State ex rel. Flores v. State*, 183 Wis. 2d 587, 622-24, 516 N.W.2d 362 (1994).

⁹²Wis. Stat. § 809.31(5).

⁹³*Ibid.*

⁹⁴*Ibid.*

⁹⁵*Ibid.*

⁹⁶Wis. Stat. § 809.32(1)(a).

⁹⁷*Ibid.*

⁹⁸Wis. Stat. § 809.32(2).

⁹⁹Wis. Stat. § 809.32(2)(a).

¹⁰⁰Wis. Stat. § 809.32(2)(b).

¹⁰¹Wis. Stat. § 809.32(2).

¹⁰²*Ibid.*

¹⁰³Wis. Stat. § 809.32(1)(d).

¹⁰⁴*Ibid.*

¹⁰⁵Wis. Stat. § 809.32(1)(b)1.

¹⁰⁶*Ibid.*

¹⁰⁷Wis. Stat. § 809.32(1)(b)2.

¹⁰⁸*Ibid.*

¹⁰⁹*Ibid.*

¹¹⁰*Ibid.* Also see Judicial Council Note, 2001 following Wis. Stat. § 809.32:

Judicial Council Note, 2001:

...

Subsection (1) (f) was created to allow the attorney to reply to the defendant’s response to a no-merit report. The rule

allows the attorney to file a supplemental no-merit report and affidavit(s) disclosing information that is outside the record and relevant to the attorney's no-merit determination without violating confidentiality rules. The supplemental report and affidavit procedure is in accordance with SCR 20:1.6 (c) (1), which allows disclosures of otherwise confidential communications "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;" SCR 20:1.6 (c) (2), which allows disclosures "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client...or to respond to allegations in any proceeding concerning the lawyer's representation of the client;" and SCR 20:3.3, which requires candor toward the tribunal.

¹¹¹ Wis. Stat. § 809.32(1)(c).

¹¹² *Ibid.*

¹¹³ Wis. Stat. § 809.32(1)(e).

¹¹⁴ Wis. Stat. § 809.32(1)(f).

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Wis. Stat. § 809.32(1)(g). ■

"Thiel" continued from Page 10

§980.05(1m), he argued, the double jeopardy clause of the U.S. Constitution prohibits his retrial.

The state argued that the supreme court's decision in *Thiel* should be entirely prospective, that is it should apply only to litigation subsequent to the date of the court's decision. The state argued that the supreme court's decision announced a new rule of law and that it somehow was not fair to the state to allow Ch. 980 committees to take advantage of the state's misunderstanding of the statute. In the alternative, the state argued that even if Mr. Thiel was entitled to relief, the most he was entitled to was a retrial limited to the single issue of whether he was within 90 days of his release at the time the petition was filed. Such a result, however, would have done Mr. Thiel little good.

As the appeal of Mr. Thiel's initial commitment order meandered through the courts of appeal, Thiel petitioned for discharge pursuant to Wis. Stat. §980.09. At a probable cause hearing, the trial court denied Mr. Thiel discharge after finding that he had not met the threshold level necessary to warrant a due process hearing. *See State v. Paulick*, 213 Wis.2d, 570 N.W.2d 626 (Ct. App. 1997). Mr. Thiel appealed and I was appointed to represent him in that matter as well.

Two issues arose in that case. Pursuant to Wis. Stat. §980.07(1), Thiel requested the appointment of an expert to assist him, a request that was denied by the

trial court. Although the trial court denied Thiel the appointment of an expert, it did allow him to waive his right to counsel. The court did so, however, without the sort of inquiry ordinarily required in a criminal case. On appeal again to the District II Court of Appeals, Thiel argued that he was entitled to the appointment of an expert to assist him, even though the statute in effect at the time appeared to vest the trial court with the discretion to grant or deny that request.⁵ In addition, Thiel claimed his waiver of his right to counsel was defective in so far as it failed to meet the requirements for a waiver of counsel in the criminal context (*see State v. Klessig*, 211 Wis.2d 194, 564 N.W.2d 716 (1997)).

The court of appeals decided both *Thiel II* and *Thiel III* the same day. In *Thiel II*, the court of appeals allowed that Thiel was entitled to relief in his own appeal, but that his relief was a new trial at which the state would have the opportunity to put in proof that he was within 90 days of his release at the time the petition was filed. The court reasoned that the constitutional protection against double jeopardy is not really a right available to a defendant *in* a criminal proceeding pursuant to Wis. Stat. §980.05, but rather the protection afforded defendants by the double jeopardy clause "only operates *after* acquittal in a criminal prosecution and the state attempts to commence a second criminal prosecution." 2001 WI App 52 ¶27. Moreover, the court held that the state's failure to prove Thiel was within 90 days of his release did not result from an evidentiary insufficiency but from a misunderstanding of its burden of proof. The court claimed that the state, by reason of that misunderstanding, really did not have a fair opportunity to present its evidence. Therefore a remand for a limited second trial was the appropriate remedy.

In *Thiel III*, the court of appeals appeared to take a different view of the scope of constitutional rights available to Ch. 980 respondents. The court held that the mandate of *State v. Klessig, supra* applies to a waiver of the right to counsel in Ch. 980 proceedings. The court noted that "we have held that Wis. Stat §§ 980.03(2) and 980.05(1m) essentially incorporate the constitutional rights available to those accused of a crime into all 980 proceedings." 2001 WI App 32 ¶15. Parenthetically, the court also held that Thiel was entitled to the appointment of an expert witness because the use of the word "may" in Wis. Stat. §980.07(1) meant that it was mandatory.

Reading these two cases together, it appears the scope

and application of constitutional rights available to the criminal defendant to Ch. 980 respondents is at best inconsistent. Arguably, as the court in *Thiel II* noted, Wis. Stat. §980.05(1m) only applies to the rights available to defendants *in* a criminal proceeding. Yet in *Thiel III*, the court extended all of the criminal trial safeguards available to a defendant in a criminal proceeding to a reexamination proceeding. A cynical view of this dichotomy suggests that all the constitutional rights available to a criminal defendant are available to Ch. 980 respondents only when it doesn't make much difference. It is hard to reconcile the holdings in *Thiel II*, and *Thiel III* without regard to the outcome of the two cases.

On May 9, 2001, the Wisconsin supreme court declined to further review the decision of the court of appeals in *Thiel II* without comment. The state did not petition for review in *Thiel III*.

What are the lessons for Ch. 980 practitioners in these cases? Certainly the litigation in *Thiel II* and *Thiel III* is a lesson in the limits the courts will go to protect the rights of respondents in Ch. 980 proceedings. When it comes to procedural safeguards the courts appear willing to extend the constitution's protections to Ch. 980 respondents. When it comes to extending the full

panoply of constitutional rights to Ch 980 respondents there is a limit to which the courts will go.

The litigation in *Thiel* also makes clear the need to be creative and to push the envelope as far as possible in this area of the law. Although the relief Mr. Thiel may ultimately receive may be of only limited value, it is important to extend the scope of the rights available to Ch. 980 respondents as far as possible. In addition at a retrial there may be problems with the state's proof. See *State v. Pharm*, 2000 WI 167, 238 Wis.2d 97, 617 N.W.2d 163 (Ct. App. 2000); *State v. Bollig*, 222 Wis.2d 558, 587 N.W.2d 908 (Ct. App. 1998). Any time the state is put to its proof, there is a chance of error. Given the interests at stake, trial counsel cannot be too careful when it comes to protecting the rights of Ch. 980 clients.

Endnotes

¹Reported at 235 Wis. 2d 823, 612 N.W.2d 94 (2000).

²2001 WI App 52, 241 Wis. 2d 439, ___ N.W.2d ___ (Ct.App. 2001).

³2001 WI App 32

⁴By the time *Thiel* was argued in the supreme court, there were approximately a dozen pending cases raising the same argument.

⁵980.07 was subsequently changed and now requires the court to appoint an expert at the respondent's request. ■

LEGISLATIVE UPDATE

The following is a general summary of two acts recently signed into law. These acts and other legislation can be viewed on-line at:

<http://www.legis.state.wi.us/2001/data/acts/>

2001 Wisconsin Act 2

Effective Date: April 18, 2001

This act creates new CHIPS and involuntary TPR grounds related to a child whose custody has been relinquished by a parent when the child was 72 hours old or younger. See ss. 48.13 (2m) and 48.415 (1m), Stats.

Specifically, the act allows a law enforcement officer, EMT, or hospital staff person to take such a child into custody and deliver the child to an intake worker. The identity of a parent who relinquishes custody of a newborn child and any person who assists the parent remains anonymous unless abuse or neglect of the child is suspected. Also, a parent who relinquishes custody of a

newborn child and any person who assists the parent are immune from civil or criminal liability for any good faith act or omission related to that relinquishment. Finally, the "reasonable efforts" requirement does not apply to children whose custody has been relinquished.

2001 Wisconsin Act 3

Effective Date: April 18, 2001

This act creates a new felony crime related to the storage and handling of anhydrous ammonia, an ingredient in methamphetamine. Specifically, if a person violates any of the prohibitions specified under new section 101.10 (3), Stats., the person may be fined up to \$10,000 and/or imprisoned for up to 3 years and 6 months. However, if the person was engaged in an "agricultural activity" (see definition of "agricultural activity" under new section 101.10 (1)(a), Stats.) while violating certain prohibitions, the person would not be subject to criminal penalties but rather payment of a forfeiture.

The criminal penalties apply to violations that occur on or after April 18, 2001. ■

JURY INSTRUCTIONS COMMITTEE REPORT

By: Richard D. Martin*

Last year marked the 40th anniversary of the Criminal Jury Instructions Committee – a collaborative effort of the U.W. Law School and the state courts. The Committee is continuing its ongoing review and revision of many existing jury instructions. As discussed previously, these revisions include adding captions and subject headings (such as “*Elements of the Offense*”), numbering the elements, using bullets in certain lists or definitions, and a larger type size.

These changes are intended to make the instructions easier for the judge to read aloud and easier for the jury to understand. Also, some of the repetition in the earlier instructions - which dates to an earlier era, where the jury received the instructions orally - has been eliminated. Now that the jury receives the instructions in writing as well this repetition has outlived much of its usefulness. The Committee has already received significant positive feedback from trial judges who have used instructions in the new format.

Approved Instructions

The Committee has revised a number of its general instructions employing the new format, including:

- **JI 60 Use of an Interpreter** (added is a paragraph cautioning that jurors with some fluency in the language being translated must nonetheless rely on the official translation)
- **JI 245 Testimony of an Accomplice**
- **JI 246 Testimony of Witness Granted Immunity or Other Concessions** (with language indicating its use is limited to cases where concessions are undisputed)

***Richard Martin** joined the Wisconsin Public Defender’s Office in 1981 and is an Assistant State Public Defender in the Milwaukee Appellate Office. He has been attending the Jury Instructions Committee on behalf of the agency since 1996.

Also approved:

- **JI 305-340**
- **JI 460-494**
- **JI 515-525**

Substantive instructions revised to reflect the new format include:

- **JI 400-415 Party to a Crime**
- **JI 550 Solicitation — §939.30**
- **JI 580 Attempt**
- **JI 1020 First Degree Reckless Homicide**
- **JI 1070 Attempted First Degree Intentional Homicide**
- **JI 1200A Sexual Contact**
- **JI 1220-1226 Battery**
- **JI 1408 Arson of Property Other Than a Building**
- **JI 1410 Arson With Intent to Defraud**
- **JI 1421, 1424, 1425A Burglary**
- **JI 1437 Criminal Trespass To Dwelling** (with a minor change in the definition of dwelling)
- **JI 1465-1467.5 Operating Vehicle Without Owner’s Consent et al.** (violations of §943.23)
- **JI 1778 Assault by a Prisoner: Placing an Officer, Employee, Visitor, or Inmate in Apprehension of Death or Great Bodily Harm — §946.43(1)**
- **JI 1779 Assault by a Prisoner: Restraining or Confining an Officer, Employee, Visitor, or Inmate - - §946.43(2)**
- **JI 2101B Sexual Contact**
- **JI 2134 Child Enticement**
- **JI 6040 Delivery of an Imitation Controlled Substance**
- **JI 6050 Possession of Drug Paraphernalia**

New Instructions, or Substantive Revisions of Existing Jury Instructions

The Committee has also approved the following instructions:

Wis JI – Criminal 59 Police Reports

This new instruction advises the jury that police reports to which they might hear reference during the trial ordinarily are not furnished to them for review.

Wis JI - Criminal 70 Defendant Proceeding Pro Se

This instruction is to be given only when the defendant has expressly waived counsel and has decided to represent himself (as opposed to where the court finds waiver of counsel by operation of law, due to defendant's actions). The instruction also briefly addresses the limited role of standby counsel.

Wis JI – Criminal 101 Opening Statements

The phrase “expect to prove” has been modified to “expect the evidence to show” in order to preclude an inference that the defendant bears any burden of proof.

Wis JI - Criminal 154 Organizational Chart

This is a new instruction intended to be used when one of the parties has prepared a chart for the purpose of organizing the evidence.

Wis JI – Criminal 275 Cautionary Instruction: Evidence of Other Conduct [Required if Requested] — §904.04(2)

This is a revision of an existing instruction. The Comment calls attention to the “greater latitude” rule concerning sex offenses.

Wis JI - Criminal 780 Entrapment

This instruction was substantially revised in light of *State v. Schuman*, 226 Wis. 2d 398, 595 N.W.2d 86 (Ct. App. 1999). The “double burden” of proof has been retained, *see State v. Saternus*, 127 Wis.2d 460, 381 N.W.2d 290 (1986). The Committee decided to withdraw JI-780A, an alternate entrapment instruction.

Wis JI - Criminal 924A Circumstances Which Show Utter Disregard

This is a republication of the former JI 924.1. The definition of “utter disregard” remains the same. The Supreme Court's decision in *State v. Jensen* will be discussed in a footnote.

Wis JI - Criminal 1200B Sexual Intercourse; JI 2101B Sexual Intercourse

These instructions were revised in light of *State v. Olson*, 2000 WI App 158, 238 Wis.2d 74. In *Olson* the court held that the phrase “upon the defendant's instruction” modifies the entire range of activities listed in §948.01(6).

Wis JI - Criminal 1292 Intimidation of a Witness; 1296 Intimidation of a Victim — §940.44; 1296A

A single instruction will be used in both misdemeanor and felony violations. 1296A is to be used for offenses against a “person acting in behalf of a victim.”

Wis JI – Criminal 1458 Misappropriation of Personal Identifying Information or Personal Identification Documents

This recently published instruction has been revised in response to an inquiry the Committee received. The revision lists five elements (rather than four) and modifications were made to better reflect the alternative ways of committing this crime.

Wis JI – Criminal 1485 Fraudulent Writings: Falsifying a Corporate Record — §943.39(1); 1486 Fraudulent Writings: Obtaining a Signature by Means of Deceit — §943.39(2)

These new instructions include a revised definition of “by means of deceit.”

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

In addition to putting this instruction in the “new format” the decriminalization of violations involving five or fewer machines is discussed in the Comment.

Wis JI – Criminal JI 1779A Assault by a Prisoner: Throwing or Expelling a Bodily Substance at an Officer, Employee, Visitor, or Inmate — §946.43(2m)

This is a new instruction for a new offense. §946.43(2m) was created by 1999 Wisconsin Act 188, with an effective date of June 2, 2000. Like escape, sentences must be imposed consecutively to any crime or offense for which the person was in custody.

Wis JI – Criminal 2120-22 Sexual Exploitation of Child.

These instructions have been corrected to reflect the change in the statutory definition of “sexually explicit conduct.” The instructions have been revised to use the following: “lewd exhibition of (name intimate part).”

Wis JI – Criminal 2142A Exposing a Child to Harmful Material; 2142A Exposing a Child to Harmful Material: Affirmative Defense — §948.11(2)(a)(and (c))

A revised definition of the civil burden of proof has been adopted. A discussion of *State v. Weidner*, 2000 WI 52, 235 Wis.2d 306, 611 N.W.2d 684 has been added to the Comment. *Weidner* found the affirmative defense provision of §948.11 “unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused.”

Wis JI - Criminal 2152 Failure to Support; JI 2152A

2152A is designed for use when the affirmative defense of inability to pay is raised.

JI-2502 Commitment as a Sexually Violent Person Under Chapter 980, Wis. Stats.

The Committee has again revised JI 2502. Rather than referring to “facts” which must be “established”, the instruction now speaks of “elements” that must be “proved.” The instruction now lists as one of these elements, that the subject was within 90 days of discharge or release when the petition was filed. See *State v. Thiel*, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94.

Wis JI - Criminal 2660C Operating with a PAC of .02 or More

This new instruction is for violations of the offense created by Wisconsin Act 109. The .02 level applies to persons with 3 or more prior convictions, suspensions, or revocations pursuant to §343.307(1). A reference to stipulations includes cautions concerning waiver and potential ineffective assistance claims.

Wis JI – Criminal 2663X Increased Fines for Repeat OWI Offenders with High Alcohol Concentrations

This instruction follows more closely the approach used in JI 1441A, Determining Value in Theft Cases.

Miscellany

A Special Material which is less than a year old, **SM-16 Collateral Attack on Prior Convictions**, has already been revised in light of *State v. Hahn*, 2000 WI 118, 238 Wis.2d 889, 618 N.W. 2d 528. The Committee debated whether to include a discussion of the Supreme Court’s treatment of this difficult area in *Hahn*, but opted for adding the following verbatim quotation:

Although these administrative considerations may weigh differently in different cases, we conclude that considerations of judicial administration favor a bright-line rule that applies to all cases. We therefore hold that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence. If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits of this challenge under *State v. Escalona-*

Naranjo, 185 Wis.2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence. We do not address the appropriate disposition of any such application.

2000 WI 118, ¶28, as modified on reconsideration, 2001 WI 6, ¶3, 24 Wis.2d 85.

SM-20 Voir Dire has been revised again. Although approved in 1999, publication was held back to allow incorporation of several recent Wisconsin Supreme Court “jury bias” decisions that were pending. ■

Legal Resources On-Line

State of Wisconsin homepage:

<http://www.wisconsin.gov/>

The State of Wisconsin site contains links to:

◆ **WI Statutes**

<http://www.legis.state.wi.us/rsb/stats.html>

◆ **WI Administrative Code**

<http://www.legis.state.wi.us/rsb/code/index.html>

◆ **Courts**

<http://www.courts.state.wi.us/>

Other helpful sites include:

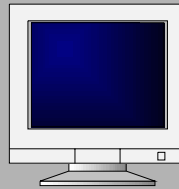
Wisconsin Bar Association

<http://www.wisbar.org/>

FindLaw

<http://www.findlaw.com/>

Web Site of the Month



If eyewitness identification issues interest you, check out the web site of Gary Wells, Professor of Psychology at Iowa State University, at:

<http://psych-server.iastate.edu/faculty/gwells/homepage.htm>

The web site is chock full of information related to eyewitness identifications, and includes:

- newspaper and journal articles about the problems associated with eyewitness identifications
- the Department of Justice “Guide for the Collection and Preservation of Eyewitness Evidence”
- audio news accounts about eyewitness identification
- examples of biased and unbiased photo lineups
- a list of Professor Wells’ publications

If you have a video viewer, you can take the “Wells eyewitness test.” Watch a man plant a bomb on a rooftop and then try to pick him out of a lineup. You might be surprised with the results.

Another web site to check out...

www.refdesk.com

This site touts itself as “Facts and Reference: Best Source for Facts on the Net.” In this instance, the hype just may be justified.

Refdesk might be best described as a portal for general research. It contains a large number of exceptionally well-organized links. Under “Facts-at-a-Glance,” you’ll find sources for (to mention a few) phone rates, college rankings, exchange rates, the Merck Manual and Strunk’s *Elements of Style*. Want the “Lottery Results”? You’ll find them under “Just for Fun,” along with “Aphorisms Galore” and “Urban Legends and Myths.”

There’s also a collection of “Current News/Weather/Business/Sports” which provides access to a variety of on-line sources. And, of course, as befits the site name, you’ll find “Reference Resources.” Want to synchronize your clock to the Atomic Clock? You can it here. “Ask the Experts”; “Journalist’s Tools”; “Facts Encyclopedia” (7500+ sites); “Essential Reference Tools”; numerous on-line newspapers---you’ll find these and much more.

Thank you to Bill Tyroler, SPD Assistant Legal Counsel, for submitting refdesk.com.



AGAINST ALL ODDS

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

The odds of winning were 1 in 22 million. But Ina Pogainis (First Assistant State Public Defender-Stevens Point) beat the odds and won. Did Ina's win take place in the courtroom? Nope. Ina's win took place in the state of Florida. The Florida Lotto to be exact. How much did she win? **\$10 million!**

Ina bought her winning lottery ticket on May 1, 2001 at a grocery store in Satellite Beach, Florida while she was on vacation. Ina doesn't regularly play the lottery. The lottery ticket was an impulse buy.



When Ina realized she had the winning numbers, her reaction was that of probably most lottery winners. She didn't believe it was true. Instead, she was convinced there had been a misprint in the newspaper. She even went so far as to call both the newspaper and the lottery people to make sure there hadn't been some sort of mistake. When it finally sunk in, she said it felt like Christmas, ten times over.

What is Ina going to do with all that money? For starters she has given some to her family members and even her colleagues at the office. Ina feels it's better to give small amounts to more people than large amounts to fewer people. The rest she'll invest for herself.

Is Ina going to quit her job at the Public Defender's Office? Nope. Ina said quitting her job so suddenly would be too big a change for her. Besides, she's been with the agency for over 20 years and she's not ready to leave yet. She loves her job at the SPD. It's never dull and she always has the feeling that she's doing work that is worthwhile, not only for clients but society as a whole. ■

Case Digest

Summaries by Brian Findley*

This composite digest includes all available digests from March 7, 2001 to April 25, 2001. Segments are arranged in reverse chronological order.

United States Supreme Court Decisions

DEATH PENALTY

COURT MUST INFORM JURY THAT LIFE SENTENCE CARRIES NO POSSIBILITY OF PAROLE WHERE FUTURE DANGEROUSNESS IS AN ISSUE IN A CAPITAL SENTENCING PROCEEDING

Shafer v. South Carolina, 121 S. Ct. 1263 (2001)

The court must inform the jury that a life sentence carries no possibility of parole in a capital sentencing proceeding once a life sentence and the death penalty are the only two remaining options. *See Simmons v. South Carolina*, 512 U.S. 154 (1994). The court does not address whether a parole eligibility instruction is required where the state does not argue future dangerousness because the lower courts found that the state did argue future dangerousness. Justices Scalia and Thomas dissented.

POSTCONVICTION AND APPELLATE PROCEEDINGS

THE COURTS OF APPEAL SHOULD REVIEW DISTRICT COURTS' FINDINGS ON WHETHER A DEFENDANT'S PRIOR CONVICTIONS WERE

***Brian Findley** is Deputy First Assistant State Public Defender in the Madison Appellate office of the Wisconsin State Public Defender. He is a graduate of Macalester College and has a Master's Degree in international relations from the University of Southern California. He is also a graduate of Boalt Hall School of Law at the University of California-Berkeley.

RELATED FOR CAREER OFFENDER PURPOSES DEFERENTIALLY

Buford v. United State, 121 S. Ct. 1276 (2001)

The 7th Circuit Court of Appeals applied the proper standard of review—deference—when it reviewed the district court's findings on whether a defendant's prior convictions were related for career offender purposes. The district court is "in a better position than the appellate court to decide whether a particular set of individual circumstances demonstrates 'functional consolidation.'"

PRISONERS RIGHTS

PRISONERS DO NOT POSSESS A FIRST AMENDMENT RIGHT TO PROVIDE LEGAL ASSISTANCE TO OTHER INMATES

Shaw v. Murphy, 121 S. Ct. 1475 (2001)

SEARCH AND SEIZURE

A STATE HOSPITAL'S PERFORMANCE OF A DIAGNOSTIC TEST TO OBTAIN EVIDENCE OF A PATIENT'S CRIMINAL CONDUCT FOR LAW ENFORCEMENT PURPOSES IS AN UNREASONABLE SEARCH IF THE PATIENT HAS NOT CONSENTED TO THE PROCEDURE.

Ferguson v. Charleston, 121 S. Ct. 1281 (2001)

In order to reduce the abuse of cocaine by pregnant women, staff members of the Charleston public hospital, operated by a state university, created a policy for identifying, testing, and reporting those women who test positive for drugs. A task force including the law enforcement officials created the policies and they established procedures for documenting a chain of custody and referral to the police. The Court holds that the hospital's performance of the diagnostic tests in order to obtain evidence of criminal conduct is unreasonable unless the patient has consented to the search. Because the hospital is a state hospital its staff members are government actors subject to the Fourth Amendment, and the tests were indisputably searches. The Court distinguishes its prior precedents, *see e.g. Chandler v. Miller*, 520 U.S. 305, which balanced the intrusion to the individual with the "special needs" that supported the program. In this case, "the policy's central and indispensable feature from its inception was the use of law enforcement officers to coerce patients into substance abuse treatment." Justice Kennedy concurs to point out that this ruling does not call into question the validity of mandatory reporting laws. Justice Scalia dissents.

SELF-INCRIMINATION

THE SIXTH AMENDMENT RIGHT TO COUNSEL IS OFFENSE SPECIFIC AND IT DOES NOT NECESSARILY EXTEND TO OFFENSES THAT ARE FACTUALLY RELATED TO THOSE THAT HAVE BEEN CHARGED UNLESS THE NEW CHARGES WOULD BE CONSIDERED THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES

Texas v. Cobb, 121 S. Ct. 1335 (2001)

Cobb confessed to a home burglary while under arrest for an unrelated burglary. However, he denied knowledge of a woman's and a child's disappearance from the home. While in custody he subsequently waived his *Miranda* rights and confessed to murdering the missing persons. The court rejects his claim that the confession violated his Sixth Amendment right to counsel. It holds that the right to counsel is offense specific and does not necessarily extend to offenses that are factually related to those that have been charged. The court finds that this rule will not be disastrous for suspects' constitutional rights because *Miranda* requires informing the defendant of the right to counsel and because the constitution does not negate society's interest in allowing the police to talk to witnesses and suspects. The court adopts the *Blockburger* test for determining whether the suspect faces charges for two different offenses. Burglary and murder are two different offenses and therefore the Sixth Amendment did not bar the police from interrogating Cobb about the murders. Justices Breyer, Stevens, Souter and Ginsburg dissent finding that the *Blockburger* test limits review to the four-corners of the charging instrument, is unnecessarily technical, and undermines the Sixth Amendment.

TRIAL PROCEEDINGS

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION CAN APPLY TO A WITNESS WHO CLAIMS INNOCENCE.

Ohio v. Reiner, 121 S. Ct. 532 U.S. (2001 *per curiam*)

The Fifth Amendment privilege against self-incrimination applies even to those witnesses claiming innocence. According to the court, a "witnesses' assertion does not by itself establish the risk of incrimination," but the court never has held "that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's basic functions ... is to protect innocent men who might otherwise be ensnared by ambiguous circumstances."

Wisconsin Supreme Court and Court of Appeals Opinions

CRIMES

FELON WHO HANDLES A WEAPON TEMPORARILY HAS POSSESSED THE WEAPON

State v. Black, 2001 WI 31, No. 99-0230-CR, (S. Ct. 4-5-01)

For Appellant: Michael S. Holzman, Waukesha
For Respondent: Chris R. Larsen, James E. Doyle, Madison

Possession means knowing, physical control of a firearm with no temporal limitations. Possession of a weapon by a felon is a strict liability offense, and therefore a statement in the criminal complaint that the defendant "handled" a gun is sufficient to show possession. Justice Bradley concurs but states that the crime requires knowing possession and therefore is not a strict liability offense. Justices Babsitch and Abrahamson dissent claiming that possession requires dominion or control over the weapon.

CHILD ENTICEMENT PROSECUTION UNDER WIS. STAT. §948.07 MAY PROCEED EVEN WHERE THE "CHILD" IS FICTITIOUS

State v. Koenck, 2001 WI App 93, No. 00-2684-CR (Ct. App. Dist. II, 3-7-01)

For Appellant: Lew A. Wasserman, Milwaukee
For Respondent: Lloyd V. Carter, Waukesha; Jennifer E. Nashold, Madison

Wis. Stat. § 948.07 merges attempt with the completed act of child enticement, and Koenck's act to entice two girls into a building for the ultimate purpose of sex constituted a completed crime despite the fact that the "girls" were fictitious. The court rejects Koenck's argument that attempt principles are inapplicable saying "[I]t is clear that the legislature, by enclosing the attempted and completed act in the same statute, did not intend to eliminate the crime of attempted child enticement, but determined that the attempted act of child enticement was as egregious as the completed act...." The fictitious nature of the girls Koenck was trying to meet was an "extraneous factor" beyond his control. Since he did all he could to ensure commission of the crime, impossibility is not a bar to prosecution.

DOUBLE JEOPARDY

CHARGES OF COMPLETED AND ATTEMPTED SEXUAL ASSAULT OF THE SAME VICTIM WERE NOT MULTIPLICITOUS

State v. Meehan, 2001 WI App ____, No. 97-3807-CR (Ct. App. Dist. I, 4-17-01)

For Appellant: Pamela Moorshead, Brookfield
For Respondent: Robert D. Donohoo, Milwaukee; William C. Wolford, Madison

The defendant sexually touched the victim who then rebuffed the defendant when he tried again. The charges of sexual assault and attempted sexual assault were not multiplicitous. The victim said “no” to the first assault and therefore enough time separated the assaults for the defendant to reconsider his course of action before he attempted a second assault.

DEFENDANT JUDICIALLY ESTOPPED FROM MAKING POSTCONVICTION DOUBLE JEOPARDY CLAIM BASED ON A CLAIM INCONSISTENT WITH HIS DEFENSE AT TRIAL

State v. Johnson, 2001 WI App ____, No. 00-0645-CR (Ct. App. Dist. IV, 4-19-01)

For Appellant: David R. Karpe, Madison
For Respondent: Christopher G. Wren, Madison; Ami L. Larson, Madison

Defendant was arrested in a room with two other persons. He had drugs in his pocket that he claimed to possess for his personal consumption. He denied ownership of the other drugs in the room. The jury convicted him of the lesser offense of possession for the drugs in his pocket but also convicted of possession with intent to deliver the other drugs. On appeal he tried to claim that all of the drugs were his and that he failed to get rid of all of them before the police arrested him. The court finds that he is collaterally estopped on appeal from challenging the convictions on double jeopardy grounds. Collateral estoppel applies because this claim is inconsistent with his position at trial, the facts are the same, and he successfully sold his first claim to the jury and the court.

EVIDENCE

PRIOR SEXUAL ASSAULT NOT SUFFICIENTLY SIMILAR TO CURRENT OFFENSE TO BE ADMISSIBLE UNDER WIS. STAT. §904.01

CROSS-EXAMINING ALIBI WITNESS ABOUT DEFENDANT’S PRIOR OFFENSE WAS ERROR

IT WAS ERROR TO ADMIT INTO EVIDENCE THE VICTIM’S PRIOR TESTIMONY

State v. Meehan, 2001 WI App ____, No. 97-3807-CR (Ct. App. Dist. I, 4-17-01)

For Appellant: Pamela Moorshead, Brookfield
For Respondent: Robert D. Donohoo, Milwaukee; William C. Wolford, Madison

Meehan was convicted for a crime committed 4 years previous to the current offense. In the prior offense he broke into a stranger’s house and fondled a 23 year-old sleeping man’s penis through the man’s clothes. In this case, Meehan allegedly grabbed and fondled a 14 year-old boy’s penis in a steam room. The prior offense is not admissible as other crimes evidence because it is not sufficiently similar to the current offense. The prior victim was an adult, and the crimes were committed in very dissimilar ways. According to the court, “Even with the application of the greater latitude rule, we cannot conclude that this suggested list of similarities overcomes the greater dissimilarities. The State’s list presents factors or similarities that are, for the most part, common to most sexual assaults.”

Even had the prior offense been admissible, using the evidence on cross-examination of an alibi witness was improper. It could have only been admissible as proof of motive or intent, but its use on cross-examination was clearly used to attack Meehan’s character.

Admitting the victim’s testimony at a prior proceeding was error where the victim also testified in person. The prior testimony was not necessary to prove a prior consistent statement because it was not offered to rebut a claim of recent fabrication. In addition, some of it was not consistent with the victim’s testimony at trial. The entire prior testimony was also not admissible under the rule of completeness. That rule allows admission “when it is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion.” There is no showing that admitting the entire testimony satisfied this standard.

IDENTIFICATION PROCEDURES

INCLUDING ONLY THE PHOTOGRAPH OF THE DEFENDANT IN TWO DIFFERENT PHOTO ARRAYS WAS NOT UNDULY SUGGESTIVE WHERE THE ARRAYS WERE PRESENTED TO THE VICTIM 16 MONTHS APART

State v. Benton, 2001 WI App ____, No. 00-1096-CR (Ct. App. Dist. I, 3-27-01)

For Appellant: James E. Kachelski, Milwaukee

For Respondent: Jeffrey J. Kassel, Madison

Photo identification of the defendant was not unduly suggestive where only his photograph was included in two different photo arrays. The showings were 16 months apart and the victim withheld final judgement until he saw the defendant in a line-up.

JURORS

COURT SAYS BUT DOES NOT HOLD THAT TRIAL COURT SHOULD NOT STRIKE A JUROR FOR "NONVERBAL EXPRESSIONS" WITHOUT CONDUCTING *VOIR DIRE*

State v. Meehan, 2001 WI App ____, No. 97-3807-CR (Ct. App. Dist. I, 4-17-01)

For Appellant: Pamela Moorshead, Brookfield
For Respondent: Robert D. Donohoo, Milwaukee; William C. Wolford, Madison

The court resolved this case on other issues and did not decide whether a trial court can properly dismiss a juror during trial for nonverbal expressions without conducting *voir dire*. According to the court, "What happened in this case disturbs this court. Without any *voir dire*, the trial court struck a juror based on nonverbal reaction during a witness's testimony. ... We strongly discourage trial courts from striking jurors for cause [for this reason] without conducting a proper *voir dire* to determine if the juror is unable to be impartial."

PEREMPTORY STRIKE OF SOLE BLACK JUROR NOT A *BATSON* VIOLATION WHERE PROSECUTION HAD VALID REASONS FOR THE STRIKE

DEFENDANT NOT ENTITLED TO A POSTCONVICTION HEARING ON THE VALIDITY OF THE PROSECUTION'S REASONS FOR STRIKING SOLE BLACK MEMBER OF THE JURY PANEL WHERE THOSE REASONS WERE BASED ON INFORMATION OUTSIDE THE PROSECUTOR'S PERSONAL KNOWLEDGE

State v. Gregory, WI App ____, No. 00-0961-CR, (Ct. App. Dist I, 4-5-01)

For Appellant: Meredith J. Ross, Madison
For Respondent: Christian R. Larsen, Madison; Gerald A. Urbik, Janesville

The prosecution had race-neutral reasons for striking the sole black juror during *voir dire*. These included living close to the scene of the crime, concern about the juror's truthfulness, and a family member's involvement with the criminal justice system.

A *Batson* challenge must be decided prior to swearing in the jury. Therefore if a defendant is attempting to prove that the prosecutor's reasons for striking a minority juror are pretextual, the defendant must show either that the prosecutor intentionally misrepresented the facts or that he relied on facts that he knew were erroneous. Here Gregory attempted to prove by postverdict motion that the facts were not as the prosecutor believed them to be. If the defense needed additional information to challenge the prosecutor's information, then counsel should have requested a brief adjournment when the strike occurred. Judge Vergeront dissents pointing out that at least some of the information relied upon by the prosecutor was wrong. Accordingly, when the prosecutor says he or she is relying on outside information, the defense should be given an opportunity to explore that information and the court must evaluate it.

JUVENILE

AN IMPOSED BUT STAYED ONE-YEAR PLACEMENT COMMENCES RUNNING ON THE DATE THAT THE COURT LIFTS THE STAY ORDER ENTERED UNDER WIS. STAT. §938.34(16)

In Interest of Kendell G., 2001 WI App 95, No. 00-3240-FT (Ct. App. Dist. II, 3-29-01)

For Appellant: Brian C. Findley, Madison
For Respondent: Ryan C. Wetzsteon, Racine

"It would be unreasonable for this court to conclude that a dispositional order that has been stayed pursuant to § 938.34(16) commences any earlier than the date the stay is lifted by the juvenile court."

OWI

LAW ENFORCEMENT OFFICERS MUST USE REASONABLE METHODS TO CONVEY IMPLIED CONSENT WARNINGS IN WIS. STAT. §343.0305(4) AND THE DRIVER CANNOT CLAIM "SUBJECTIVE CONFUSION"

USING REASONABLE METHODS TO CONVEY IMPLIED CONSENT WARNINGS TO A DEAF DRIVER DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION

SUPPRESSION MAY NOT BE THE APPROPRIATE REMEDY FOR VIOLATION OF THE IMPLIED CONSENT LAW

EVEN WERE THE AMERICANS WITH DISABILITIES ACT (ADA) TO APPLY, SUPPRESSION WOULD NOT

BE THE REMEDY FOR A VIOLATION

State v. Piddington, 2001 WI 24, No. 99-1250 (S. Ct. 3-22-01)

For Appellant: Kathleen M. Ptacek, James E. Doyle, Madison
For Respondent: Michele A. Tjader, Madison

The test for determining whether an officer has complied with the informed consent law is not whether the driver understood the warnings but whether the officer used reasonable methods to convey the warning under the circumstances at the time of the arrest. This rule denies neither due process nor equal protection because the law does not treat a deaf driver differently from one who can hear. Violation of the informed consent law would not automatically require suppression. Other remedies could include a challenge to suspension of the driver's license, a challenge to automatic revocation of the license for refusing to submit, or a challenge to automatic admissibility of the blood test under Wis. Stat. §885.235. The law is not clear as to whether the Americans with Disabilities Act applies, but even if it did a violation of the ADA would not require suppression. Chief Justice Abrahamson concurs to stress the importance of providing interpreters. Justice Sykes concurs but questions the practical operation of the test and assumes that "an officer who merely reads the implied consent warning in English to a suspect who speaks only Spanish will not have complied with the statute"

PLEAS

COURT CAN FIND FACTUAL BASIS FOR A PLEA IN THE COMPLAINT ALONE

State v. Black, 2001 WI 31, No. 99-0230-CR, (S. Ct. 4-5-01)

For Appellant: Michael S. Holzman, Waukesha
For Respondent: Chris R. Larsen, James E. Doyle, Madison

If the facts set forth in the complaint meet the elements of the crime charged, they may form the factual basis for a plea. This is true even though the complaint may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one. In this case, the court properly accepted a plea of no contest in accordance with Wis. Stat. 971.08 to the charge of felon in possession of a weapon. The complaint alleged that he "handled" a pistol but the pistol owner informed the court that Black "touched" the pistol only once and told her she did not need it.

TRANSFER TO OUT-OF-STATE PRISON DID NOT BREACH PLEA BARGAIN; THE STATE OF

INCARCERATION IS A COLLATERAL CONSEQUENCE OF THE PLEA

State v. Parker, 2001 WI App ____, No. 00-1532 (Ct. App. Dist. II, 4-18-01)

For Appellant: Anthony A. Parker, Appleton, MN
For Respondent: Robert S. Flancher, Racine; Sally L. Wellman, Madison

Parker cannot prove a breach of the plea bargain agreement because the state of incarceration is a collateral consequence of the plea and because the prosecution never promised that he would never be transferred out-of-state.

POSTCONVICTION AND APPELLATE PROCEEDINGS

STATUTE OF LIMITATION FOR FILING WRIT OF CERTIORARI IS TOLLED WHILE PRISONER WAITS FOR THE STATE TO FILE DOCUMENTS OUTSIDE OF THE PRISONER'S CONTROL

State ex rel. Walker v. McCaughtry, 2001 WI App ____, No. 00-1439 (Ct. App. Dist. IV, 4-19-01)

For Appellant: Tony Darnell Walker, Green Bay
For Respondent: Jaime Luna Preciado, Madison

It would be inequitable to penalize a prisoner for the Department of Correction's delay in providing the court with documentation necessary to comply with the Prisoner Litigation Reform Act (PLRA). Here the court tolls the statute of limitation from the date a prisoner requested his trust fund account statement to the date the court received it. However, a prisoner cannot serially toll the statute of limitation by asking for each PLRA document in sequence. The tolling begins when all the documents over which the prisoner has control have been mailed and all of the documents over which the prisoner has no control have been requested.

TRANSFER TO OUT-OF-STATE PRISON IS NOT A NEW FACTOR ENTITLING DEFENDANT TO SENTENCE MODIFICATION WHERE THE RECORD DOES NOT ESTABLISH THAT THE COURT INTENDED FOR THE SENTENCE TO BE SERVED ONLY IN WISCONSIN

State v. Parker, 2001 WI App ____, No. 00-1532-CR (Ct. App. Dist. II, 4-18-01)

For Appellant: Anthony A. Parker, Appleton, MN
For Respondent: Robert S. Flancher, Racine; Sally L. Wellman, Madison

A POSTVERDICT PSYCHIATRIC EVALUATION IS NOT A NEW FACTOR WHERE IT AMOUNTS TO NO MORE THAN A DISAGREEMENT ABOUT DIAGNOSIS AND WHERE IT IS SIMILAR TO OTHER DIAGNOSES ALREADY IN THE RECORD

State v. Slogoski, WI App ____, No. 00-1586-CR (Ct. App. Dist II, 4-4-01)

For Appellant: Christopher William Rose, Kenosha
For Respondent: Gregory M. Posner-Weber, Madison

A postverdict psychiatric evaluation does not establish a new factor requiring sentence modification where it amounts to no more than disagreement about diagnosis. In addition, determinations similar to the new diagnosis were part of the record that the court knew about.

TIME LIMIT FOR FILING WRIT OF CERTIORARI IS TOLLED WHILE A PRISONER WAITS FOR THE DEPARTMENT OF JUSTICE TO PROVIDE HIM OR HER WITH THE REQUIRED THREE-STRIKES CERTIFICATION

State ex rel. Locklear v. Schwarz, 2001 WI App 74, No. 99-3211 (Ct. App. Dist. II, 2-21-01)

For Appellant: Michael E. Locklear, Sayre, OK
For Respondent: William C. Wolford, Madison

The 45-day statute of limitations for a prisoner to file a writ of certiorari challenging his revocation must be tolled while the prisoner waits for the DOJ to provide him with the three-strikes documentation necessary to comply with Wis. Stats. §§801.02(7)(d) and 802.05(3)(c). Receipt of the certification lies totally in the hands of governmental officials and therefore could not fairly be ascribed to the prisoner requesting the certification.

A PETITIONER CHALLENGING REVOCATION OF PROBATION NEED NOT EXHAUST ADMINISTRATIVE REMEDIES WHERE HIS CASE FALLS WITHIN A RECOGNIZED EXCEPTION TO THE DOCTRINE OF EXHAUSTION

State ex rel. Mentek v. Schwarz, 2001 WI 32, No. 99-0182 (S. Ct. 4-4—01)

For Appellant: Stephen M. Compton, Delavan
For Respondent: William C. Wolford, James E. Doyle, Madison

Following Mentek's revocation hearing, Mentek's attorney told him that the attorney would file an administrative appeal, but the attorney did not. The trial court dismissed Mentek's petition for writ of certiorari because Mentek had failed to exhaust remedies. The court of appeals affirmed finding that

Mentek had no right to counsel. The Wisconsin Supreme Court now reverses and remands. The strict exhaustion requirement in Wis. Stat. 801.02(7)(b) applies only to suits against the Department of Corrections and not to appeals involving the Division of Hearings and Appeals. While exhaustion is the normal rule, this case falls under a well-established exception to the doctrine of exhaustion of remedies. Justices Abrahamson and Bradley concur to find that the right to an attorney at revocation extends to the administrative appeal.

RIGHT TO COUNSEL

TRIAL COURT INCORRECTLY APPLIED FEDERAL POVERTY GUIDELINES IN DETERMINING NOT TO APPOINT APPELLATE COUNSEL AT COUNTY EXPENSE

State v. Nieves-Gonzalez, 2001 WI App 90, No. 00-2138-CR (Ct. App. Dist. I, 3-15-01)

For Appellant: Jose Nieves-Gonzalez, Appleton
For Respondent: Robert D. Donohoo, Milwaukee

At a *Dean* hearing for court appointment of counsel where the State Public Defender (SPD) has determined that a defendant is not indigent, "the trial court should consider the federal guidelines" which are lower than the indigency schedule used by the SPD. *See State v. Dean*, 163 Wis. 2d 503 (Ct. App. 1991). Not every defendant with income less than the federal guidelines is entitled to court appointment of counsel, but the trial court should set forth its findings whenever it determines that such a defendant nevertheless can afford counsel.

SEARCH AND SEIZURE

ORDINANCE ALLOWING POLICE TO ENTER PREMISES OPEN TO THE PUBLIC OF PRIVATE INNERTUBE BUSINESS IS NOT FACIALLY UNCONSTITUTIONAL

Float-Rite Park, Inc. v. Village of Somerset, WI App ____, No. 00-1610, (Ct. App. Dist III, 4-3-01)

For Appellant: Matthew A. Biegert, New Richmond
For Respondent: Timothy J. Yanacheck, Madison

The court upholds a local ordinance that requires that an applicant for an innertube license must consent to allow police and other emergency personnel access to all premises used by the public. The ordinance is not facially invalid because it authorizes no more than those inspections already allowed by the Fourth Amendment. As a general matter, the police may accept a general public invitation to enter business

premises open to the public, and that is all the ordinance authorizes. It does not authorize unlimited access to every area of the premises, nor does it authorize otherwise unconstitutional searches.

COMMUNITY CARETAKER DOCTRINE AUTHORIZED
WARRANTLESS, FORCED POLICE ENTRY TO A
BEDROOM AND THE SEARCH OF A CLOSET

State v. Ferguson, WI App ____, No. 00-0038-CR, (Ct. App. Dist I, 4-3-01)

For Appellant: Melinda A. Swartz, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; William L. Gansner, Madison

Police responded to a call of a fight. They discovered several underaged teenagers who had been drunk. Several were extremely intoxicated. The door to Ferguson's bedroom was locked from the inside. The other teenagers told them Ferguson was at work, but his employer said he had not been to work for several days. The police knocked and yelled for thirty minutes, but Ferguson did not open the door. The other teenagers then admitted that there were three people in the room. Finally, the police jimmied the door open, saw Ferguson and several others and they looked in the closet where they found marijuana growing. The court affirms the denial of the suppression motion under the community caretaker doctrine. The police were not investigating a crime because underaged drinking is a forfeiture offense and not a crime. The finding that the police were motivated to assist Ferguson was not clearly erroneous, and Ferguson's right to privacy did not outweigh the officer's reasons for searching the closet.

DEFENDANT HAD NO STANDING TO OBJECT TO
GUN FOUND IN CAR IN WHICH DEFENDANT WAS A
PASSENGER WHERE THE DEFENDANT CLAIMED
THAT THE GUN WAS NOT HIS

State v. Benton, 2001 WI App ____, No. 00-1096-CR (Ct. App. Dist. I, 3-27-01)

For Appellant: James E. Kachelski, Milwaukee
For Respondent: Jeffrey J. Kassel, Madison

Benton lacked a reasonable expectation of privacy necessary to object to the seizure of a gun found under a seat in a car in which he was a passenger because Benton asserted neither a property nor possessory interest in the car and he disclaimed ownership of the gun.

CONSENT TO SEARCH NOT VOLUNTARILY GIVEN
WHERE THE POLICE MISLED SUSPECT ABOUT WHY
THEY WANTED TO ENTER THE PREMISES AND
WHERE THE PERSON HAD SATISFIED THEIR STATED
REASON FOR ENTRY

State v. Munroe, 2001 WI App ____, No. 00-0260-CR (Ct. App. Dist. I, 3-20-01)

For Appellant: Peter M. Konaezny, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Susan M. Crawford, Madison

Two armed police officers asked Munroe if they could enter his motel room to check his identification in order to determine if he had violated a local ordinance requiring persons renting a room to produce some form of identification. In reality they were investigating various other kinds of crime. Munroe produced identification and rebuffed their first request to search the room. His acquiescence to a second request led to a discovery of drugs. The court reverses and suppresses finding that once the officers' ostensible reason for entry expired, "Munroe's acquiescence to their presence in his room vanished. ... Their continued questioning and their renewed request to search made Munroe's 'consent' not voluntary."

A CONTEMPORANEOUS TIP FROM A CELL PHONE
USER DESCRIBING ERRATIC DRIVING CREATES A
REASONABLE SUSPICION JUSTIFYING A STOP OF
THE DRIVER SUSPECTED OF OPERATING WHILE
INTOXICATED

State v. Rutzinski, 2001 WI 22, No. 98-3541-22 (S. Ct. 3-20-01)

For Appellant: Craig A. Mastantuono, Milwaukee
For Respondent: Warren D. Weinstein, James Doyle, Madison

The police received a tip from an anonymous motorist describing a pickup truck that was being driven erratically, describing the direction of the vehicle, identifying that the caller was in front of the other vehicle, and informing dispatch when a police car joined up with the other two vehicles. The officer stopped the truck without observing erratic driving. The court affirmed the stop because "the information ... [and therefore possible punishment]; the tip reported contemporaneous and verifiable observations...; and the allegations in the tip could suggest to a reasonable police officer that Rutzinski was operating his vehicle while intoxicated. This exigency strongly weighs in favor of immediate police investigation."

AN ANONYMOUS 911 TELEPHONE TIP, PURPORTING
TO DESCRIBE THE CRIME IN PROGRESS, AND
INDEPENDENT OBSERVATION AND
CORROBORATION OF DETAILS CREATED
REASONABLE SUSPICION JUSTIFYING A STOP

THE POLICE REASONABLY CONDUCTED A

PROTECTIVE SEARCH OF THE VEHICLE WHERE THEY BELIEVED THAT THE DRIVER MAY HAVE BEEN ARMED

State v. Williams, 2001 WI 21, No. 96-1821-CR (S. Ct. 3-13-01)

For Appellant: Melinda A. Swartz, Milwaukee
For Respondent: Warren D. Weinstein, James Doyle, Madison

Following its decision in *Florida v. J.L.*, the U.S. Supreme Court vacated and remanded this case. On remand, the Wisconsin Supreme Court again affirms finding that an anonymous 911 telephone and independent corroboration of details created reasonable suspicion to stop Williams. In *Florida v. J.L.* the Supreme Court suppressed evidence stemming from a stop based on a “bare-boned” tip about a gun where the anonymous informant provided only details that were readily observable. The court distinguishes *J.L.* finding that there were indicia of reliability in this case. These included the facts that the informant described the activity as she was observing it; the informant identified her location and described it as her apartment building; the 911 call was recorded; Milwaukee “may” have developed a “sophisticated” emergency phone system capable of identifying the caller and address; the officers corroborated some of the details reported; and the automobile was occupied in an alley without any license plates on the vehicle. Justice Prosser’s concurrence provides the winning margin, and he would find that this is not an anonymous informant case because the informant made a 911 call on an “enhanced” system and therefore the police knew the address and telephone number of the caller. The dissent, Justices Bablitch, Abrahamson, and Bradley, find this case indistinguishable from *J.L.* Furthermore, they reject the claim that the caller put her identity at risk.

The court upholds the search of the vehicle because of the anonymous tip, because Williams’ hand was concealed from view when the officers approached, and because the vehicle had no license plates.

SENTENCING

AT SENTENCING THE COURT COULD CONSIDER THE RESULTS OF A COMPETENCY EXAMINATION SUGGESTING THAT THE DEFENDANT POSED A HOMICIDE-SUICIDE RISK

THE USE AT SENTENCING OF PRETRIAL PSYCHIATRIC EVALUATIONS DID NOT VIOLATE THE DEFENDANT’S RIGHT TO NOT INCRIMINATE HIMSELF AND HIS RIGHT TO THE ASSISTANCE OF COUNSEL

State v. Slogoski, WI App ____, No. 00-1586-CR (Ct. App. Dist II, 4-4-01)

For Appellant: Christopher William Rose, Kenosha
For Respondent: Gregory M. Posner-Weber, Madison

It is reasonable to consider a mental competency examination when determining whether a defendant poses a risk of future dangerousness. The trial court is to consider all relevant information at sentencing, and the trial court reasonably considered the evaluations when gauging the need to protect the public.

Slogoski waived his Fifth Amendment rights to not incriminate himself when, through counsel, he initiated a psychiatric evaluation and entered a plea of not guilty by reason of insanity. His Sixth Amendment right to counsel was not violated when his attorney asked for the psychiatric evaluation. His attorney knew that Slogoski had mental issues at the time that the attorney requested the mental evaluation.

COURT MAY ORDER RESTITUTION TO COUNTY MEDICAL ASSISTANCE PROGRAM AS AN INSURER

COURT MAY ORDER RESTITUTION FOR AN AMOUNT CERTAIN TO BE DISBURSED FROM PRISON WAGES

State v. Baker, 2001 WI App ____, No. 99-3273 (Ct. App. Dist. IV, 3-29-01)

For Appellant: Not given
For Respondent: Not given

While the Medical Assistance Program is a social welfare program, it is the equivalent of health insurance. The court can order restitution to an insurer and therefore properly ordered restitution under Wis. Stat. § 973.20(5)(d) to the Program for hospital expenses of the victim. The statute listing the DOC’s authority to disburse prison wages does not list restitution. However, the trial court’s restitution order was an “other obligation” reduced to judgment which the prison could disburse. This case is distinguishable from *State v. Evans*, 2000 WI App 178, where the court ordered the defendant to pay restitution of up to 25 percent of his prison wages. Here, the court did not commit the same error of referring determination of the amount to the DOC but instead set restitution at an amount certain.

SEXUALLY VIOLENT PERSONS

WAIVER OF JURY TRIAL IS VALID EVEN WHERE THE COURT DOES NOT ADVISE THE PERSON ALLEGED TO BE SEXUALLY VIOLENT THAT A JURY VERDICT MUST BE UNANIMOUS

REMAND IS APPROPRIATE REMEDY TO DETERMINE

TRAINING CALENDAR

Trial Practice Institute

National Criminal Defense College
June 17-30 and July 15-28, 2001
Macon, GA

Nuts and Bolts of Chapter 980 Defense

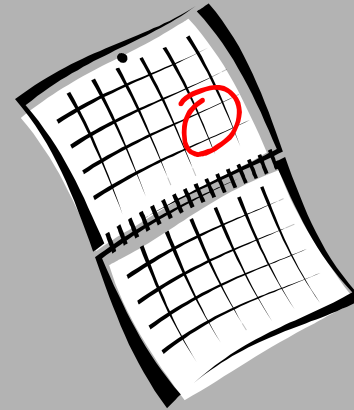
Wisconsin State Public Defender
July 26-27, 2001
Eau Claire, WI

Annual Criminal Defense Conference

Wisconsin State Public Defender
October 4-5, 2001
Milwaukee, WI

Appellate Defender Training

National Legal Aid & Defender Association
November 29-December 2, 2001
New Orleans, LA



WHETHER THE PERSON WAS WITHIN 90 DAYS OF RELEASE

In re: the Commitment of Kerby G. Denman, 2001 WI App 96, No. 99-1829 (Ct. App. Dist. IV, 3-22-01)

For Appellant: Glenn L. Cushing, Madison
For Respondent: Diane M. Welsh, Madison

The general, criminal jury-waiver-rules do not apply to waiver of a jury trial in a ch. 980 case because Wis. Stat. §980.05(2) creates a different rule that does not require the court to engage in any particular procedure. *State v. Thiel*, 2000 WI App 52, requires remand to determine whether the person was within 90 days of release at the time the state filed the petition.

DUE PROCESS REQUIRES ENFORCEMENT OF AN ORDER ENTERED AS PART OF AN AGREEMENT TO WAIVE A TRIAL FOR OUTRIGHT RELEASE IN EXCHANGE FOR A SUPERVISED CH. 980 PLACEMENT

STATE'S FAILURE TO RESPOND TO CLAIM THAT SECOND PETITION FOR OUTRIGHT RELEASE ESTABLISHED PROBABLE CAUSE CONCEDED THE ISSUE

In re: the Commitment of August T. Krueger, 2001 WI App 76, No. 00-0152 (Ct. App. Dist. III, 3-20-01)

For Appellant: Jack E. Schairer, Madison
For Respondent: Warren D. Weinstein, Madison; John M. Schellpfeffer, Merrill

The state and Krueger stipulated that Krueger would forego a trial on whether he was suitable for outright discharge in exchange for an agreement that Krueger would be placed on

supervised release. Due in part to public outcry the department informed the court that it could not and would not find a suitable placement. The trial court then vacated the stipulation and, at the state's urging, vacated its prior decision that Krueger had even established probable cause for a hearing on outright discharge. The court of appeals reverses finding that "an allegedly sexually violent person's admission to the allegations in the underlying petition pursuant to a stipulation is akin to a plea agreement." Like a defendant who has pleaded guilty, due process entitled Krueger to enforcement of the agreement. The trial court therefore had discretion "to modify the release plan to effectuate supervised release, including the power to order the department to create facilities and services" but it could not vacate the order. The state's failure to respond to Krueger's claim that a second petition established probable cause conceded the issue.

CHAPTER 980 APPLIES TO PERSONS ADJUDICATED DELINQUENT UNDER FORMER CHAPTER 48

In re the Commitment of Aaron K. Gibbs, 2001 WI App 83, No. 00-1176 (Ct. App. Dist. II, 3-7-01)

For Appellant: Donna L. Hintze, Madison
For Respondent: Phillip A. Koss, Elkhorn; Susan M. Crawford, Madison

The 1997-98 version of ch. 980 refers to the recreated and newly numbered juvenile code but makes no reference to ch. 48 of the old juvenile code (1993-94). Read literally, ch. 980 would not cover sexual offenders adjudicated under former ch. 48 (1993-94). In substance, however, the references are the same. The legislature intended to apply ch. 980 to those individuals adjudicated delinquent under the old ch. 48 as well as those adjudicated delinquent under ch. 938. ■

REVIEW GRANTED IN THE WISCONSIN SUPREME COURT

(March 2001 through May 18, 2001)



State v. C. Dunlap 99-2189-CR REVW 04/05/2001

District 2/Walworth County

239 Wis. 2d 423

620 N.W.2d 398

Issues: Did the State open the door to evidence of sexual behavior by the child victim predating the charged assault that would normally be barred by the rape shield law when it presented a social worker's testimony on the cognitive abilities of young children and the phenomenon of progressive disclosure, and did the evidence of the child victim's prior sexual behavior satisfy the five part test of *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990)?

State v. S. Samuel 99-2587-CR REVW 04/05/2001

District 2/Winnebago County

240 Wis. 2d 756

623 N.W.2d 565

Issues: What standard is to be applied in determining whether an alleged coerced statement of a witness should be suppressed? Is there a threshold showing that a defendant must make to warrant a suppression hearing on a defendant's claim that a witness's statement was coerced?

State v. J. Williams 00-0535-CR REVW 04/05/2001

District 2/Ozaukee County

241 Wis. 2d 1

Issues: Whether a prosecutor violates the terms of a negotiated sentencing agreement when the prosecutor makes a recommendation consistent with the terms of the agreement, but also communicates the victim's statement or information from the presentence writer that disagrees with the negotiated sentencing agreement?

State v. J. Krajewski 99-3165-CR REVW 05/08/2001

District 4/Jefferson County

Summary Disposition

Issues: Whether the reasonableness requirement of the Fourth Amendment to the U.S. Constitution was violated when a police officer ignored a suspected drunk driver's request to take a breath test rather than a blood draw in determining the driver's blood alcohol content?

State v. G. Schwebke 99-3204-CR REVW 05/08/2001

District 2/Fond du Lac County

2001 WI App 99

Issues: Does the sending of mail containing newspaper clippings, 45 r.p.m. recordings of popular songs, and stenciled letters expressing admiration and affection for the recipient constitute disorderly conduct pursuant to Wis. Stat. §974.01? Did the Court of Appeals apply the correct standard of review

for determining if the disorderly conduct statute was properly applied in this fact situation?

State v. L. Harvey 00-0541-CR REVW 05/08/2001

District 4/Dane County

2001 WI App 59

242 Wis. 2d 189

Issues: Did the circuit court's instruction that the jury must accept as true that Penn Park is a city park, rather than a state park as originally indicated in the information, violate the defendant's state and constitutional rights to due process and a jury trial in light of the U.S. Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)? Under this court's inherent and implied power, should Wis. Stat. §902.01(7), which requires a court to "instruct the jury to accept as established any facts judicially noticed" be changed to permit, but not require, the jury to find a judicially noticed fact in a criminal trial?

State v. C. Davis 00-0889-CR REVW 05/08/2001

District 4/Dodge County

2001 WI App 63

Issues: Does Wis. Stat. §971.11, the Interstate Detainers Act, permit the circuit court to dismiss a criminal prosecution with prejudice where the time limits in the statute have not been followed? If so, did the circuit court properly exercise its discretion in this action by dismissing with prejudice?

State v. B. Vorburger 00-0971-CR REVW 05/08/2001

District 4/Dane County

2001 WI App 43

241 Wis. 2d 481

624 N.W.2d 398

Issues: Do the Fourth Amendment and Wis. Stat. §968.24 permit police officers to detain non-occupants of a motel room that they suspect are connected to drug activity being investigated in the motel room for which they are awaiting a search warrant?

R. Schaefer v. R. Riegelman 00-2157 CERT 05/08/2001

District 2/Racine County

Issues: Does the signature on a complaint by an attorney not admitted to practice law in Wisconsin, at the direction and on behalf of an attorney who is admitted to practice law in Wisconsin, constitute a fundamental defect sufficient to deprive the circuit court of jurisdiction? ■

RECENT LAW REVIEW ARTICLES

ADMINISTRATIVE LAW

Branham, Lynn S. The Prison Litigation Reform Act's enigmatic exhaustion requirement: what it means and what Congress, courts and correctional officials can learn from it. 86 Cornell L. Rev. 483-547 (2001).

Taylor, Kathryn F. Note. The Prison Litigation Reform Act's administrative exhaustion requirement: closing the money damages loophole. 78 Wash. U. L.Q. 955-978 (2000).

CIVIL RIGHTS

Goins, Garnet M. Case comment. Constitutional law—broadening the scope of qualified immunity to public officials for section 1983 liability for conducting warrantless entry into individual's home. (*Joyce v. Town of Tewksbury*, 112 F.3d 19, 1st Cir. 1997, en banc.) 32 Suffolk U. L. Rev. 803-812 (1999).

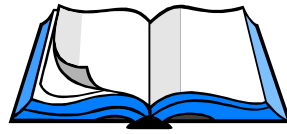
Hoon, Carrie L. Comment. The reasonable girl: a new reasonableness standard to determine sexual harassment in schools. 76 Wash. L. Rev. 213-241 (2001).

CONSTITUTIONAL LAW

Howell, Alison E. Note. Loki surfs for porn: an analysis of the discord the Internet may cause in obscenity law. 22 Hastings Comm/Ent L.J. 509-527 (2000).

Intille, Amy M. Note. Video surveillance and privacy: implications for wearable computing. 32 Suffolk U. L. Rev. 729-765 (1999).

Monroe, Sarah A. Case note. Will the right to a jury trial remain inviolate? (*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, Ohio 1999.) 53 Ark. L. Rev. 931-964 (2000).



Note. Powers of Congress and the Court regarding the availability and scope of review. 114 Harv. L. Rev. 1551-1574 (2001).

Rothenberg, Lance E. Comment. Re-thinking privacy: peeping Toms, video voyeurs, and failure of the criminal law to recognize a reasonable expectation of privacy in the public space. 49 Am. U. L. Rev. 1127-1165 (2000).

Rubin, Edward L. Getting past democracy. 149 U. Pa. L. Rev. 711-792 (2001).

Salzmann, Victoria S. Are public records really public?: The collision between the right to privacy and the release of public court records over the Internet. 52 Baylor L. Rev. 355-379 (2000).

Strauss, David A. The irrelevance of constitutional amendments. 114 Harv. L. Rev. 1457-1505 (2001).

COURTS

Fritzler, Hon. Randal B. and Leonore M.J. Simon. The development of a specialized domestic violence court in Vancouver, Washington utilizing innovative judicial paradigms. 69 UMKC L. Rev. 139-177 (2000).

Kondo, LeRoy L. Advocacy of the establishment of mental health specialty courts in the provision of therapeutic justice for mentally ill offenders. 24 Seattle U. L. Rev. 373-465 (2000).

CRIMINAL LAW AND PROCEDURE

Adams, Teresa E. Note. Tacking on money laundering charges to white collar crimes: what did Congress intend, and what are the courts doing? 17 Ga.

St. U. L. Rev. 531-573 (2000).

Alexander, Joyce London. Aligning the goals of juvenile justice with the needs of young women offenders: a proposed praxis for transformational justice. 32 Suffolk U. L. Rev. 555-611 (1999).

Barth, Carolyn. Note. Aggravated assaults with chairs versus guns: impermissible applied double counting under the Sentencing Guidelines. 99 Mich. L. Rev. 183-215 (2000).

Binder, Guyora and Nicholas J. Smith. Framed: utilitarianism and punishment of the innocent. 32 Rutgers L.J. 115-224 (2000).

Bowers, C. Albert. Comment. Divining the Framers' intentions: the immunity standard for criminal proceedings under the Utah Constitution. 2000 Utah L. Rev. 135-170.

Brookstein, Mark D. Comment. Why should gang membership be a "status" symbol? Status crimes and ... (*City of Chicago v. Youkhana*, 660 N.E.2d 34, Ill. App. Ct. 1995, aff'd *City of Chicago v. Morales*, 687 N.E.2d 53, Ill. 1997, aff'd *City of Chicago v. Morales*, 527 U.S. 41, 1999.) 76 Chi.-Kent L. Rev. 703-715 (2000).

Chang, Michael. Student article. Bridging the gap: the role of Asian American public interest organizations in the pursuit of legal and social remedies to anti-Asian hate crimes. 7 Asian L.J. 139-160 (2000).

Chase, Irene J. Comment. Making the criminal pay in cash: the ex post facto implications of the Mandatory Victims Restitution Act of 1996. 68 U. Chi. L. Rev. 463-489 (2001).

Colquitt, Joseph A. Ad hoc plea bargaining. 75 Tul. L. Rev. 695-776 (2001).

Concannon, Brian, Jr. Beyond

- complementarity: the International Criminal Court and national prosecutions, a view from Haiti. 32 Colum. Hum. Rts. L. Rev. 201-250 (2000).
- Conley, John M., William J. Turnier and Mary R. Rose. The racial ecology of the courtroom: an experimental study of juror response to the race of criminal defendants. 2000 Wis. L. Rev. 1185-1220.
- Courselle, Diane, Mark Watt and Donna Sheen. Suspects, defendants, and offenders with mental retardation in Wyoming. 1 Wyoming L. Rev. 1-90 (2001).
- D'Amico, Suzanne. Comment. Inherently female cases of child abuse and neglect: a gender-neutral analysis. 28 Fordham Urb. L.J. 855-885 (2001).
- Dana, David A. Rethinking the puzzle of escalating penalties for repeat offenders. 110 Yale L.J. 733-783 (2001).
- DeCock, Kenneth and Erin Mercer. Comment. Balancing the scales of justice: how will Vasquez v. State affect vehicle searches incident to arrest in Wyoming? 1 Wyoming L. Rev. 139-169 (2001).
- Eggers, Stacy C., IV. Comment. A Fourth Amendment problem with probation in North Carolina. 23 Campbell L. Rev. 143-156 (2000).
- Eisenberg, Theodore, Stephen P. Garvey and Martin T. Wells. The deadly paradox of capital jurors. 74 S. Cal. L. Rev. 371-397 (2001).
- Fugate, Jeanne A. Note. Who's failing whom? A critical look at failure-to-protect laws. 76 N.Y.U. L. Rev. 272-308 (2001).
- Fuhriman, Troy. State v. Foster: Washington State undermines confrontation rights to protect child witnesses. 36 Gonz. L. Rev. 7-47 (2000/01).
- Fourth Amendment Trends and the Supreme Court's October 1999 Term. Student contributors: John P. Cronan, Robert S. Huie, Chi T. Steve Kwok, Kate Nepveu and Clay M. West. 19 Yale L. & Pol'y Rev. 197-233 (2000).
- Fuchs, Andrew J. Note. The effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: blurring the distinction between sentencing factors and elements of a crime. (Apprendi v. New Jersey, 120 S. Ct. 2348, 2000.) 69 Fordham L. Rev. 1399-1438 (2001).
- Gee, Harvey. New paradigms of criminal justice for the twenty-first century: a review essay. 27 Ohio N.U. L. Rev. 29-66 (2000).
- Goins, Garnet M. Case comment. Constitutional law—broadening the scope of qualified immunity to public officials for section 1983 liability for conducting warrantless entry into individual's home. (Joyce v. Town of Tewksbury, 112 F.3d 19, 1st Cir. 1997, en banc.) 32 Suffolk U. L. Rev. 803-812 (1999).
- Gowie, Renata Ann. Driving while Mexican: why the Supreme Court must reexamine United States v. Brignoni-Ponce, 422 U.S. 873 (1975). 23 Hous. J. Int'l L. 233-254 (2001).
- Greenlee, Mark B. Faith on the bench: the role of religious belief in the criminal sentencing decisions of judges. 26 U. Dayton L. Rev. 1-41 (2000).
- Hagen, Leslie A. and Kim Morden Rattet. Communications and violence against women: Michigan law on privilege, confidentiality, and mandatory reporting. 17 T.M. Cooley L. Rev. 183-271 (2000).
- Hanna, Ronald L. Comment. Consular access to detained foreign nationals: an overview of the current application of the Vienna Convention in criminal practice. 25 S. Ill. U. L.J. 163-178 (2000).
- Harms, Brian C. Redefining "crimes of moral turpitude": a proposal to Congress. 15 Geo. Immigr. L.J. 259-288 (2001).
- Hassel, Diana. The use of criminal sodomy laws in civil litigation. 79 Tex. L. Rev. 813-848 (2001).
- Hedges, Ryan S. Note. Justices blind: how the Rehnquist Court's refusal to hear a claim for inordinate delay of execution undermines its death penalty jurisprudence. 74 S. Cal. L. Rev. 577-615 (2001).
- Hessler, Stephen E. Note. Establishing inevitability without active pursuit: defining the inevitable discovery exception to the Fourth Amendment exclusionary rule. 99 Mich. L. Rev. 238-278 (2000).
- Holley, Danyne. Culpability evaluations in the state supreme courts from 1977 to 1999: a "model" assessment. 34 Akron L. Rev. 401-520 (2001).
- Jost, Peter-J. Crime, coordination, and punishment: an economic analysis. 21 Int'l Rev. L. & Econ. 23-46 (2001).
- Kaiser, David Aram. Note. The end of detrimental reliance for plea agreements? (United States v. Coon, 805 F.2d 822, 8th Cir. 1986.) 52 Hastings L.J. 579-601 (2001).
- Klarman, Michael J. The racial origins of modern criminal procedure. 99 Mich. L. Rev. 48-97 (2000).
- Kondo, LeRoy L. Advocacy of the establishment of mental health specialty courts in the provision of therapeutic justice for mentally ill offenders. 24 Seattle U. L. Rev. 373-465 (2000).
- Linden, Patrick J. Comment. The temporary guest's reduced expectation of privacy. (State v. Carter, 569 N.W.2d 169, Minn. 1997, rev'd, Minnesota v. Carter, 119 S. Ct. 469, 1998.) 77 Denv. U. L. Rev. 217-241 (1999).
- Martin, Christine A. Note. Murder by child abuse—who's responsible after ... (State v. Jackson, 137 Wash. 2d 712, 976 P.2d 1229, 1999.) 24 Seattle

- U. L. Rev. 663-689 (2000).
- Montgomery, Erika Ross. Note. Criminal procedure—pretext in a state of confusion—the Arkansas Supreme Court takes a stand on pretextual arrests. (State v. Sullivan, 340 Ark. 315, 11 S.W.3d 526, supplemental op. On denial of reh'g, 340 Ark. 318A, 16 S.W.3d 551, 2000, pet. for cert. filed, 69 U.S.L.W. 3157, U.S. Aug. 16, 2000, No. 00-262.) 23 U. Ark. Little Rock L. Rev. 511-540 (2001).
- Morris, Paul. Case note. The Arkansas nighttime search rule—helping make Arkansas the country's number one producer of methamphetamine. (Fouse v. State, 337 Ark. 13, 989 S.W.2d 146, 1999.) 53 Ark. L. Rev. 965-981 (2000).
- Morrison, Trevor W. Fair warning and the retroactive judicial expansion of federal criminal statutes. 74 S. Cal. L. Rev. 455-521 (2001).
- Morriss, Andrew P. Returning justice to its private roots. (Reviewing Bruce L. Benson, To Serve and Protect: Privatization and Community in Criminal Justice.) 68 U. Chi. L. Rev. 551-578 (2001).
- Neill, Brian. Comment. A retributivist approach to parental responsibility laws. 27 Ohio N.U. L. Rev. 119-140 (2000).
- Note. The rhetoric of difference and the legitimacy of capital punishment. 114 Harv. L. Rev. 1599-1622 (2001).
- O'Sullivan, Julie R. The Bakaly debacle: the role of the press in high-profile criminal investigations. 60 Md. L. Rev. 149-204 (2001).
- Ospina-Velasco, Jaime. Strengths and hurdles in the struggle against asset laundering and the repression of financial crime: the Colombian perspective. 13 Fla. J. Int'l L. 96-114 (2000).
- Owens, John B. Have we no shame?: Thoughts on shaming, "white collar" criminals, and the Federal Sentencing Guidelines. 49 Am. U. L. Rev. 1047-1058 (2000).
- Pena, Melissa J. Note. The role of appellate courts in domestic violence cases and the prospect of a new partner abuse cause of action. 20 Rev. Litig. 503-528 (2001).
- Pinard, Michael. Limitations on judicial activism in criminal trials. 33 Conn. L. Rev. 243-301 (2000).
- Podgor, Ellen S. Do we need a "Beanie Baby" fraud statute? 49 Am. U. L. Rev. 1031-1046 (2000).
- Rand, Joseph W. The demeanor gap: race, lie detection, and the jury. 33 Conn. L. Rev. 1-76 (2000).
- Rice, Scott E. Casenote. The Fifth Amendment privilege against self-incrimination and fear of foreign prosecutions. (United States v. Balsys, 524 U.S. 666, 1998.) 25 S. Ill. U. L.J. 215-242 (2000).
- Robinson, Paul H. Punishing dangerousness: cloaking preventive detention as criminal justice. 114 Harv. L. Rev. 1429-1456 (2001).
- Rothenberg, Lance E. Comment. Re-thinking privacy: peeping Toms, video voyeurs, and failure of the criminal law to recognize a reasonable expectation of privacy in the public space. 49 Am. U. L. Rev. 1127-1165 (2000).
- Sachar, David J. Overview of Arkansas warrantless search and seizure law. 23 U. Ark. Little Rock L. Rev. 423-484 (2001).
- Stevens, Aaron P. Note. Arresting crime: expanding the scope of DNA databases in America. 79 Tex. L. Rev. 921-960 (2001).
- Strudler, Alan. Belief and betrayal: confidentiality in criminal defense practice. 69 U. Cin. L. Rev. 245-272 (2000).
- Sullivan, J. Thomas. The culpability, or mens rea, "defense" in Arkansas. 53 Ark. L. Rev. 805-884 (2000).
- Tague, Peter W. Ensuring able representation for publicly-funded criminal defendants: lessons from England. 69 U. Cin. L. Rev. 273-288 (2000).
- Tew, Eric C. Note. Establishing uniformity: the need for a per se rule against the grouping of money laundering and fraud counts under the Federal Sentencing Guidelines. 42 Wm. & Mary L. Rev. 1077-1103 (2001).
- Trepiccione, Melissa A. Note. At the crossroads of law and social science: is charging a battered mother with failure to protect her child an acceptable solution when her child witnesses domestic violence? 69 Fordham L. Rev. 1487-1522 (2001).
- Wake, Paul. Helping children through the juvenile justice system: a guide for Utah defense attorneys. 15 BYU J. Pub. L. 31-51 (2000).
- Wasserman, Jill. Note. Has habeas corpus been suspended in Georgia? Representing indigent prisoners on Georgia's death row. 17 Ga. St. U. L. Rev. 605-634 (2000).
- Yamagami, Donald S. Comment. Prosecuting cyber-pedophiles: how can intent be shown in a virtual world in light of the fantasy defense? 41 Santa Clara L. Rev. 547-579 (2001).
- Zacharias, Fred C. The professional discipline of prosecutors. 79 N.C.L. Rev. 721-778 (2001).

DISPUTE RESOLUTION

Sutton, Kimberly. Comment. Illinois' proposed mediation privilege. 25 S. Ill. U. L.J. 179-199 (2000).

DOMESTIC RELATIONS

Neill, Brian. Comment. A retributivist approach to parental responsibility laws. 27 Ohio N.U. L. Rev. 119-140 (2000).

Pena, Melissa J. Note. The role of appellate courts in domestic violence cases and the prospect of a new partner

abuse cause of action. 20 Rev. Litig. 503-528 (2001).

EVIDENCE

Bellamy, Kristi Michelle. Note. The "automatic companion" rule and its unconstitutional application to the frisk of car passengers. 27 Am. J. Crim. L. 217-232 (2000).

DeCock, Kenneth and Erin Mercer. Comment. Balancing the scales of justice: how will Vasquez v. State affect vehicle searches incident to arrest in Wyoming? 1 Wyoming L. Rev. 139-169 (2001).

Karns, Jack E. Establishing the standard for a physician's patient diagnosis using scientific evidence: dealing with the split of authority amongst the Circuit Courts of Appeal. 15 BYU J. Pub. L. 1-29 (2000).

Menard, Richard H., Jr. Note. Ten reasonable men. 38 Am. Crim. L. Rev. 179-203 (2001).

Murphy, Justin P. Note. Expert witnesses at trial: where are the ethics? 14 Geo. J. Legal Ethics 217-239 (2000).

Murray, Brian and Joseph C. Rosa. He lies, you die: criminal trials, truth, perjury, and fairness. 27 New Eng. J. on Crim. & Civ. Confinement 1-25 (2001).

Payton, Debra M. Note. A conflict in the knowledge requirement for possession between the Tenth Circuit and Fifth Circuit: should it be permissible to infer that a driver of a vehicle has knowledge of the contraband within it or does knowledge require additional circumstantial evidence? 27 New Eng. J. on Crim. & Civ. Confinement 131-157 (2001).

Peters, Doran D. Note. Per se prohibitions of the admission of polygraph evidence as upheld in Scheffer are both violative of the Constitution and the Federal Rules of Evidence as applied by Daubert. 27 Am. J. Crim. L. 249-278 (2000).

Pinkerton, Amy L. Casenote. The work product doctrine in the Eighth Circuit. (Baker v. General Motors Corp., 209 F.3d 1051, 8th Cir. 2000.) 34 Creighton L. Rev. 475-516 (2001).

Plaxton, Michael C. Casenote. Can a criminal defendant be a credible witness? (Portuondo v. Agard, 529 U.S. 61, 2000.) 27 Am. J. Crim. L. 279-292 (2000).

Rana, Sarah A. Note. Restricting the attorney-client privilege: necessary limitations or distorting the privilege? 32 Suffolk U. L. Rev. 687-705 (1999).

Robinson, Alfreda. Duet or duel: Federal Rule of Evidence 612 and the work product doctrine codified in Civil Procedure Rule 26(b)(3). 69 U. Cin. L. Rev. 197-244 (2000).

Shack, Thomas G., III. Miranda revisited: the Supreme Court rules. 27 New Eng. J. on Crim. & Civ. Confinement 159-187 (2001).

Stevens, Aaron P. Note. Arresting crime: expanding the scope of DNA databases in America. 79 Tex. L. Rev. 921-960 (2001).

JUDGES

Abramson, Leslie W. Appearance of impropriety: deciding when a judge's impartiality "might reasonably be questioned". 14 Geo. J. Legal Ethics 55-102 (2000).

Abramson, Leslie W. The judicial ethics of ex parte and other communications. 37 Hous. L. Rev. 1343-1394 (2000).

Greenlee, Mark B. Faith on the bench: the role of religious belief in the criminal sentencing decisions of judges. 26 U. Dayton L. Rev. 1-41 (2000).

Maltz, Earl M. The function of Supreme Court opinions. 37 Hous. L. Rev. 1395-1420 (2000).

Pinard, Michael. Limitations on judicial activism in criminal trials. 33 Conn. L.

Rev. 243-301 (2000).

Morrison, Trevor W. Fair warning and the retroactive judicial expansion of federal criminal statutes. 74 S. Cal. L. Rev. 455-521 (2001).

Wilkens, Richard G. et al. Supreme Court voting behavior: 1998 Term. 27 Hastings Const. L.Q. 423-510 (2000).

JURISPRUDENCE

Gee, Harvey. New paradigms of criminal justice for the twenty-first century: a review essay. 27 Ohio N.U. L. Rev. 29-66 (2000).

Robinson, Paul H. Punishing dangerousness: cloaking preventive detention as criminal justice. 114 Harv. L. Rev. 1429-1456 (2001).

Strauss, David A. The irrelevance of constitutional amendments. 114 Harv. L. Rev. 1457-1505 (2001).

JUVENILES

Adler, Amy. The perverse law of child pornography. 101 Colum. L. Rev. 209-273 (2001).

Alexander, Joyce London. Aligning the goals of juvenile justice with the needs of young women offenders: a proposed praxis for transformational justice. 32 Suffolk U. L. Rev. 555-611 (1999).

Campbell, Tara C. Comment. Did video games train the school shooters to kill? Determining whether Wisconsin courts should impose negligence or strict liability in a lawsuit against the video game manufacturers. 4 Marq. L. Rev. 811-844 (2001).

D'Amico, Suzanne. Comment. Inherently female cases of child abuse and neglect: a gender-neutral analysis. 28 Fordham Urb. L.J. 855-885 (2001).

Fugate, Jeanne A. Note. Who's failing whom? A critical look at failure-to-protect laws. 76 N.Y.U. L. Rev. 272-308 (2001).

Fuhriman, Troy. State v. Foster: Washington State undermines confrontation rights to protect child witnesses. 36 Gonz. L. Rev. 7-47 (2000/01).

Higgins, Angela. Note. Do unto thy neighbor: in support of a conditional privilege to warn neighbors of a suspected child molester after ... (Schmitz v. Aston, 3 P.3d 1184, Ariz. Ct. App. 2000.) 69 UMKC L. Rev. 471-490 (2000).

Johnson, Caia. Comment. Traumatic amnesia in the new millennium: a new approach to exhumed memories of childhood sexual abuse. 21 Hamline J. Pub. L. & Pol'y 387-442 (2000).

Katner, David R. Coming to praise, not to bury, the new ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. 14 Geo. J. Legal Ethics 103-137 (2000).

Scott, Elizabeth S. The legal construction of adolescence. 29 Hofstra L. Rev. 547-598 (2000).

Trepiccione, Melissa A. Note. At the crossroads of law and social science: is charging a battered mother with failure to protect her child an acceptable solution when her child witnesses domestic violence? 69 Fordham L. Rev. 1487-1522 (2001).

Wake, Paul. Helping children through the juvenile justice system: a guide for Utah defense attorneys. 15 BYU J. Pub. L. 31-51 (2000).

Weinstein, Janet and Ricardo Weinstein. Before it's too late: neuropsychological consequences of child neglect and their implications for law and social policy. 33 U. Mich. J.L. Reform 561-613 (2000).

LAW AND SOCIETY

Conley, John M., William J. Turnier and Mary R. Rose. The racial ecology of the courtroom: an experimental study of juror response to the race of criminal defendants. 2000 Wis. L. Rev. 1185-

1220.

Mullin, Wallace P. Will gun buyback programs increase the quantity of guns? 21 Int'l Rev. L. & Econ. 87-102 (2001).

LAW ENFORCEMENT AND CORRECTIONS

Feeney, Floyd. Police clearances: a poor way to measure the impact of Miranda on the police. 32 Rutgers L.J. 1-114 (2000).

Lee, Jennifer Arnett. Note. Women prisoners, penological interests, and gender stereotyping: an application of equal protection norms to female inmates. 32 Colum. Hum. Rts. L. Rev. 251-288 (2000).

Marmon, Jennifer L. Note. Intrusion and the media: an old tort learns new tricks. 34 Ind. L. Rev. 155-177 (2000).

Mehling, Elizabeth D. Comment. Where do prisoners live: do taxpayers have a valid legal claim for lost federal funds resulting from the Census Bureau's enumeration standards relating to prisoners? 32 U. Tol. L. Rev. 47-65 (2000).

White, Ahmed A. Rule of law and the limits of sovereignty: the private prison in jurisprudential perspective. 38 Am. Crim. L. Rev. 111-146 (2001).

LEGAL PROFESSION

Diamond, Michael. Community lawyering: revisiting the old neighborhood. 32 Colum. Hum. Rts. L. Rev. 67-131 (2000).

Fischer, Julee C. Note. Policing the self-help legal market: consumer protection or protection of the legal cartel? 34 Ind. L. Rev. 121-153 (2000).

John, Jessica R. Note. I gotta get out of this case: withdrawal from representation as a public defender. 10 B.U. Pub. Int. L.J. 152-170 (2000).

Morgan, Thomas D. Real world pressures on professionalism. 23 U. Ark.

Little Rock L. Rev. 409-421 (2001).

Richmond, Douglas R. The new law firm economy, billable hours, and professional responsibility. 29 Hofstra L. Rev. 207-234 (2000).

Strudler, Alan. Belief and betrayal: confidentiality in criminal defense practice. 69 U. Cin. L. Rev. 245-272 (2000).

MOTOR VEHICLES

DeCock, Kenneth and Erin Mercer. Comment. Balancing the scales of justice: how will Vasquez v. State affect vehicle searches incident to arrest in Wyoming? 1 Wyoming L. Rev. 139-169 (2001).

Payton, Debra M. Note. A conflict in the knowledge requirement for possession between the Tenth Circuit and Fifth Circuit: should it be permissible to infer that a driver of a vehicle has knowledge of the contraband within it or does knowledge require additional circumstantial evidence? 27 New Eng. J. on Crim. & Civ. Confinement 131-157 (2001).

PRACTICE AND PROCEDURE

Murphy, Justin P. Note. Expert witnesses at trial: where are the ethics? 14 Geo. J. Legal Ethics 217-239 (2000).

Wyoming Commission on Jury System Improvement. Re-examining Wyoming's jury trial procedures. 1 Wyoming L. Rev. 91-137 (2001).

PROFESSIONAL ETHICS

Hagen, Leslie A. and Kim Morden Rattet. Communications and violence against women: Michigan law on privilege, confidentiality, and mandatory reporting. 17 T.M. Cooley L. Rev. 183-271 (2000).

Guttilla, Carolyn Crotty. Note. Caught between a rock and a hard place: when can or should an attorney disclose a client's confidence? 32 Suffolk U. L.

Rev. 707-728 (1999).

PSYCHOLOGY AND PSYCHIATRY

Courselle, Diane, Mark Watt and Donna Sheen. Suspects, defendants, and offenders with mental retardation in Wyoming. 1 Wyoming L. Rev. 1-90 (2001).

Johnson, Caia. Comment. Traumatic amnesia in the new millennium: a new approach to exhumed memories of childhood sexual abuse. 21 Hamline J. Pub. L. & Pol'y 387-442 (2000).

Maloney, Bridget A. Note. Distress among the legal profession: what law schools can do about it. 15 Notre Dame J.L. Ethics & Pub. Pol'y 307-331 (2001).

SCIENCE AND TECHNOLOGY

Peters, Doran D. Note. Per se prohibitions of the admission of polygraph evidence as upheld in Scheffer are both violative of the Constitution and the Federal Rules of Evidence as applied by Daubert. 27 Am. J. Crim. L. 249-278 (2000).

SOCIAL WELFARE

Godsoe, Cynthia. Caught between two systems: how exceptional children in out-of-home care are denied equality in education. 19 Yale L. & Pol'y Rev. 81-164 (2000).

WOMEN

Alexander, Joyce London. Aligning the goals of juvenile justice with the needs of young women offenders: a proposed praxis for transformational justice. 32 Suffolk U. L. Rev. 555-611 (1999).

D'Amico, Suzanne. Comment. Inherently female cases of child abuse and neglect: a gender-neutral analysis. 28 Fordham Urb. L.J. 855-885 (2001).

Lee, Jennifer Arnett. Note. Women prisoners, penological interests, and

gender stereotyping: an application of equal protection norms to female inmates. 32 Colum. Hum. Rts. L. Rev. 251-288 (2000).

Symposium: Preventing Intimate Violence: Have Law and Public Policy Failed? Dedication to Edward A. Smith by John Q. La Fond; foreword by John Q. La Fond and Sharon G. Portwood; articles by Edward Zigler, Sally J. Styfco, Richard J. Gelles, Bruce J. Winick, David B. Wexler, N. Dickon Reppucci, Carrie S. Fried, Daniel Dodgen, Hon. Randal B. Fritzler, Leonore M.J. Simon, Mark R. Fondacaro, Jennifer L. Woolard, Sarah L. Cook, Eloise Rathbone-McCuan, Jeffrey J. Haugaard and Lisa G. Seri. 69 UMKC L. Rev. 1-237 (2000). ■