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Termination of Parental Rights and
Other Juvenile Cases

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

E-mail: pruskig@mail.opd.state.wi.us

Web: <http://www.wisspd.org/>

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From the Editor...

This issue of the *Wisconsin Defender* focuses on termination of parental rights cases, which have been described by many practitioners as probably the most difficult type of case to handle. Some have even found a TPR case to be more challenging than a first degree intentional homicide case. Clearly, what's at stake in a TPR case is enormous, and a TPR case typically involves voluminous records spanning several years. This issue of the *Wisconsin Defender* is intended to help lawyers better understand the complexities of a TPR case.

First, Judge Joseph Wall from Milwaukee County Children's Court, provides an in-depth look at the evidentiary issues involved in a TPR trial. Judge Wall discusses how the Wisconsin rules of evidence, especially the rules on hearsay, specifically apply in a TPR case.

Next, Attorney Richard Auerbach gives us an overview of the appellate process as it relates to TPR cases by spelling out the procedural differences between a criminal appeal and a TPR appeal. He also provides several practice pointers.

Milwaukee County Court Commissioner Lindsey Draper provides an overview of the permanency plan laws (recently changed by Act 109 to bring Wisconsin into accord with the federal Adoption and Safe Families Act) and identifies several issues for lawyers to consider when participating in permanency plan reviews.

Finally, for lawyers who handle delinquency cases, Attorney Leslee Ruscitti talks about the importance of juvenile court trials in "Bench Trials: Juvenile Court and the Jury of One" and "Juvenile News" by Attorney Michael Yovovich offers helpful hints related to court-ordered DPAs and juvenile competency issues.

Agency Mission

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

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Evidentiary Issues in Termination of Parental Rights Trials

By: Honorable Joseph R. Wall*

Termination of parent rights “adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship. . . . [P]arental termination decrees are among the most severe forms of state action.”¹ Indeed, one state supreme court has declared that severance of the parent-child relationship through a termination of parental rights proceeding is “tantamount to imposition of a civil death penalty.”²

Termination of parental rights trials present special issues for both petitioner’s and parents’ counsel. Although the trials are conducted under the Wisconsin Rules of Civil Procedure, the well-recognized fundamental rights of the parent separate the proceedings somewhat from the normal civil arena. Furthermore, the discrete area of substantive law surrounding such proceedings creates unique evidentiary issues that in some cases contradict long and well-established principles. Finally, since the cases are usually document intensive and concern time periods often covering several years of activity, practitioners must have a good understanding of the rules of evidence, especially the rules of hearsay.

Introduction

A Termination of Parental Rights (TPR) trial is a bifurcated process. In the first phase, called the “grounds” phase, a parent is entitled to a jury trial. At this phase it is the duty of the fact-finder to determine if grounds (statutory reasons) exist to terminate the rights of a parent.³

At the grounds phase, the parent’s rights are paramount.⁴ “During this step, the burden is on the government, and the parent enjoys a full complement of procedural rights.”⁵ The Wisconsin Rules of Evidence are applicable at this stage.⁶

If a jury (or court, when a parent waives the jury) finds grounds, the case proceeds to the second phase, the dispositional hearing. This hearing is to the court. During this second phase, the best interests of the child are paramount.⁷ The Wisconsin Rules of Evidence are not applicable at this stage.⁸

The Interests of a Parent

The United States Supreme Court has stated that what is at risk in a TPR proceeding is the “interest of a parent in the companionship, care, custody, and management of his or her children.”⁹ “[F]ar more precious . . . than property rights,”¹⁰ parental rights are “essential to the orderly pursuit of happiness by free men,”¹¹ and are considered to be more significant than “liberties which derive merely from shifting economic arrangements.”¹²

A parent’s rights are firmly rooted in the Due Process Clause of the Fourteenth Amendment. In *Troxel v. Granville*, the Supreme Court stated:

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart,

***Honorable Joseph R. Wall** is a Circuit Court Judge currently assigned to Milwaukee County Children’s Court. From 1986 to 2001 he was an Assistant United States Attorney for the Eastern District of Wisconsin specializing in the prosecution of drug conspiracies and white collar crime prosecutions. From 1984 to 1986 he practiced as an Assistant District Attorney in Milwaukee County. Judge Wall graduated from Marquette University Law School magna cum laude in 1984, where he was the editor in chief of the Marquette Law Review. Judge Wall is also a certified public accountant.

“guarantees more than fair process.” The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” The liberty interest at stake in this case - the interest of parents in the care custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this Court.¹³

The Wisconsin Supreme Court likewise has recognized the magnitude of the parents’ interests. That court has stated that terminations of parental rights affect some of parents’ most fundamental human rights.¹⁴ “Due to the severe nature of terminations of parental rights, termination proceedings require heightened legal safeguards against erroneous decisions.”¹⁵ Because a termination proceeding “implicates the fundamental rights of a parent . . . [t]he rights of the parent must be accorded a high order of respect and must be considered paramount until circumstances show that the parent has forfeited these rights.”¹⁶

“The child, too, has an interest in a termination proceeding because of her or his right to traditional parental bonds, including the right to financial, physical, and emotional care.”¹⁷ For courts deciding these issues the Wisconsin Supreme Court has emphasized the importance of the family as an entity. In *Barstad v. Frazier*,¹⁸ the court stated:

[P]arental rights do not exist solely for the benefit of the individual parent but exist also and perhaps most importantly for the benefit of the family unit of which the parent is part. The import of the United States Supreme Court decisions in this area is to create a “private realm of *family life* which the state cannot enter.” The law casts its protection around the family unit.¹⁹

Congress too has weighed in on the issue, recognizing that “removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty”²⁰

Grounds For Termination of Parental Rights

The State, the guardian ad litem, or the parent initiates a TPR proceeding by filing a petition alleging grounds, or statutory reasons, for terminating a parent’s rights. The most common grounds and their basic elements are as follows.

A. *Abandonment (CHIPS)*

Wis. Stat. § 48.415(1)(a)2 requires a showing that:

- 1) The child was placed outside of the parent’s home pursuant to a CHIPS order, and,
- 2) The parent failed to visit or communicate with the child for a period of three months or longer.

A parent can rebut this ground by showing that he or she: had good cause for failing to visit or communicate with their child; communicated about the child with the individual who had custody of the child; or had good cause for failing to communicate about the child with the person who had custody of the child.

B. *Abandonment (Non-CHIPS)*

Wis. Stat. § 48.415(1)(a)3 requires a showing that:

- 1) The parent left the child with another;
- 2) The parent could have discovered the child’s whereabouts; and

- 3) The parent failed to visit or communicate with the child for a period of six months or longer.

A parent can rebut this ground by making the same showing enumerated above.

C. *Continuing Need of Protection or Services (“Continuing CHIPS”)*

Wis. Stat. § 48.415(2) requires a showing that:

- 1) A court has adjudicated a child as being in need of protection or services and placed the child outside the home for a cumulative total of six months or more;
- 2) The social services agency has made reasonable efforts to provide the parent with the services ordered by the court;
- 3) The parent has failed to meet the conditions established by the court for the safe return of the child to the home; and
- 4) There is a substantial probability that the the parent will not meet those conditions within the twelve-month period following the conclusion of the trial.

D. *Failure to Assume Parental Responsibility (“Failure to Assume”)*

Wis. Stat. § 48.415(6) requires a showing that:

- 1) The parent has failed to assume parental responsibility for the child.

This is demonstrated by proving that the parent never has had a substantial parental relationship with the child. The jury instruction defines “substantial parental relationship” as the “acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child.” Under this ground “a person’s parental rights may be terminated without proof that the person had the opportunity and ability to establish a substantial parental relationship with the child.”²¹

E. *Miscellaneous Other Grounds*

The following grounds are alleged much less often than those detailed above: continuing need of protection or services (“three strikes”) under § 48.415(2)(am); continuing parental disability under § 48.415(3); continuing denial or periods of physical placement or visitation under § 48.415(4); child abuse under § 48.415(5); incestuous parenthood under § 48.415(7); homicide or solicitation to commit homicide of a parent under § 48.415(8); parenthood as a result of sexual assault under § 48.415(9); serious felony against one’s children under § 48.415(9m); and prior involuntary TPR of another child under § 48.415(10).

Evidence Relevant to a Particular Ground

Relevance is always the threshold inquiry when evaluating the admissibility of an item of evidence. Wis. Stat. § 904.01 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Wis. Stat. § 904.02 provides that: “All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.”

The most important limitation on the use of relevant evidence is set forth in Wis. Stat. § 904.03. That statute, the “balancing test,” provides in part: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” In *State v. Sullivan*,²² the supreme court expanded upon the statutory test stating that “unfair prejudice

results when the proffered evidence has a tendency to influence the outcome by improper means or it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established proposition in the case."

When evaluating whether an item of evidence ultimately will be admissible, trial counsel must always be prepared to argue the 904.03 "balancing test."

A. Admissibility of Particular Evidence in a Continuing CHIPS Case

The fourth element of the Continuing CHIPS ground is predictive in nature. The element requires the jury to look into the parent's future in order to determine whether there is a "substantial probability that the parent will not meet" the court-ordered conditions within twelve months after the close of the trial. It is the only predictive element in any TPR ground in Wisconsin. Since the best, and possibly the only, way a jury can make this determination is by evaluating the parent's past behavior, this element opens up an almost unlimited variety of character evidence.

In *In re Termination of Parental Rights to Deantye P.-B.*,²³ the court of appeals held that evidence of a parent's prior bad parenting may be admissible in a TPR proceeding. The court stated:

We agree with [the mother] that this evidence was both offered as and used to show her character and propensity to be an unfit parent and the corresponding low likelihood that she would comply with conditions during the ensuing twelve-month period. We disagree that it was inadmissible under § 904.04(2). . . . In determining whether "there is a substantial likelihood" that a parent will not meet conditions for the return of his or her children, a fact finder must necessarily consider the parent's relevant character traits and patterns of behavior, and the likelihood that any problematic traits or propensities have or can be modified in order to assure the safety of the children.²⁴

It is especially significant that the court held admissible evidence of the parent's "character traits," "patterns of behavior," and "propensities." This is classic character evidence traditionally barred by Wis. Stat. § 904.04(1)²⁵ and the long line of cases following *Whitty v. State*.²⁶ Considering the well-established rules limiting the direct use of character evidence, the court's use of those terms is groundbreaking and can be attributed to the unique nature of this element. The court went on to declare that "events occurring prior to a CHIPS dispositional order are frequently relevant at a termination proceeding. . . . It is readily apparent that a history of parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date."²⁷

The court's decision in *Deantye P.-B.* makes clear that in a "Continuing CHIPS" case a broad range of "prior bad acts" evidence may be relevant and ultimately admissible. The relevance of bad acts evidence will be limited only by the extent and nature of the parent's court conditions. If a parent was ordered to not violate the law, any prior or continuing criminal conduct will be relevant at trial. The same is true as to prior or continuing alcohol abuse, drug use, abuse of other children, psychological or psychiatric disorders, maintenance of an unclean house, association with criminal elements, and so on. Again, if an item of evidence is relevant to a parent's past failure or future inability to meet a court condition, the only limitation as to its admissibility at trial is the application of the 904.03 balancing test.

B. Admissibility of Particular Evidence in a Failure To Assume Parental Responsibility Case

The broadest decision affirming the trial court's exercise of discretion in admitting a parent's prior criminal conduct is *State v. Quinsanna D.*²⁸ There, the court of appeals upheld the trial court's admission of substantive evidence involving the mother's selling of drugs and maintaining a drug house while the children

were with her, and, subsequent to the children's removal from the home, the mother's involvement in theft and obstruction of an officer.

The *Quinsanna D.* court found that the drug evidence was relevant to the reason why the children were removed from the home, and the theft and obstructing conduct were relevant to whether the mother had assumed parental responsibility for the children.²⁹ The court found that the evidence was not being introduced to show the mother's bad character, "[t]hat is, the drug offenses and sentences were not introduced to prove [the mother] possessed drugs and kept a drug house; the theft and obstructing offenses and sentences were not introduced to prove she was a thief or a liar."³⁰ Instead, the court found that the

evidence of all the offenses and sentences was introduced to prove that she had failed to assume parental responsibility for [her children]. That was fair. As the supreme court has explained, in a termination case a trial court cannot ignore the circumstances of why a parent was not physically available to assume parental responsibility when that unavailability is due not to illness, military service, or employment, but, rather to incarceration from the willful act of burglary and where it was the parent's second incarceration for that crime. [citing *In the Interest of Baby Girl K.*, 113 Wis. 2d 429, 442, 335 N.W.2d 846 (1983)]. Similarly, in another termination case, the supreme court commented that it could not ignore the fact that any roadblock to establishing a [parental] relationship with [the child] caused by [the parent's] arrest, bond, and conviction was produced by [the parent's] own conduct. [citing *In the Matter of Termination of Parental Rights to SueAnn A.M.*, 176 Wis. 2d 673, 685, 500 N.W.2d 649 (1993)].³¹

Expanding upon its reasoning the court of appeals said: "In those cases, courts logically considered parental responsibility for their own criminal conduct. And in [*Baby Girl K.*], and the instant case, courts logically considered parents' decisions to commit crimes notwithstanding what, at the very least, should have been their appreciation for the impact of their conduct on their relationships with their children."³²

Finally, the court noted with approval that the trial court "carried out the balancing analysis required under Wis. Stat. § 904.03 and articulated reasonable bases for the admission of the evidence of all [the mother's] offenses and sentences."³³

In *In the Interest of Baby Girl K.*,³⁴ the supreme court found that in order to prove this ground, the petitioner may introduce evidence of the parent's conduct during the child's conception period. "[A] parent's action prior to a child's birth can form a sufficient basis for determining whether that parent has established a substantial parental relationship with the child."³⁵ The opportunity to exercise responsibility for the care and protection of a child begins before the child's birth.³⁶ In *Baby Girl K.* the court found it relevant that the father: asked his girlfriend, the pregnant mother-to-be, to smuggle marijuana to him while he was in prison; had physically assaulted her while she was pregnant; had failed to provide care or support to her during her pregnancy; and had failed to contribute to the mother's medical expenses arising from her pregnancy and the birth of the baby.³⁷

In another TPR proceeding under this ground, the supreme court found that the father's failure to marry the mother or to provide any financial assistance during her pregnancy was relevant.³⁸

C. Use of "Best Interest" Evidence at the Grounds Phase

At the grounds phase, the jury is not to consider the best interests of the child. In *In the Interest of C.E.W.*,³⁹ the supreme court emphasized this point, stating: "We conclude that at the fact finding stage, the fact finder - here the jury - does not consider the best interests of the child standard. This conclusion has a bearing on the nature of the questions addressed to witnesses and on the nature of the summation to the jury" While

the guardian ad litem can argue the facts to the jury at the fact-finding stage, “[t]he guardian ad litem cannot, of course, invoke the best interests of the child in statements to the jury.”⁴⁰

D. Use of “Dual Purpose” Evidence

Evidence that may be relevant at the dispositional phase may also be relevant at the grounds phase. As such, certain “best interest” testimony may be relevant and admissible during the trial. Examples include, among other things: details of “unsuccessful” parental visits, that is, a child’s negative reaction to the parent at the visit; foster parent testimony about the child’s special needs and details of the foster parents’ duties in meeting the child’s special needs; foster parent testimony about the failure of the parent to contact the child, provide support for, or give gifts to the child; and details regarding the physical and mental health of the biological parent.

Since this type of evidence could shift the jury’s focus away from the grounds testimony, a limiting instruction may be appropriate after the specific testimony and again during the closing instructions.⁴¹

Documentary Evidence

As previously stated, TPR trials are usually document intensive. The physical file of the social service agency often will be bulging with court records and other documents cataloging the history of the case while it wound its way through the foster care system. That agency file will contain some or many of the following items: visitation logs recording the parents’ visits with the child, including the details of their interaction and often the social worker’s opinion of the “success” or lack of success of the visit; records of the various case managers’ inspection of the parents’ home and their opinions regarding the suitability of the residence for the child; letters from the parents, foster parents, previous case managers, physicians, psychiatrists, psychologists, counselors, teachers, and many others; doctor reports and medical records; records from other agencies and providers to whom the parent has been referred for services and treatment; and, court reports, court orders, and numerous other documents filed with the court as part of the CHIPS history.

The proponent of records in the Bureau file must overcome the hearsay nature inherent in every document generated during the history of the CHIPS case. Wis. Stat. § 908.01(3), entitled “Hearsay,” provides: “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Wis. Stat. § 908.02, entitled “Hearsay Rule,” provides: “Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.”

A. Business Records

Records created through a regularly conducted activity are a well-established exception to the hearsay rule. This rule is also referred to as the “business records exception.” Wis. Stat. § 908.03(6), entitled “Records of Regularly Conducted Activity,” provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

In *State v. Gilles*⁴² the court of appeals emphasized that, “[t]he rule requires . . . that all the declarants involved in the making of the memorandum be part of the organization which prepared it.”

1. Opinions

The rule specifically allows opinions as proper subjects of admissible entries.⁴³ Courts must exercise caution with this type of evidence since opinions, by their very nature, do not involve concrete determinations. In *Noland v. Mutual of Omaha Insurance Company*,⁴⁴ the supreme court stated: “A medical record containing a diagnosis or opinion is not henceforth to be ipso facto excluded from evidence, but such evidence may be excluded in the trial judge’s discretion if the entry requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based.” Since an opinion in a business record may go right to the heart of an element in a ground alleged in the petition,⁴⁵ particular care must be taken in a TPR case when the parent does not have the opportunity to cross examine the declarant.

2. Third-Party Records

In TPR cases, issues often arise as to who is an “other qualified witness” and what foundation is necessary such to introduce records from another business entity. This occurs most often when a social worker from the county or state child welfare bureau attempts to introduce records received from a separate entity that is contracted to provide services to a parent. The common argument is that these records “are part of the bureau’s file.” Examples include records from outside agencies provided to the social worker documenting such services as random urine testing, drug counseling, literacy classes, visitation services, parenting classes, and home management counseling. Ordinarily, the proponent of these records cannot rely upon the business records exception because the social worker is unfamiliar with the creation and retention of the records by the third party.

The long-standing rule in Wisconsin is that, without something more, a records custodian cannot introduce records created by and received from another entity. In *Berg-Zimmer v. Central Mfg. Corp.*,⁴⁶ the court of appeals reversed a circuit court decision allowing the records custodian from one company to introduce invoices sent to his corporation from a second company. The court determined that the foundation was lacking for the admissibility of the billing company’s records:

The record is devoid of any evidence establishing [the custodian’s] qualifications to lay a proper foundation for the admissibility of [the billing company’s] records. He did not possess knowledge to testify concerning the contemporaneousness of the entries, by whom they were transmitted or whether the entries were made in the course of a regularly conducted activity.⁴⁷ See sec. 908.03(6), Stats. That he had possession of the records, understood their contents and recommended [his company’s] payment, cannot bootstrap [the custodian] into the position of a qualified witness under subs. (6).⁴⁸

Clearly, the foundation in *Berg-Zimmer* was woefully inadequate. There is, however, an emerging line of cases in the federal courts that allow for some flexibility in the technical requirements of the business records exception.⁴⁹ The most liberal interpretation can be found in decisions such as that from the Federal Circuit in *Air Land Forwarders, Inc. v. United States*.⁵⁰ In this and other decisions the courts found it sufficient if the custodian of the incorporating company provides the business records foundation and can state that his company integrated the third party’s records into their record-keeping system, the custodian’s company relies upon the accuracy of the incorporated record, and there are circumstances indicating the trustworthiness of the document.⁵¹ This approach is open to criticism since the incorporating company is not required to confirm the accuracy of the third party records in any way.⁵²

A bit more restrictive, but certainly more reliable, rule can be found in cases such as *United States v. Childs*.⁵³ In these decisions the custodian must not only show that the company integrated the third party’s

records into its system and relied upon the accuracy of the incorporated record, but also *independently verified the accuracy* of the third party records.⁵⁴

This is an area in which a trial court has broad discretion. Again, however, a court must always give import to the heightened interests of the parent in these proceedings. The risks inherent in admitting third-party records require the court to scrutinize closely the trustworthiness of such materials especially if the records go to the heart of an element in the case and the parent does not have the opportunity to test the reliability of the information through cross-examination.

3. *Reliability*

In the final analysis, the key to any decision as to the admissibility of business records is a determination of trustworthiness and reliability. In *Kuhlman, Inc. v. G. Heileman Brewing Co.*,⁵⁵ the supreme court stated: “Although the memorandum may meet the requirements of sec. 908.03(6), its admission could be denied by the trial court if ‘the sources of information or other circumstances’ surrounding the preparation of the [document] ‘indicate lack of trustworthiness.’ This language is broad enough to include many facets of untrustworthiness, e.g. the preparant’s motive to misrepresent, the failure of the type of record in issue to satisfy the rationale for the exception, and the manner in which the entry was made or kept.”

B. *Public Records*

Court documents such as CHIPS court orders, Permanency Plan Reviews, and other public documents such as judgments of conviction may be admissible as public records. Wis. Stat. § 908.03(8), entitled “Public Records and Reports,” allows for admissibility of the following:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

If, however, the record contains multiple levels of hearsay, the proponent must qualify each level,⁵⁶ just as in the case of business records. Thus, while the document itself is a public record, some or all of its contents may be excluded if they originate from outside the public entity.

Neither the person who created the official entries nor the records custodian are necessary to authenticate the record.⁵⁷ Any “competent witness” may introduce a public record.⁵⁸ Certified copies of public records⁵⁹ and public records under seal⁶⁰ are self authenticating and require no witness.⁶¹

C. *Refreshed Recollection*

Under the doctrine of present recollection refreshed,⁶² a witness may look at a writing or other item⁶³ to refresh his memory and then, based upon his refreshed memory, may testify in his own words.⁶⁴ A key requirement in this doctrine is that the witness had a memory of the events to which he is testifying. To refresh a witness’s memory, there must exist a memory to refresh. The risk here is that through this procedure the proponent is “planting” the information into the witness’s blank memory.

D. *Past Recollection Recorded*

The proponent of a document may introduce the item through the witness who authored the document or relayed to another the facts reflected in the document if the witness can no longer recall the contents of the

document and review of the document does not sufficiently refresh the witness's memory of its contents. Wis. Stat. § 908.03(5), entitled "Recorded Recollection," provides the following exception to the hearsay rule:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

The proponent of the evidence should use this rule when refreshing the memory of the witness is insufficient for the witness to then testify. If the document "does not revive or refresh his memory to the extent he can claim an independent recollection of the facts therein - then and only then - the writing itself and not the witness' testimony may come into evidence."⁶⁵ It is erroneous to admit the document if the witness can independently recall the facts or has refreshed his memory by reference to the document.⁶⁶ It is within the trial court's discretion to allow the jury to view a document admitted under this exception.⁶⁷

E. *Prior Consistent Statements*

Occasionally, trial court judges hear the proponent of evidence attempting to introduce a prior consistent statement or prior written report of a witness argue that such evidence is admissible "because the witness is here and is available to be cross-examined" regarding the statement or report. This argument is erroneous. Prior consistent statements or prior reports of the testifying witness, with nothing more, are inadmissible hearsay.⁶⁸

A prior consistent statement or prior written report of a witness is admissible and is outside the hearsay rule under Wis. Stat. § 908.01(4)(a) in three limited circumstances: for impeachment when the prior statement (or report) is inconsistent with the testimony of the witness; the prior testimony is consistent but is offered to rebut a charge of recent fabrication or improper influence or motive; or the statement is one of identification of a person made soon after seeing the person.

In *Gelhaar v. State*,⁶⁹ the supreme court adopted the position that the fact-finder could consider a prior inconsistent statement of a witness as substantive evidence. In that same decision the supreme court rejected similar treatment for prior consistent statements saying "[w]e purposely have not extended the rule herein to include prior *consistent* statements. We do not feel that self-serving statements have the same evidentiary value as prior inconsistent statements."⁷⁰

F. *Hearsay Within Hearsay*

Since documents often contain several layers of hearsay, the proponent of the document must establish an exception for each layer.⁷¹ Wis. Stat. § 908.05, entitled "Hearsay Within Hearsay" provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter." However, with each increased level of hearsay there is a corresponding decrease in reliability. Thus, a trial judge has discretion under § 904.03 to exclude multiple hearsay, even if each portion conforms to a statutory exception, if the judge finds the statement so unreliable that its probative value is substantially outweighed by the danger of prejudice or confusion.⁷²

G. *Admissibility of Prior Criminal Convictions*

Regardless of the limitations imposed by substantive law, prior criminal convictions of a witness are admissible for impeachment purposes. Wis. Stat. § 906.09, entitled "Impeachment by Evidence of Conviction of Crime," provides:

- (1) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. . . .
- (2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

This statute reflects the presumption that “one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted.”⁷³ If the court allows evidence of a witness’s prior convictions, the witness may be asked if they have been convicted of a crime, and, if so, the number of convictions. The impeaching party cannot inquire into the nature of the convictions.⁷⁴

Whether to allow prior-conviction evidence for impeachment purposes under § 906.09 is within the discretion of the trial court.⁷⁵ In exercising its discretion, the court should consider the lapse of time since the conviction, the gravity of the crime, the rehabilitation of the person convicted, the involvement of dishonesty or false statement in the crime, and, whether the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice.⁷⁶ A party may not impeach a witness with evidence of prior convictions until the trial court has ruled on the admissibility of the convictions.⁷⁷

Conclusion

Any person, and certainly any parent, would agree that trials to terminate a parent’s right to his or her child or children are among the most important proceedings to be adjudicated in our legal system. The parent’s right to the care, custody, and control of his or her child is guaranteed by the Due Process Clause of the Fourteenth Amendment.

Attorneys representing parents must clearly understand the substantive law and the nuances of the evidentiary issues that often arise during the proceedings. Attorneys must also have a keen understanding of the rules of evidence, especially those that concern documentary exhibits.

Endnotes

1. *M.L.B. v. S.L.J.*, 519 U.S. 102, 127-28 (1996).
2. *Matter of Parental Rights as to K.D.L. and S.P.K.*, 58 P.3d 181, 2002 Nev. LEXIS 89 (2002); *Matter of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000).
3. Wis. Stat. § 48.424(1).
4. *In re Jayton S.*, 246 Wis. 2d 1, 16, 629 N.W. 2d 768 (2001).
5. *Sheboygan County HHS v. Julie A.B.*, 255 Wis. 2d 170, 185, 648 N.W.2d 402 (2002).
6. Wis. Stat. § 48.299(4)(a).
7. *Jayton S.*, 246 Wis. 2d at 16. *See also Julie A.B.*, 255 Wis. 2d at 186 (at this stage, “the focus shifts to the interests of the child.”).
8. Wis. Stat. § 48.299(4)(b).

NEWS BRIEFS

Coalition for Juvenile Justice Opposes Waiving Juveniles to Adult Court

The Coalition for Juvenile Justice recently passed a resolution opposing the transfer of juveniles to adult court. The CJJ is a leading national resource on delinquency prevention and juvenile justice issues. The Coalition grew out of the State Advisory Groups formed in response to the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974.

The resolution cited several reasons for opposing waivers into the adult court system, including research that demonstrates the transfer of juveniles into the adult system increases the likelihood that they will reoffend, research that establishes differences between adult and adolescent brain development, statistics that indicate juveniles who are housed in adult facilities are sexually assaulted five times more often than those who are housed in juvenile facilities, and concerns that youth of color are disproportionately represented in cases sent to adult court.

For more information about the Coalition for Juvenile Justice, visit their website at: <http://juvjustice.org/index.html>

WEBSITE OF THE MONTH

<http://www.abanet.org/crimjust/juvjus/home.html>

Professionals working in the juvenile justice system will want to check out the website of the American Bar Association's Juvenile Justice Center. An outgrowth of the Juvenile Justice Standards Project, the Center tracks legislative, budgetary, policy and administrative changes related to juvenile justice systems around the country. The Center's present focus is on the right to effective assistance of counsel and the representation of delinquents, issues related to juveniles tried as adults, and conditions of confinement. The Center responds to a variety of juvenile justice issues and provides leadership to those who work in juvenile justice.

The website has sections with information specific to defense counsel, prosecutors, and judges. The site also contains information about upcoming juvenile justice-related training opportunities and sections on girls in the juvenile justice system and zero tolerance policies. The Center also maintains a list serve. The list serve is free of charge and provides subscribers with timely information on juvenile justice issues.

Juvenile Arrests in Wisconsin Down 29.4 Percent From 1993

The Wisconsin Office of Justice Assistance has released a preliminary version of its 2002 "Crime and Arrests in Wisconsin" report. This report is prepared annually by OJA and summarizes monthly crime and arrest reports submitted by law enforcement agencies around the State. Data are collected on "Index Crimes," as defined by the FBI, for adults and juveniles and analyzed for trends. Index Crime categories include murder, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle theft, and arson.

While there were increases in certain categories of crimes, juvenile arrests between 1993 and 2002 decreased 6.5 percent for violent crimes and 31.2 percent for property crimes resulting in an overall decrease of 29.4 percent. Adult arrests for the same time period went down 8.7 percent overall.

The preliminary version of the 2002 report is available on the OJA website at: <http://oja.state.wi.us/asx/crimereports.asp>



ASSIGNED COUNSEL DIVISION NEWS

SPD Online Billing The Faster & Easier Way To Get Paid

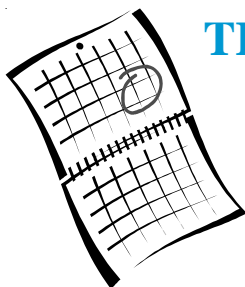


**Go to www.wisspd.org
Click on eOPD Online Access**

The Wisconsin State Public Defender's online billing system (eOPD) is getting rave reviews from the private bar. The system is easy to use and accommodates the most popular billing software. Paper bills have to be mailed to the local offices and then forwarded on to Madison. All figures have to be re-totaled and errors corrected. Electronic billing eliminates both of these steps. Paper bills take 20 business days or more to process. Electronic bills are processed in 10 business days or less. eOPD also allows you to make expert and investigator requests, check on the status of your payments, and submit CLE credits online. Almost half of the private bar have already signed up.

When Your Client Appeals

The Wisconsin State Public Defender minimum attorney performance standards require that trial counsel cooperate fully with any successor attorney representing the client. When your client decides to appeal, this means you must cooperate with appellate counsel. Supreme Court rules and case law say that the file you maintained during your trial level representation of the client belongs to the client. If and when appellate counsel requests the client file, you must provide it. If you wish to maintain a copy, you may do so. If you have questions about providing the file to appellate counsel, please contact Deb Smith in the Assigned Counsel Division at smithd@mail.opd.state.wi.us or 608.261.8856.



TRAINING CALENDAR

For more information about these and other training events, please contact the SPD's Office of Training and Development at:
training@mail.opd.state.wi.us

**Objection Noted:
The Law of Evidence in Wisconsin**
State Bar of Wisconsin
September 24, 2003
Marriott West
Waukesha, Wisconsin

2003 Annual Criminal Defense Conference
Office of the Wisconsin State Public Defender
October 9 & 10, 2003
Hilton City Center Hotel
Milwaukee, Wisconsin

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Appeals in Termination of Parental Rights Cases

By: Attorney Richard Auerbach*

Appeals in terminations of parental rights (TPR) cases are procedurally quite similar to appeals in criminal cases, with several exceptions. This article addresses the procedural differences between TPR and criminal appeals and provides some practice pointers. Note that a discussion of general appellate procedure is beyond the scope of this article; an attorney should have a good understanding of the appellate process before participating in a TPR appeal. Similarly, this article does not summarize case law, which is extensive and ever-changing.

Procedure

As with a criminal appeal, an appeal by a parent in a TPR case is initiated by the filing of a notice of intent to appeal. §809.107(2). The notice must be filed within 30 days of the signing of the final order. §808.04(7m). If the notice is not filed within 30 days, the appeal will be deemed untimely; no extension of time is available. §808.04(7m). Section 809.107(2) sets forth what must be in the notice of intent to appeal, including the case name, caption, names and addresses of counsel, and other data.

When a notice of intent to appeal in a TPR case is filed, court staff are required to act much more expeditiously than in ordinary appeals. Within five days, the clerk must forward a copy of the notice to the public defender's office if the parent requests appointed counsel, together with a copy of the judgment or order and a list of the court reporters. §809.107(3)(a). The court reporters are required to provide transcripts within 30 days of their being ordered, which the parent (or parent's counsel) must do within 15 days of the filing of the notice of intent to appeal. §809.107(4).

The parent must file a notice of appeal and docketing statement no later than 30 days from service of the transcripts, and the clerk is required to transmit the record as soon as it is prepared but no later than 15 days after the notice of appeal. §809.107(5). There is no provision for review and approval of the compiled record prior to its transmittal to the court of appeals, unlike in criminal cases where §809.15(2) requires at least 10 days notice of the proposed record prior to its transmittal. Thus, if the record is believed to be incomplete, the remedy is a motion to the court of appeals, which will probably require a request for an extension of the deadline for filing briefs.

Once the record is filed, briefs are required on an expedited basis. The appellant's brief is due within 15 days, with the respondent's brief due only 10 days thereafter and the reply, if any, due 10 days after the respondent's brief is filed. Note that the 15 day period is 15 calendar days, while the 10 day periods are 10 business days. Unlike the time for initiating the appeal, these dates can be extended by motion. §809.82(2).

***Richard Auerbach** obtained his undergraduate degree from Stanford University in Economics in 1976 and obtained his law degree with honors from the University of Wisconsin in 1979. Upon graduation, Richard was an associate with La Follette Sinykin until becoming an Assistant District Attorney for Dane County in 1981. In 1985, he formed his current law practice, Auerbach & Porter. Richard works extensively in the areas of juvenile and family law, as advocate counsel, guardian ad litem and appellate counsel, as well as in the areas of legal malpractice, personal injury and other litigation areas. Richard has served as a contract juvenile court guardian ad litem for Dane County since the outset of that project, has been a presenter at numerous seminars in juvenile and family law matters, and has been responsible for updating the Guardian ad Litem Handbook's chapter on Juvenile Law since 1997.

The court of appeals is required to decide the case within 30 days of the filing of the last brief, and any petition for Supreme Court review must be filed within 30 days of that decision. §809.107(6)(e) and (f).

One additional procedural difference must be discussed. In a criminal case, a defendant raises ineffective assistance of counsel by filing a motion in the trial court, obtaining a decision and appealing from both the judgment of conviction and the order denying the ineffective assistance motion. There is no provision for trial court consideration of a motion alleging ineffective assistance of counsel in a TPR case, nor any provision for the tolling of the deadlines discussed above. Of course, an assertion of ineffective assistance of counsel is ordinarily an evidentiary matter to be addressed by the trial court. Accordingly, the proper way of raising this issue is by filing the appropriate notices of intent and appeal, and then moving the appellate court for a stay of the briefing deadlines and for remand to the trial court for an evidentiary (*Machner*) hearing. This request will be granted automatically unless the motion fails to establish a *prima facie* case for ineffective assistance of counsel.

Practice Pointers

- ◆ An attorney accepting a TPR appeal should anticipate a considerable demand on his or her time. The combination of what will likely be a large record (multiple days of trial transcripts, large numbers of exhibits, etc.) and the expedited briefing schedule means that appellate counsel will need to spend a great deal of time in a short amount of time.
- ◆ Appellate counsel should review the court file in both the TPR case and, in most cases, any underlying CHIPS file (most TPR cases arise out of CHIPS cases). An order from the CHIPS court authorizing the latter may be required. In addition, counsel should obtain a complete copy of trial counsel's file, and may wish to review human services files as well.
- ◆ Appellate counsel should meet with trial counsel and engage in a lengthy discussion about the case. Trial counsel may be the single best resource for appellate issues. In addition, trial counsel can provide appellant counsel with his or her trial strategies, tactical decisions, and reasons for his or her actions or omissions. Ethical trial counsel will readily discuss areas of possible ineffectiveness. Moreover, in many TPR cases, the parent is either intellectually or emotionally challenged. A frank discussion of the parent's competence and understanding of the proceedings may cause appellate counsel to question whether the parent received due process and may suggest that aspect of the CHIPS proceedings (TPR warnings, conditions of return) insufficiently complied with due process requirements.
- ◆ Appellate counsel should also meet with the client whenever possible. The parent will frequently identify certain matters that seemed wrong or unfair, thereby assisting appellate counsel in identifying issues worthy of further investigation.
- ◆ Appellate counsel should track each stage of the TPR proceedings, from the filing of the petition to the date of disposition, and ascertain whether the statutory time lines were followed or, if they were not, whether the necessary good cause findings were made. For example, plea hearings must occur within 30 days of the filing of the petition; did it? If a time line violation occurred, an appellate issue has been found. Similarly, counsel should determine whether the TPR judge was also the CHIPS judge and, if so, responsible for changing the permanency plan to TPR (and thereby disqualified from conducting the TPR case).

- ◆ Ineffective assistance of counsel must always be considered. Unfortunately, many attorneys accept trial level TPR appointments with little experience in these complex cases, and the opportunities for error abound. Trial counsel's performance in the areas of discovery and motions practice must be investigated. Were depositions taken? Were motions *in limine* filed? Were witnesses favorable to the parent located and called to testify? Should an expert have been retained on behalf of the parent? Were proper objections made? Should trial counsel have raised issues of parental competence, or challenged the adequacy of the CHIPS proceedings based on a parent's mental status? (For example, a trial court dismissed a TPR action upon a showing that a hearing impaired parent could not read and did not have the warnings translated by a competent interpreter. Had trial counsel failed to recognize this issue and filed the appropriate challenge, appellate counsel would have had to raise that failure as ineffective.)
- ◆ Appellate counsel should scrutinize the verdict and jury instructions given in the case, as well as reviewing the trial transcript for error. Several cases have been handed down by the appellate courts that clarify, and sometimes expand upon, the permissible defenses to statutory grounds for termination.
- ◆ In some "Continuing CHIPS" ([see page 6 of the Wisconsin Defender](#)) TPR cases, the conditions of return will have changed over the months and years of CHIPS jurisdiction. Appellate counsel should analyze the time periods that each set of conditions was in effect, examining the statutory warnings given in the disposition, revision and extension orders, and compare them to the conditions of return that the parent was alleged in the TPR petition not to have met.
- ◆ The role played by the guardian *ad litem* should be examined: were there impermissible references to the child's best interest? ([see page 8 of the Wisconsin Defender](#))
- ◆ Appellate counsel should examine the trial transcript to determine whether the petitioner (usually the county) or the child's guardian *ad litem* introduced evidence or made arguments that only related to dispositional (best interest) issues, and did that argument or evidence improperly influence the jury? Similarly, was evidence primarily focused on best interest and only marginally relevant introduced and, if so, should a motion *in limine* have been filed to exclude it as more prejudicial than probative?
- ◆ The dispositional order and the transcript of the dispositional hearing should be reviewed to determine whether the statutory factors were addressed. In addition, appellate counsel should investigate whether a vigorous defense to TPR was made at disposition. Just as defense counsel may be ineffective at sentencing even though effective at trial, so too can trial counsel for a parent in a TPR case conduct a reasonable trial defense and drop the ball at disposition. Too often, trial counsel experience a letdown after an adverse jury verdict and view disposition as a rubber stamping of the petitioner's position. Yet, there may have been evidence that reflected positively upon the parent's fitness or evidence favorable to the parent that was relevant to other dispositional factors that was not brought to the trial court's attention.
- ◆ Finally, appellate counsel should not hesitate to bounce ideas off of experienced appellate counsel. Staff attorneys with the appellate division of the Public Defender's Office are usually more than willing to discuss an issue; in addition, attorneys who have litigated TPR cases in the appellate courts are often willing to spend a little time going over possible arguments. One way to locate such attorneys is to review recent published and unpublished TPR appellate cases, as the attorneys for the parents will be found in those decisions. ■

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Permanency Plan Reviews

By: Court Commissioner Lindsey D. Draper*

The Adoptions and Safe Families Act of 1997 (ASFA) and the strict time limits imposed under it have focused considerable attention on the requirements that permanency planning occur whenever children are placed outside of their homes.

The provisions of the budget repair bill [Wisconsin Act 109], which brought Wisconsin law into accord with the Adoption and Safe Families Act, represented just one of many steps taken by legislatures and the courts to address “foster care drift” which had come to symbolize the problems with the child care system and the plight of many children who found themselves the subjects of lengthy out-of-home-placements. The changes to Wisconsin law became effective on July 30, 2002.

The issues raised by ASFA are not new. The Wisconsin Children’s Code (Chapter 48) and Juvenile Justice Code (Chapter 938) have included mandates for written permanency plans to be prepared by those providing dispositional services to children and juveniles who are placed outside the home since the 1980s. Wis. Stats. ss. 48.38 and 938.38 define the circumstances in which such reports must be submitted and the required contents of the written reports.

While courts regularly made findings that continued out-of-home placements were in a child’s best interest and that reasonable efforts had been made to return the child to the home, it was through the strict time limits imposed by the Adoptions and Safe Families Act that the federal government framed the states’ adherence to the national goals of placing children in permanent homes as quickly as safely possible.

Courts have been called upon to recognize foster care placements as short-term safety nets where children can safely reside while the conditions that led to their removal from the home are corrected. Agencies providing services to the courts are mandated to attempt to preserve safe in-home placements and, when removal is necessary, to facilitate reunification by providing services that will allow safe return of children to the home. When parents or other caretakers are not able to meet return conditions in a timely manner, the courts determine how to provide a permanent home for the child.

To encourage the use of out-of-home placements for as brief a time as possible, federal and state law require that written permanency plans be filed within 60 days of the removal of the child from the home. Wis. Stats. ss. 48.938 and 938.38 detail the requirements of the plan which include statements of the efforts to prevent removal, the basis for the decision to place the child, and the goals of the plan and services that will be provided to attempt to reach the goals.¹

The provisions of Wis. Act 109 expanded the requirements of the plan to include school and medical information regarding the child. The plan must address the manner in which educational and health needs are being made available to the child and family.

The revisions to the statutes require that the plan include a description of services to be provided. In addition to medical and educational services for the child, services for parents or caretakers including mental health and AODA services, couples counseling, domestic violence intervention, and parenting or nurturing programs are to be included. Whether the goal is to return the child to the parental home, to place the child

***Lindsey D. Draper** is a Judicial Court Commissioner for Milwaukee County, Wisconsin. He received his undergraduate degree from Seattle University and his law degree from Marquette University Law School. He has previously been employed at the Milwaukee Children’s Court Center as an Assistant District Attorney and State Public Defender and is active in training in Juvenile Justice for the Milwaukee County Sheriff’s Department and University of WI-Extension. He is a member of the Milwaukee Bar Association and the Wisconsin Association of Minority Attorneys. He is currently president of the Wisconsin Association of Judicial Court Commissioners.

with a relative, to maintain the child in an alternative permanent living arrangement, or to terminate the rights of the parents and make the child available for adoption, the plan must state the efforts and services of those supervising the placement to be sure the child is safe and cared for appropriately.

Recognizing that as children and juveniles approach the age of majority they will need skills to be able to live without the safety net of the child welfare system and children's courts, there is a requirement that the plan include a description of a transition plan for children 15 years of age and older.

Finally, to be sure consistent attention is paid to the implementation of the plan, regular reviews of the permanency plan and the performance of those governed by it are required. There must be, pursuant to the requirements of ss. 48.38 and 938.38, court review at least once every twelve months from the date of removal. There is also a requirement for an interim review that must take place within six months of the removal date. However, that review can be made by either a court or a panel of at least three persons who will determine each of the elements outlined in ss. 48.38(5)(c) and 938.38(5)(c).²

Issues to Examine

There are a number of issues raised by permanency plan reviews. A significant one is whether parties and agencies governed by the plan have met the expectations stated in the plan.

The review should address whether the ordered services were made available to the parents and child, whether the parents or child cooperated with the available services, whether the services are having the desired impact in addressing the identified needs of the family, whether the permanency plan previously ordered continues to be appropriate, and when placement in a permanent home can be expected to occur. Regular review of the permanency plan should identify deficiencies in the implementation of the plan and allow appropriate modification in ordered services.

Identification and Adjudication of Fathers and Relative Placement

In a system in which significant numbers of the children come from non-marital relationships, the importance of the birth father in permanency planning is receiving greater recognition. There have been a number of reasons that fathers have often not been the focus of the attention of service providers. Although mothers have quite regularly been automatically assumed to be entitled to services by caseworkers seeking to plan for children in care, birth fathers have often been required to demonstrate their connection to the child in order for services to be tendered. The time restrictions imposed by ASFA have given new impetus to efforts to identify and adjudicate fathers early in the process of providing court services. Having the children placed safely with fathers is one of the options such adjudication opens.

A second valuable resource for placement is the number of paternal relatives who become available once a paternity adjudication occurs. Paternal grandparents, aunts, uncles and other extended family provide additional family placement alternatives for the child. When children are placed with relatives, there is often less trauma due their familiarity with these persons. Relative placements often allow greater opportunity to keep sibling groups together, and even in those instances in which siblings are separated, relative placements make it easier to facilitate both sibling and parental visitation.

There have traditionally been a number of factors that have contributed to non-custodial fathers not being viewed as the first options for placement. Lack of involvement in the daily lives of children and lack of financial contribution to the upkeep of the home have often been seen as demonstrating a father's lack of interest in children. They are also seen as raising questions of fitness about possible placement.

Additional factors that have contributed to non-custodial fathers not being considered in placement decisions have included the number of fathers who were incarcerated, homeless or impaired by significant problems with mental illness or substance abuse. Lack of accurate reporting of the father's identity and location, whether due to lack of knowledge by the mother or unwillingness of the mother to give accurate information,

is frequently an impediment to involvement by birth fathers in placement decisions. The reluctance of mothers to provide information may arise because of fears the father may get into trouble due to outstanding child support payments, concern the father may be an undocumented immigrant, or knowledge the father has outstanding arrest warrants. Similar difficulties may result when relatives are questioned regarding the identity and location of fathers.

Having fathers adjudicated and paternal relatives available as placement resources is extremely important given the requirements of ASFA that permanent homes be identified for children within strict time periods following initial out-of-home placements. In those instances in which children are placed with relatives, courts can find "compelling circumstances" not to pursue termination of a parent's rights. This allows relatives to sometimes pursue guardianship transfers, permitting the child to maintain the relationship with the birth parents while assigning legal privileges and responsibilities to the caretakers. Many relative caretakers find this to be preferable to having a family member's rights terminated and adopting the children, because relatives often hold out hope that the parents will correct the circumstances that led to the original removal and resume their roles in their children's lives.

There are, however, problems that can arise with the identification and adjudication of fathers. In the instances in which children with the same mother have different fathers, although they have the same maternal relatives, they may have no relationship with the paternal relatives of their siblings. Placement of the children with paternal relatives would result in the separation of siblings. Efforts to keep siblings together by having the relatives of one child licensed as foster parents of a sibling are often unsuccessful if there are impediments to licensing such as a prior CPS history or felony conviction. These difficulties notwithstanding, the advantages of having fathers identified and adjudicated far outweigh any perceived disadvantages.

Special Issues Related to Adolescents

There are special concerns relating to adolescents in formulating and implementing permanency plans. While the term "resilience" is often used to describe the ability of younger children to adapt to changes in living circumstances, adolescents have special characteristics that often make planning for them difficult.

The very efforts at individualization that frequently cause tensions in the homes of teenagers and biological families create special problems in the placement of and planning for adolescents who have been removed from the home. As adolescents go through the process of psychologically separating from family, attempting to find a place in society as a whole rather than just as a member of a family, they often act in manners that seem to oppose rules, values and expectations. Many of the behavioral changes pose challenges to foster parents, group homes, and shelter care staff as well as possible adoptive resources.

As a result, permanency plans for older adolescents often involve little consideration of adoption. Reunification and relative placement are regularly seen as viable possibilities for older children, but when those options are not available, recommendations commonly emphasize independent living skills, concentrating on employment and economic outcomes, difficulties in obtaining medical and health care, and insurance coverage.

One of the drawbacks of this emphasis is that it presumes an emotional maturity equal to the chronological age. Permanent family connections help to meet the need for safety, permanency and well-being that life-skills acquisition alone cannot. As a result, with less emphasis on attempting to find adoptive or other permanent homes for older adolescents, many, recognizing the benefits of family as they transition into adulthood, return to the biological relatives from whose homes they were originally removed once the court orders and government involvement have ended.³

The ties of children to their families, whether parents or siblings, and the impact of separation from family are all a part of the issues to be addressed in permanency planning. The notion that children will just adapt to

a new living circumstance and “move on” with their lives cannot replace recognition that their emotional well being is affected by the decisions made by others as to what is in their best interest.

The importance of realistic planning is clear when the difficult issues relating to visitation are considered. Among the common themes regarding visitation are how frequent visitation assists in reunification with parents, how disruptions that occur when return conditions are not met and children are moved from placement to placement, and difficulties that arise when parents meet return conditions but children have bonded to caretakers and do not wish to be reunified with parents.

Role of Lawyers for Children in Permanency Plan Hearings

As in any other proceeding, the attorney must advance the wishes of his client and attempt to achieve their goals. Interviewing the client is essential and lawyers should assure that they speak to their clients in an environment where the child feels free to speak their mind.

Since orders may now be made up to age 18, those children will not have a yearly extension review at which they can raise objections to some aspect of the placement or services provided. The permanency plan hearing is now their only resource for this purpose.

Attorneys for children in permanency review hearings should take care to consider whether the agency and others who are responsible for making due and diligent efforts to return the child to the home are doing everything they are required to do. If reasonable efforts are not made, valuable time is wasted and return home is made even more difficult. So check to see that visits are being arranged, for example, and that the frequency of visits is adequate.

If the child is unhappy in their current placement, what are their realistic options? Do they have relatives who are willing and able to take them in? Children sometimes assume that people will open their door to them when that may not be the case.

Another emphasis for the lawyer is to focus on whether the specific needs of the child are being met. Are sibling visits being conducted? Have concerns raised by the child been addressed? Courts and agency workers at times focus on the needs of the parents while the concerns of the child may be unknown or not considered.

If the child wishes to change the order, a revision or change in placement may be pursued. Under section 48.38(5m)(f), a court may revise the order or make a change in placement based upon the review of the permanency plan even without the filing of a petition for revision under section 48.363 or for change in placement under section 48.357. The changes to the order would be made at the permanency plan hearing and objections to any change would be considered by the court at that time.

Permanency plan reviews are an important safeguard for a child’s successful return home and adjustment to life as an adult. It is important that the review system serve as a safety net for children in out of home placements and that the children’s needs and concerns are considered when forming appropriate plans.

Endnotes

1. Wis. Stats. 48.38(3), 938.38(3).
2. Wis. Stats. 48.38(5)(ag), 938.38(5)(ag).
3. Study of Father’s Involvement in Permanency Planning and Child Welfare Casework, The Urban Institute (August, 2002). ■

Bench Trials: Juvenile Court and the Jury of One

By: Leslee Ruscitti*

In 1996, one of the most profound changes to the practice of juvenile law in Wisconsin, the elimination of the jury trial, became law. Many professionals who work in the juvenile justice system were concerned about the potential for juveniles to be imprisoned without benefit of a jury trial. The law was appealed and *Hezzie B.* settled the issue by declining to reinstate the jury but instead removed the threat of prison. After seven years, the juvenile court trial appears to be here to stay.

Most experienced juvenile court practitioners find that the time needed to prepare for a court trial is often the same as that needed to prepare for a jury trial. There are, however, many things a lawyer should keep in mind when specifically preparing for a court trial.

First, know your judge. This can be an important aspect of a bench trial. If you are setting a trial in a jurisdiction where you rarely practice, talk to other lawyers who have had experience with the trial judge. Every judge, like every juror, brings his or her own opinions and biases to the courtroom. Find out if there is something about your client's case that will affect this particular fact-finder.

The rules of evidence apply. This is often overlooked in juvenile law practice. Although there are many types of contested hearings where the rules of evidence do not apply, the bench trial affords those evidentiary protections. Attorneys must be familiar with the rules of evidence in order to object to the introduction of improper information. Failing to object may waive your appeal rights. Remember that it is your job to preserve the record.

Keep the judge's attention. Because the court is often forced to focus on several issues at one time and caseloads for juvenile courts are often staggering, keep your presentations clear, concise and logical. Doing so will clarify the issues and focus the court's attention on your specific legal argument.

Do not assume that the judge is familiar with the peculiarities of juvenile law. Experience on the bench does not necessarily translate into experience with the Juvenile Justice Code. Once again, know your judge. Prepare concise legal arguments that relate specifically to your issue. Be prepared to address any questions or comments from the bench. If it appears that the court is unclear about the technical aspects of the Juvenile Justice Code, state with specificity the statute and any related case law. It is important not to presume an in-depth familiarity with the juvenile code on the part of any party in the courtroom.

Take the time to prepare your witnesses and talk to them about the process. Acting as the trier of fact, decisions as to what testimony to accept or reject rests solely with the judge. Keep in mind that the juvenile court case is more likely than the adult trial to involve the testimony of a child witness. There is a particular expertise involved in the direct and cross-examination of a child. Moreover, assessing credibility and childhood levels of understanding often require some experience with child witnesses. Do not assume that your trial judge has that specific experience. If the child witness is testifying for the defense, make sure that he or she is well-prepared.

Cross examination techniques are different in court trials. Cross examinations during a court trial often require more preparation time in order to weed out the argumentative and superfluous. As always, a professional

*Leslee Ruscitti has been with the Juvenile Division of the State Public Defender's Office in Milwaukee for almost 18 years. She is an experienced trial attorney, practicing exclusively in the juvenile system. She is currently an adjunct faculty professor at Marquette Law School and has conducted dozens of training sessions for both new attorneys and those experienced practitioners who are interested in juvenile law.

demeanor will be viewed positively by the court. At the same time, do not assume that the judge will automatically disregard a non-responsive answer from a witness. You should make your motion to strike and allow the judge to make a ruling. Doing so will draw the court's attention to an uncooperative witness.

Do not waive your closing argument. A cohesive, well thought-out closing argument will make your point more effectively than testimony from the witnesses. It is the time to organize and present your responses to certain issues that may have arisen during the course of the trial. It is the opportunity to emphasize the points that support your position.

In conclusion, make the best use of the court trial. Preserve the formality of the proceedings. Be prepared to slow down the pace when necessary. Use your time to thoroughly prepare a concise, logical and cohesive trial strategy. It will be well worth the effort. ■

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JUVENILE NEWS

By: Michael Yovovich*

Court Ordered Deferred Prosecutions: A Defense Weapon

On June 20, 2003, the Wisconsin Supreme Court held that a juvenile judge may dismiss a delinquency petition and refer the case to intake for a deferred prosecution agreement at any time during the pendency of the case. *In the Interest of Lindsey A.F.*, 2003 WI 63. In this case, Assistant State Public Defender Ann Davey convinced the trial judge that her 13-year-old client was selling “ditch weed” in middle school, and did not deserve a delinquency adjudication. The district attorney disagreed and refilled the petition in an attempt to end the deferred prosecution agreement. The trial court dismissed again and the state appealed.

In both the court of appeals and the supreme court, Assistant State Public Defender Eileen Hirsch argued that the trial court has the authority to dismiss a juvenile delinquency petition and refer the case for a deferred prosecution at any time, and the district attorney could not veto such a decision by filing a new petition. Both courts agreed and reiterated that rehabilitation is a primary objective of the juvenile code. Some attorneys have successfully used the motion at the dispositional hearing.

Competency To Stand Trial: Is There a Difference Between Those 15 and Below and Young Adults?

There is a new study which you may want to read and share with your experts in order to educate them about the competency of children to assist in their defense. In the usual adult case, the focus of the expert when looking at competency is on mental illness or retardation. However, when dealing with children 15 and younger, their capacity to understand and assist counsel is also affected by intellectual and emotional immaturity. See The MacArthur Juvenile Adjudicative Competency Study at <http://www.mac-adoldev-juvjustice.org/>

The Study gives defense attorneys and experts guidance on what should be considered in determining the competencies of youthful offenders. Remember that under the Constitution, a criminal defendant must be capable of understanding the trial process and assisting defense counsel. This means the defendant must understand the charges, court proceedings, make important decisions about the case (*e.g.* plea agreements), and answer questions from defense counsel.

The Study found that youths between 11 and 13 were three times as likely to be seriously impaired on the above abilities than their comparison group (ages 18-24). Those that were 14 to 15 were twice as likely than their comparison group to be seriously impaired.

The greatest predictor of serious impairment was below average intelligence. Therefore, 50% of children between the ages of 11 and 13 with below average intelligence were significantly impaired as to their competence to stand trial. More than 40% of those between 14 and 15 were significantly impaired. The results of the Study mean that many children age 15 and below with low intelligence are probably going to trial while legally incompetent.

[See “Juvenile News” on page 26](#)

***Michael Yovovich** has been with the State Public Defender’s Madison Appellate Office since 1977 after spending a year as an appellate attorney in Illinois. He has served as First Assistant, Acting Appellate Division Director, Newsletter Editor, and a member of the *Wisconsin Defender* Editorial Advisory Board. He has specialized in juvenile law since the 1996 revision of the Children’s Code into the Juvenile Justice Code. He is currently a Board Member of the Children and the Law Section of the State Bar of Wisconsin.

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While the focus of the Study was adult criminal prosecution, there is no reason that the results of the Study cannot be applied to delinquency cases. There may be no right to a jury trial, but the offenses and defenses remain the same. There are still suppression hearings and court trials. (See page 23 of the *Wisconsin Defender*.) Moreover, there is still a need to have effective communication between lawyer and client.

It Can Work In Real Life

As reported in the May 21, 2003, *Wisconsin Law Journal*, challenges to a child’s competency to stand trial can be successful. Craig A. Mastantuono, a private practitioner in Milwaukee (formerly a staff attorney in Waukesha), found himself faced with a 10-year-old client who was in adult court on a homicide charge. With the aid of Dr. Antoinette Kavanaugh, a forensic psychologist from Northwestern University School of Law, the defense was able to establish that the boy was incompetent.

Dr. Kavanaugh was familiar with the criteria suggested by the ABA—Juvenile Justice Division. She also relied on a previous MacArthur Study which gives attorneys and experts guidance and criteria for an effective competency evaluation. She gives some pointers in the *Wisconsin Law Journal* article. The MacArthur Study can be located on the web at <http://www.abanet.org/crimjust/juvjus/macarthur.html>. In the case of the 10-year-old, she carefully compared the IQ test she administered to those given earlier in the boy’s schooling to prevent any challenge to “malingering.” She spent two separate three-hour periods interviewing him carefully and non-judgmentally. She also gathered as much information as possible concerning Wisconsin criminal procedure and what assistance Attorney Mastantuono would need from his client. She ultimately found the boy to be incompetent to stand trial and the court agreed with her conclusion.

Competency to Waive *Miranda* Rights—Voluntariness

In the April 2002, edition of the *Wisconsin Defender*, (<http://www.wisspd.org/html/publications/docs/wdefApr02.pdf>) there was a Practice Pointer regarding voluntariness/*Miranda* in the context of juveniles and the failure of police to call their parents prior to questioning. The Practice Pointer reminded courts and defense practitioners of the special scrutiny which should be placed on juvenile confessions. In particular, the following quotation from *Theriault v. State*, 66 Wis. 2d 33, 48, 233 N.W.2d 850 (1974), was pointed out: “[I]f the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements.”

Now there is an actual case pending in the Court of Appeals, District I, which may address whether special care and scrutiny should be placed on incommunicado confessions by juveniles. *In the Interest of Jerrell J.* (02-3423), is being litigated by Assistant State Public Defender Eileen Hirsch of the Appellate Division.

The Milwaukee police interrogated 14-year-old Jerrell for over five hours. He had been left alone in an interrogation room handcuffed to a wall for two hours prior to the interrogation. He denied the alleged armed robbery several times and asked to speak to his parents several times. The police did not want to stop the flow or lose control of the interrogation, so they continued and did not allow him to speak to his parents.

The case presents the court with the opportunity to reinvigorate the older case law regarding the incommunicado interrogation of children. Keep an eye on this one.

*NOTE: Dr. Antoinette Kavanaugh testified at the postconviction hearing regarding Jerrell’s intelligence and ability to knowingly waive his *Miranda* rights. In the proper case, you may want an expert to testify at the suppression hearing. ■*

CRIMINAL JURY INSTRUCTION COMMITTEE REPORT

By: Chuck Vetzner*

*Chuck Vetzner is an Assistant State Public Defender in the Madison Appellate Office. He attends the Criminal Jury Instruction Committee meetings on behalf of the State Public Defender. He has previously served as both the SPD Director of Training and of the Appellate Division.

The following is a summary of important actions by the Wisconsin Jury Instruction Committee at its meetings in June and August 2003. It should be emphasized that the importance of the included items is subjective from the perspective of your reporter. This summary, like previous and future discussions of the Committee's work, is not intended to be complete. To put this caution in context, it should be noted that the yearly supplement—Release No. 41—was mailed to jury instruction subscribers in May. It contained 21 new instructions, 98 revised instructions and 2 revised special materials. The Committee is currently meeting six times a year. Thus, on average, 20 new items are approved at each meeting.

In *State v. Henning*, 2003 WI App 54, ___ Wis. 2d ___, 660 N.W.2d 698, the court reversed a bail jumping conviction where the jury was allowed to predicate a guilty verdict on a lesser included offense on which it had not been instructed. This prompted the Committee to revise the pattern bail jumping instruction, JI No. 1795, where the bond was allegedly violated by the commission of a new criminal offense. The revision requires that the new crime be specifically identified and its elements set forth.

The Committee revised JI No. 1208 for second-degree sexual assault where the assault was accomplished "by use or threat of force or violence." The change involves adding the following language to explain the above-quoted element: "The use of force or violence may occur before or as part of the sexual (contact)(intercourse)." The revision was prompted by the recent decision in *State v. Hayes*, 2003 WI App 99, ¶15 that summarized prior case law as allowing proof of the force element to be satisfied by evidence of such conduct either as a separate act prior to the assault or as part the assault itself.

The Committee revised a lengthy series of instructions pertaining to drunk driving offenses reflecting the new .08 prohibited alcohol concentration. One of the more curious revisions in the law, reflected in the appropriate instructions, is the removal of any prima facie effect to test results for "under the influence" prosecutions if the defendant has three or more priors.

The format was changed and minor revisions were made in Wis. J.I. Nos. 2902 and 2904 concerning securities fraud. In approving the former instruction, the Committee declined to adopt a change in the definition of the element requiring that the defendant acted "willfully." Such a change had been requested in a letter sent jointly to the Committee by the Departments of Justice and Financial Institutions.

The instruction in question concerns Wis. Stat. § 551.21(1) prohibiting the sale of securities unless they are registered or exempt from registration. The prosecution request would have essentially limited the mental state element to a statement that the defendant "knowingly committed the acts charged." The proposal would have eliminated the additional statement: "'Willfully' also requires that the defendant knew that _____ was a security and knew that it was not registered and not exempt from registration."

The change was sought in light of the decision in *State v. Mueller*, 201 Wis.2d 121, 549 N.W.2d 455 (1996). That decision had upheld an instruction concerning willful conduct that defined the term as essentially: "Willful means only that the defendant knowingly committed the act charged."

The Committee decision was predicated on two circumstances. First, in *State v. Cissell*, 127 Wis.2d 205, 211-12, 378 N.W.2d 691 (1985) the court held that "willfully" is to be given the same meaning as "intentionally" for crimes outside the Criminal Code. Second, *Mueller* concerned a prosecution for violation of Wis. Stat § 551.54 for the making of false or misleading statements when registering securities with the appropriate regulatory agency (the statute covered in J.I. No. 2904). The Committee concluded that the sale, as opposed to the more technical act of registering securities, involved a distinct affirmative act warranting an obligation for the prosecution to prove that the seller was aware of the status of the item being sold.

Finally, the Committee gave tentative approval to a new instruction for carrying a concealed weapon to implement the decision in *State v. Hamdan*, 2003 WI 113, recognizing a constitutionally-based privilege to bear arms. The new instruction and commentary will be reviewed at a subsequent Committee meeting. After final approval, the instruction may be provided to judges, prosecutors and the defense bar prior to the yearly dissemination of new jury instruction material. ■

"TPR Trials" continued from page 13

9. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).
10. *May v. Anderson*, 345 U.S. 528, 533 (1953).
11. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
12. *Stanley v. Illinois*, 405 U.S. at 651.
13. 530 U.S. 57, 65 (2000) (citations omitted).
14. *T.M.F. v. Children's Serv. Soc'y*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983).
15. *In re Jayton S.*, 246 Wis. 2d 1, 16, 629 N.W.2d 768 (2001).
16. *In re Termination of Parental Rights to T.R.M.*, 100 Wis. 2d 681, 689, 303 N.W.2d 581 (1981).
17. *In the Interest of C.E.W.*, 124 Wis. 2d 47, 65, 368 N.W.2d 47 (1985).
18. 118 Wis. 2d 549, 348 N.W.2d 479 (1984)
19. *Id.* at 568 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (emphasis added).
20. H. R. Rep. No. 95-1386, p.22 (1978).
21. *In the Matter of Termination of Parental Rights to SueAnn A.M.*, 176 Wis. 2d 673, 684, 500 N.W.2d 649 (1993).
22. 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998).
23. 252 Wis. 2d 179, 189, 643 N.W.2d 194 (Ct. App. 2002).
24. *Id.*
25. The "character evidence" statutes at issue are as follows:

Wis. Stat. § 904.04 provides:

(1) "Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: [character of accused; character of victim]."

(2) "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Wis. Stat. § 904.05(2) provides:

"In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct."

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26. 34 Wis. 2d 278, 149 N.W.2d 557 (1967).
 27. *Deantye P.-B.*, 252 Wis. 2d at 187.
 28. 259 Wis. 2d 429, 655 N.W.2d 752 (Ct. App. 2002).
 29. *Id.* at 444.
 30. *Id.* at 445.
 31. *Quinsanna D.*, 259 Wis. 2d at 445-46 (quotations omitted).
 32. *Id.* at 446.
 33. *Id.* at 447.
 34. 113 Wis. 2d 429, 335 N.W.2d 846 (1983).
 35. *Id.* at 439.
 36. *Id.*
 37. *Id.* at 440.
 38. *In the Matter of Termination of Parental Rights to SueAnn A.M.*, 176 Wis. 2d 673, 685, 500 N.W.2d 649 (1993).
 39. 124 Wis. 2d 47, 61, 368 N.W.2d 47 (1985) (emphasis added).
 40. *Id.* at 70. *Cf. In the Interest of J.A.B.*, 153 Wis. 2d 761, 769, 451 N.W.2d 799 (1989) (not error for trial court to introduce guardian ad litem as “the attorney to represent the best interests of” the child). *See also In re Termination of Parental Rights of Kristeena A.M.S.*, 230 Wis. 2d 460, 467-68, 602 N.W.2d 167 (Ct. App. 1999) (while not deciding the issue, noting potential error in GAL’s statements to the jury about the best interests of the child).
 41. The following cautionary instruction is consistent with the law:

“I want to again emphasize to you that this hearing is only one part of a process that may result in termination of parental rights. (*Wis JI-Children # 300*).

In this first stage, you, the fact-finders, must decide whether there is clear, satisfactory and convincing evidence that proves the separate grounds for termination. If you find that grounds have been proved, it is my obligation to decide whether or not to terminate the parents’ rights by determining what is in the best interests of the child. (*In re Kristeena A.M.S.*, 230 Wis.2d 460 (Ct. App. 1999) citing *In re C.E.W.*, 124 Wis.2d 47, 54 (1985)).

Consideration of the best interests of the child is a matter for the court, not for the jury.”
 42. 173 Wis. 2d 101, 113, 496 N.W. 2d 133 (Ct. App. 1992) (citing *Mitchell v. State*, 84 Wis.2d 325, 330, 267 N.W. 2d 349 (1978)).
 43. *Rollie Johnson Plumbing v. Dept. of Transportation*, 70 Wis. 2d 787, 793, 235 N.W.2d 528 (1975).
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44. 57 Wis. 2d 633, 641, 205 N.W.2d 388 (1973).

45. As one example, in a Continuing CHIPS case in which a parent has been ordered to have “successful visits with your child,” a visitation log may reflect a visitation employee’s opinion that the parent’s visits with the child were “unsuccessful.”

46. 148 Wis. 2d 341, 350, 434 N.W. 2d 834 (Ct. App. 1988).

47. The court quoted the 1974 Judicial Council Committee’s Note that states “the entry must be based upon information transmitted to the recorder by one with first-hand knowledge who has a duty to know and report the information.” *Id.* at 350-51 n.6.

48. 148 Wis. 2d at 350-51.

49. *See Falco v. Alpha Affiliates, Inc.* 2000 U.S. Dist. LEXIS 7480 (D. Del. 2000) (collecting cases and enumerating varying foundations for admissibility of third party records).

50. 172 F.3d 1338 (Fed. Cir. 1999).

51. *Id.* at 1343. *See also MRT Construction Inc. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998); *United States v. Jakobetz*, 955 F.2d 786 (2nd Cir. 1992).

52. *See Air Land Forwarders, Inc.*, 172 F.3d at 1347-48 (Bryson, J., dissenting) (“a custodian who has simply collected a group of documents from a wide array of sources and who has no personal knowledge of the circumstances under which those documents were prepared is not qualified to give the necessary foundational testimony. . . .”)

53. 5 F.3d 1328 (9th Cir. 1993).

54. *See Id.* at 1333; *United States v. Sokolow*, 91 F.3d 396, 403-04 (3rd Cir. 1996); *United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir. 1978); *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977). *See also Air Land Forwarders, Inc.*, 172 F.3d at 1348 (Bryson, J., dissenting) (“Thus, a company in possession of documents prepared by another company may introduce the documents as its own business records, even if the sponsoring witness from the custodian company cannot vouch for the circumstances under which the documents were prepared, provided that the custodian company ‘has made an independent check of the records, or can establish accuracy by other means.’”) (quoting MCCORMICK ON EVIDENCE § 129 (John W. Strong ed., 4th ed. 1992)).

55. 83 Wis. 2d 749, 761, 266 N.W.2d 381 (1978).

56. *State v. Gilles*, 173 Wis. 2d 101, 114, 496 N.W. 2d 133 (Ct. App. 1992).

57. *State v. Garner*, 54 Wis. 2d 100, 194 N.W. 2d 649 (1972).

58. *Id.*; *State v. Keith*, 216 Wis. 2d 61, 77, 573 N.W. 2d 888 (Ct. App. 1997).

59. *See* Wis. Stat. § 909.02(4).

60. *See* Wis. Stat. § 909.02(1).

61. *State v. Leis*, 134 Wis. 2d 441, 445, 397 N.W. 2d 498 (Ct. App. 1986).

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62. See also Wis. Stat. § 906.12 regarding disclosure of the writing used to refresh the memory of the witness.
63. “[M]ost courts today . . . adhere to the ‘classical’ view that any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guaranty of correctness, or time of making.” MCCORMICK ON EVIDENCE at 19 (Edward Cleary ed., 3rd ed. 1984)
64. *Harper, Drake & Ass., Inc. v. Jewett & Sherman Co.*, 49 Wis. 2d 330, 342, 182 N.W. 2d 551 (1971).
65. *Id.*
66. *State v. Keith*, 216 Wis. 2d 61, 75, 573 N.W. 2d 888 (Ct. App. 1997).
67. Wis. Stat. § 908.03(5) Judicial Council Committee’s Notes (1974).
68. See *State v. Meehan*, 244 Wis. 2d 121, 140, 630 N.W. 2d 722 (Ct. App. 2001) (court committed reversible error in allowing prosecutor to read witness’s prior consistent testimony to the jury); *Green v. State*, 75 Wis. 2d 631, 639-40, 250 N.W. 2d 305 (1977) (finding erroneous the admission of the witness’s prior consistent statement since it served only to bolster improperly the credibility of the witness). But see *State v. Gershon*, 114 Wis. 2d 8, 11-12, 337 N.W. 2d 460 (Ct. App. 1983) (“Because the challenged testimony was offered on the issue of the child’s credibility, it is not hearsay evidence.”); MCCORMICK ON EVIDENCE at 120 (Edward Cleary ed., 3rd ed. 1984) (If the attack on the witness’s statement is “an imputation of inaccurate memory” then “the consistent statement made when the event was recent and memory was fresh should be received in support. . . . Under a broader viewpoint the judge has at least practical discretion under Rule [904.01] to determine whether any particular circumstances justify admission of consistent statements to rehabilitate the witness.”). The thrust of *Gershon* and McCormick on this point is that the prior consistent statement is not being introduced as substantive evidence but rather to rehabilitate the witness.
69. 41 Wis. 2d 230, 240-41, 163 N.W. 2d 609 (1969).
70. *Id.* at 242 (emphasis in original). See also *FED. R. EVID.* 801(d)(1)(B) advisory committee note (The prohibition on the introduction of prior consistent statements includes concerns about the use of “prior prepared statements.”).
71. See *Boyer v. State*, 91 Wis. 2d 647, 661-63, 284 N.W. 2d 30 (1979); *Mitchell v. State*, 84 Wis. 2d 325, 330, 267 N.W. 2d 349 (1978).
72. See *Boyer*, 91 Wis. 2d at 662-63.
73. *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971).
74. *State v. Smith*, 203 Wis. 2d 288, 294-95, 553 N.W.2d 824 (Ct. App. 1996).
75. *State v. Kruzycski*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (1995).
76. *Id.* See also *State v. Kuntz*, 160 Wis.2d 722, 752, 467 N.W.2d 531 (1991).
77. *Gyrion v. Bauer*, 132 Wis. 2d 434, 438, 393 N.W. 107 (Ct. App. 1986). See Wis. Stat. § 906.09(3). ■

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CASE DIGEST

By: Bill Tyroler*

*Bill Tyroler has been with the SPD's Appellate Division since 1978. He obtained his law degree from the University of Wisconsin Law School in 1974 and a degree in sociology from the University of North Carolina-Chapel Hill in 1971.

This Case Digest includes United States Supreme Court and Wisconsin appellate decisions released/published April 1 to July 11, 2003.

UNITED STATES SUPREME COURT OPINIONS

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DUE PROCESS LIBERTY INTEREST PROTECTS PRIVATE, CONSENSUAL HOMOSEXUAL ACTIVITY; BOWERS v. HARDWICK OVERRULED

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EXTENSION OF STATUTE OF LIMITATIONS VIOLATES EX POST FACTO CLAUSE WHEN APPLIED TO REVIVE PREVIOUSLY TIME-BARRED PROSECUTION

Stogner v. California, <http://www.supremecourtus.gov/opinions/02pdf/01-1757.pdf> 01-1757, 6/26/03

(The Wisconsin supreme court recently upheld an extension of a statute of limitations before that period had expired, *State v. Jeffrey B. Haines*, 2003 WI 39; *Stogner* does not undermine that result.)

COURT MAY CLARIFY MEANING OF ELEMENT OF OFFENSE, AND APPLY THAT CLARIFICATION TO PENDING CASE, BUT MAY NOT CHANGE THE MEANING OF ELEMENT

Clyde Timothy Bunkley v. Florida, <http://www.supremecourtus.gov/opinions/02pdf/02-8636.pdf> 02-8636, 5/27/03 per curiam

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For Agnello: Jerome F. Buting

HARMLESS ERROR – ERRONEOUS IMPANELING OF NON-ENGLISH SPEAKING JUROR
State v. Michael W. Carlson, <http://www.courts.state.wi.us/html/sc/01/01-1136.htm> 2003 WI 40, reversing, 2002 WI App 296

For Carlson: Steven L. Miller

Ability to understand English required under Wis. Stat. §§ 756.02 and § 756.04. Erroneous impaneling of juror who could not understand English wasn't harmless beyond a reasonable doubt. ¶¶46-47. (Though the majority doesn't explicitly say that the error is "structural" – necessarily harmful –that does seem to be the import. See concurrence. ¶¶56-60 and dissent, ¶84.)

JOHN DOE PROCEEDING, REVIEW OF – SUPERVISORY WRIT BY COURT OF APPEALS
ADDRESSED TO JUDGE PRESIDING OVER DOE PROCEEDING

State ex rel Unnamed Persons v. State, <http://www.courts.state.wi.us/html/sc/01/01-3220.htm> 2003 WI 30
For Unnamed Persons: Franklyn M. Gimbel, et al.

(*State ex rel. Swan v. Elections Board*, 133 Wis. 2d 87, 394 N.W.2d 732 (1986) (COA not empowered to compel Elections Board to place name on ballot) limited to its facts and distinguished, principally on the ground that that case involved an administrative agency. ¶¶42-44. The Chief Justice plausibly suggests that the effect is to overrule *Swan*. ¶76.)

POSTCONVICTION DISCOVERY – PRIVILEGED RECORDS – IN CAMERA INSPECTION
REQUIRED TO DETERMINE WHETHER DISCLOSURE TO DEFENSE WARRANTED

State v. Frederick Robertson, <http://www.courts.state.wi.us/html/ca/02/02-1718.htm> 2003 WI App 84
For Robertson: Jefren Olsen, SPD, Madison Appellate

Because trial centered on credibility (the complainant conceded that she had consensual sexual contact with the defendant; the disputed question is whether he failed to stop when she wanted), and because a psychiatrist indicated after trial that she might have been psychotic, “Robertson has presented evidence demonstrating that E.B.’s psychiatric difficulties might affect both her ability to accurately perceive events and her ability to relate the truth. These problems are relevant and necessary to a determination of guilt or innocence because they bear directly on both E.B.’s credibility and Robertson’s defense of consent. Thus, Robertson is entitled to an in camera inspection of the mental health records.” ¶31.

PROCESSING APPEAL – MOTION TO RECONSIDER – NECESSITY TO RAISE “NEW ISSUE,”
LIBERALLY CONSTRUED

State v. Larry G. Edwards, <http://www.courts.state.wi.us/html/sc/01/01-3352.htm> 2003 WI 68, reversing unpublished summary order of court of appeals

For Edwards: Martha K. Askins, SPD, Madison Appellate

A motion to reconsider a final order must be supported by a “new issue,” i.e., a matter not disposed of by that order. Here, the trial court’s ruling of dismissal was ambiguous as to whether it was with or without prejudice, and the state’s motion to reconsider, “requesting that the court specify whether its dismissal was with or without prejudice,” had the effect of raising a “new issue.” An order denying the motion for reconsideration therefore supported a notice of appeal.

PROCESSING APPEAL — NOTICE OF APPEAL – PRO SE PRISONER – PRISON MAILBOX RULE

State ex rel. Dillard Earl Kelley, <http://www.courts.state.wi.us/html/ca/02/02-1495.htm> 2003 WI App 81

The prison mailbox rule of *State ex rel. Nichols v. Litscher*, <http://www.courts.state.wi.us/html/sc/00/00-0853.htm> 2001 WI 119 (petition for review filed after nominal deadline timely nonetheless if submitted before deadline to prison authorities for mailing by pro se prisoner) extended here to notice of appeal to dismissal of habeas corpus challenging custody; and, rule’s requirement that document be properly addressed satisfied if addressed to branch clerk of Milwaukee court. ¶¶11-12.

PROCESSING APPEAL – POSTCONVICTION MOTIONS — § 974.06: SERIAL LITIGATION BAR OF
STATE V. ESCALONA-NARANJO REMAINS VIABLE

State v. Anou Lo, <http://www.courts.state.wi.us/html/sc/01/01-0843.htm> 2003 WI 107, affirming unpublished opinion of court of appeals

For Lo: Robert R. Henak

SANCTIONS – SUMMARY REVERSAL OF APPEAL

Raz v. Brown, <http://www.courts.state.wi.us/html/sc/01/01-2436.htm> 2003 WI 9

Because it is no different in effect from dismissal with prejudice, summary reversal is a “drastic sanction” triggering the test under *State v. Smythe*, <http://www.courts.state.wi.us/sc/opinions/97/PDF/97-3191.PDF> 225 Wis. 2d 456, 592 N.W.2d 628 (1999) and § 809.83(2) and may not be imposed “without finding

egregious conduct, bad faith, or a litigant's abandonment of the appeal." ¶¶3, 16-18. Under the particular facts, the litigant's failure to file a response brief did not satisfy this test.

STANDARD OF REVIEW – DOUBLE JEOPARDY: “MANIFEST NECESSITY” FOR MISTRIAL OVER DEFENSE OBJECTION

State v. Brian D. Seefeldt, <http://www.courts.state.wi.us/html/sc/01/01-1969.htm> 2003 WI 47, affirming 2002 WI App 149

For Seefeldt: Donald T. Lang, SPD, Madison Appellate

¶35. As recognized in *Washington*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=434&page=497> a determination that the trial judge's mistrial order is entitled to great deference does not end the inquiry. *Washington*, 434 U.S. at 514. More is needed. Considering the double jeopardy interests, the reviewing court must still satisfy itself that the trial judge exercised “sound discretion” in concluding that the State satisfied its burden of showing a “manifest necessity” for the mistrial.

¶36. Sound discretion means acting in a rational and responsible manner. Sound discretion includes, without limitation, acting in a deliberate manner taking sufficient time in responding to a prosecutor's request for a mistrial. It requires giving both parties a full opportunity to explain their positions and considering alternatives such as a curative instruction or sanctioning counsel. Sound discretion is not exercised when the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law or does not reason its way to a rational conclusion. See *State v. Davis*, <http://www.courts.state.wi.us/html/sc/00/00-0889.htm> 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62.

¶37. Sound discretion also requires that the trial judge ensure that the record reflects there is an adequate basis for a finding of manifest necessity. As such, sound discretion is more than a review to ensure the absence of a mistake of law or fact. Rather, a review for sound discretion encompasses an assurance that an adequate basis for the finding of manifest necessity is on the record.

(Prior caselaw intimation, *State v. Barthels*, 174 Wis. 2d 173, 495 N.W.2d 341 (1993), that “strict scrutiny” is required “in all cases in which the prosecutor requests a mistrial,” is disavowed as “clearly overbroad and inconsistent with the approach set forth in *Washington*.” ¶33. Instead, the appropriate test falls along a “spectrum,” depending on the circumstances, from “great deference” to the order granting mistrial to “strict scrutiny.” ¶34.)

HARMLESS ERROR – (NON-)DISCLOSURE OF INFORMANT

State v. Phonsavanh Vanmanivong, <http://www.courts.state.wi.us/html/sc/00/00-3257.htm> 2003 WI 299, reversing, 2001 WI App 299

For Vanmanivong: John J. Grau

The trial court's failure to order disclosure of an informant is subject to harmless error analysis. The state, as beneficiary of the error, bears the burden of proving beyond reasonable doubt that the error didn't contribute to the verdict. Here, the error was harmless: the error in the trial court's finding that disclosure was unnecessary was procedural in nature (because it was based on unsworn rather than sworn in camera assertions and because it was procured by the judge rather than the litigants); and, the documentation used by the trial court in this determination was turned over to and used by the defense at trial. ¶¶40-50.

HARMLESS ERROR – WRONGFUL ADMISSION OF THREE PRIOR CONVICTIONS TO IMPEACH DEFENDANT HARMLESS WHERE TWO OTHERS WERE PROPERLY ADMITTED

State v. Gary M.B., <http://www.courts.state.wi.us/html/ca/01/01-3393.htm> 2003 WI App 72, PFR granted 5/5/03

For Gary M.B.: T. Christopher Kelly

LAW OF THE CASE

State v. Paul J. Stuart, <http://www.courts.state.wi.us/html/sc/01/01-1345.htm> 2003 WI 73, on certification
For Stuart: Christopher W. Rose

The law of the case — a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal – is not an absolute rule. And need not be followed if there has been a change in the law or if the prior decision was clearly erroneous. ¶¶23-24.

STANDARD OF REVIEW – IMPEACHMENT BY PRIOR CONVICTIONS, § 906.09

State v. Gary M.B., 2003 WI App 72, PFR granted 5/5/03

For Gary M.B.: T. Christopher Kelly

¶27. Because the trial court did not weigh the probative value of the three oldest convictions against the danger of unfair prejudice after Gary objected to their admission, we conclude that it did not engage in a proper exercise of discretion. See, e.g., *State v. Smith*, 203 Wis. 2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996). Had it done so, the court might have concluded that Gary’s three twenty-five-year-old convictions for relatively minor offenses were not sufficiently probative of his credibility to merit mention at trial. Although we may independently review the record to determine whether the proper legal standard applied to the facts of record support the trial court’s ruling, we decline to do so here. Because there were no evidentiary proceedings (and only very brief argument) on the issue in the trial court, the record provides no basis for us to conclude that, had the court applied the correct legal standard, it would have reached the same result.

STANDARD OF REVIEW — JUDICIAL BIAS — TO OVERCOME JUDGE’S PRESUMED IMPARTIALITY, DEFENDANT MUST SHOW BY PREPONDERANCE OF THE EVIDENCE THAT JUDGE IS IN FACT BIASED.

State v. Terrance J. O’Neill, <http://www.courts.state.wi.us/html/ca/02/02-0808.htm> 2003 WI App 73

For O’Neill: Roger D. Sturdevant, SPD, Monroe

STANDARD OF REVIEW – U.S. SUPREME COURT PRECEDENT BINDING ONLY WHEN ADDRESSES QUESTION OF FEDERAL LAW GOVERNING DISPUTE BEFORE WISCONSIN COURT, AND NOT RULE OF ADMINISTRATION APPLICABLE TO FEDERAL COURTS, ¶11

State v. Gary M.B., 2003 WI App 72, PFR granted 5/5/03

For Gary M.B.: T. Christopher Kelly

STANDARD OF REVIEW – PRECEDENTIAL EFFECT OF PUBLISHED WISCONSIN CASE SUBSEQUENTLY REVERSED ON OTHER GROUNDS, AND NEITHER “OVERRULED, WITHDRAWN, OR MODIFIED,” CONTINUES TO BIND THE COURT OF APPEALS, ¶13.

State v. Gary M.B., 2003 WI App 72, PFR granted 5/5/03

For Gary M.B.: T. Christopher Kelly

WAIVER – SUFFICIENCY OF EVIDENCE – TRIAL-LEVEL CHALLENGE UNNECESSARY, ¶¶7-12

State v. Obea S. Hayes, <http://www.courts.state.wi.us/html/ca/02/02-1542.htm> 2003 WI App 99, PFR filed 5/15/03

For Hayes: Philip J. Brehm

WAIVER – DEFENDANT’S OWN INTRODUCTION OF NUMBER OF HIS OR HER OWN PRIORS AS IMPEACHMENT DOESN’T WAIVE CHALLENGE TO ADMISSIBILITY OF THOSE PRIORS

State v. Gary M.B., 2003 WI App 72, PFR granted 5/5/03

For Gary M.B.: T. Christopher Kelly

Holding of *Vanlue v. State*, 87 Wis. 2d 455, 275 N.W.2d 115 (Ct. App. 1978), rev’d on other grounds, 96 Wis. 2d 81, 291 N.W.2d 467 (1980) (“a defendant who unsuccessfully objects to the admission of prior conviction

evidence does not waive the objection by preemptively testifying about the convictions on direct examination”) remains binding. ¶¶12-13.

CIVIL COMMITMENTS

SEXUALLY VIOLENT PERSONS — JURISDICTION — CIRCUIT COURT HAS JURISDICTION UNDER CH. 980 TO COMMIT AN ENROLLED TRIBAL MEMBER WHO HAS COMMITTED A SEXUALLY VIOLENT OFFENSE ON AN INDIAN RESERVATION

State v. Steven J. Burgess, <http://www.courts.state.wi.us/html/sc/00/00-3074.htm> 2003 WI 71, affirming 2002 WI App 264, 258 Wis. 2d 548, 654 N.W.2d 81

For Burgess: Steven P. Weiss, SPD, Madison Appellate

SEXUALLY VIOLENT PERSONS – PETITION MAY NOT BE FILED BY PROSECUTOR ABSENT PRIOR DOC REQUEST OR DOJ ACTION

State v. Harris D. Byers, <http://www.courts.state.wi.us/html/sc/99/99-2441.htm> 2003 WI 86, reversing unpublished opinion of court of appeals

For Byers: Jack E. Schairer & Jefren E. Olsen, SPD, Madison Appellate

SEXUALLY VIOLENT PERSONS – TIME LIMITS FOR PERIODIC REEXAMINATION, § 980.07(1), ARE MANDATORY, ¶¶19-21 (BUT: SUBJECT IS NOT ENTITLED TO RELEASE FOR VIOLATION, THOUGH THERE IS NO MAJORITY VOTE IN FAVOR OF PARTICULAR REMEDY)

State ex rel. William E. Marberry v. Macht, <http://www.courts.state.wi.us/html/sc/99/99-2446B.htm> 2003 WI 79, reversing 2002 WI App 133, 254 Wis. 2d 690, 648 N.W.2d 522

For Marberry: Donald T. Lang, SPD, Madison Appellate

SEXUALLY VIOLENT PERSONS – SUFFICIENCY OF PROOF – ACTUARIAL DATA

State v. James Lalor, <http://www.courts.state.wi.us/html/ca/00/00-1957.htm> 2003 WI App 68, PFR filed 4/15/03

For Lalor: T. Christopher Kelly

Evidence based on actuarial instruments (RRASOR; PCL-R; MnSOST-R; V-RAG), to the effect that of people with similar scores about 50% reoffend within five years and 70% within ten years, supports finding of substantial likelihood to engage in sexual violence. ¶¶15-25.

SEXUALLY VIOLENT PERSONS – SUBSTANTIVE DUE PROCESS – FACT-FINDER NEED NOT MAKE EXPRESS FINDING OF SERIOUS DIFFICULTY CONTROLLING BEHAVIOR. ¶¶ 26-30

State v. James Lalor, 2003 WI App 68, PFR filed 4/15/03

For Lalor: T. Christopher Kelly

SEXUALLY VIOLENT PERSONS – SUFFICIENCY OF PROOF – WITHIN 90 DAYS OF RELEASE – REMEDY FOR INSUFFICIENT PROOF “IS TO REMAND FOR AN EVIDENTIARY HEARING LIMITED TO THE ISSUE OF WHETHER THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT LALOR WAS WITHIN NINETY DAYS OF HIS RELEASE AT THE TIME THE PETITION WAS FILED.” ¶35.

State v. James Lalor, 2003 WI App 68, PFR filed 4/15/03

For Lalor: T. Christopher Kelly

CONFESSIONS

POST-POLYGRAPH STATEMENTS ADMISSIBLE WHERE “DISCRETE FROM THE POLYGRAPH TEST,” IN THAT DEFENDANT KNEW TEST WAS OVER, WAS DISCONNECTED FROM POLYGRAPH MACHINE, AND WAS REMOVED FROM EXAMINATION ROOM

State v. Jeremy T. Greer, <http://www.courts.state.wi.us/html/ca/01/01-2591.htm> 2003 WI App 112, on remand following equally-divided result, 2003 WI 30; PFR filed 6/12/03
For Greer: Donna L. Hintze, SPD, Madison Appellate

VOLUNTARINESS – POLICE COERCION, NECESSITY OF

State v. Paul D. Hoppe, <http://www.courts.state.wi.us/html/sc/00/00-1886.htm> 2003 WI 43, affirming unpublished opinion

For Hoppe: William E. Schmaal, SPD, Madison Appellate

¶46. Both *Connelly* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=479&page=157> and *Clappes* support the proposition that some coercive or improper police conduct must exist in order to sustain a finding of involuntariness. However, both of these cases also recognize that police conduct does not need to be egregious or outrageous in order to be coercive. Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures.

VOLUNTARINESS – SUSPECT'S "SEVERELY DEBILITATED" CONDITION COUPLED WITH "SUBTLE" POLICE COERCION

State v. Paul D. Hoppe, 2003 WI 43, affirming unpublished opinion

For Hoppe: William E. Schmaal, SPD, Madison Appellate

Under "somewhat unique" facts, a suspect's statements made during interviews in a hospital over a three-day period while delusional and in the throes of acute alcohol withdrawal were involuntary despite the absence of any egregious police pressure. ¶¶47-59.

CONFRONTATION

FORMER (PRELIMINARY HEARING) TESTIMONY, § 908.045(1)

State v. John Norman, <http://www.courts.state.wi.us/html/sc/01/01-3303.htm> 2003 WI 72, affirming unpublished decision of court of appeals

For Norman: Angela Kachelski

Admissibility at trial of preliminary hearing testimony of an unavailable witness, § 908.045(1), is a well-recognized hearsay exception and the reliability of the evidence may therefore be inferred. ¶30. Limits on cross-examination at a preliminary may in some circumstance bar subsequent admissibility, but not in this instance, where the credibility of the unavailable witness was not at issue. ¶¶39-40.

FORMER (PRELIMINARY HEARING) TESTIMONY, § 908.045(1)

State v. Paul J. Stuart, 2003 WI 73, on certification

For Stuart: Christopher W. Rose

Preliminary hearing testimony is a firmly rooted hearsay exception, for which reliability may be inferred unless unusual circumstances exist. ¶¶36-37. The limited scope of preliminary hearing and concomitant limitation on cross-examination does not itself make the evidence inadmissible. ¶39. Only one objection was sustained, and although the witness's credibility was an important facet of the case, Stuart "was able to meaningfully cross-examine" the witness, establishing facts that bore on credibility. ¶41.

DEFENSE NOT ALLOWED TO CROSS-EXAMINE PROSECUTION WITNESS ON SENTENCE ACTUALLY RECEIVED; CROSS-EXAMINATION ON HIS PERCEPTION OF WHAT BENEFIT HE THOUGHT HE MIGHT RECEIVE SATISFIES CONFRONTATION

State v. Bryan Hoover, <http://wicourts.gov/html/ca/02/02-1687.htm> 2003 WI App 116, PFR filed 6/26/03

For Hoover: Glenn C. Cushing, SPD, Madison Appellate

STATEMENT OF RECENT PERCEPTION, § 908.045(2), IS NOT A FIRMLY ROOTED HEARSAY EXCEPTION, AND THUS FOR CONFRONTATION PURPOSES MUST BE SUPPORTED BY PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS, WHICH ARE PRESENT IN THAT STATEMENT WAS SPONTANEOUS AND REPEATED, ¶¶26-27

State v. Patricia A. Weed, <http://www.courts.state.wi.us/html/sc/01/01-1476.htm> 2003 WI 85, affirming unpublished opinion of court of appeals

For Weed: T. Christopher Kelly

COUNSEL

INEFFECTIVE ASSISTANCE – DEFICIENT PERFORMANCE – CONCEDED GUILT ON ONE OF MULTIPLE COUNTS

State v. Gary L. Gordon, <http://www.courts.state.wi.us/html/sc/01/01-1679.htm> 2003 WI 69, reversing 2002 WI App 53, 250 Wis. 2d 702, 641 N.W.2d 183

For Gordon: Steven P. Weiss, SPD, Madison Appellate

There is no “rule of per se ineffectiveness” in cases where counsel concedes guilt on one count “in light of overwhelming evidence on that count.” ¶¶24-30.

CRIMES: § 940.05(2), INTENTIONAL HOMICIDE – IMPERFECT SELF-DEFENSE

State v. Anou Lo, 2003 WI 107, affirming unpublished opinion of court of appeals

For Lo: Robert R. Henak

Holding of *State v. Head*, <http://www.courts.state.wi.us/html/sc/99/99-3071.htm> 2002 WI 99 [first-degree intentional homicide mitigated to 2nd-degree if defendant had actual but unreasonable belief in necessity of deadly force] is “new rule” not requiring retroactive application to collateral attacks. ¶¶61-84.

CRIMES: § 940.19(6), AGGRAVATED BATTERY; AND § 940.20(20), BATTERY BY PRISONER

THE LEGISLATURE DID NOT INTEND TO PRECLUDE CUMULATIVE PUNISHMENTS FOR BOTH AGGRAVATED BATTERY AND BATTERY BY PRISONER FOR THE SAME CONDUCT, HENCE SUCH PUNISHMENTS DON’T VIOLATE DOUBLE JEOPARDY

State v. Jimmie Davison, <http://www.courts.state.wi.us/html/sc/01/01-0826.htm> 2003 WI 89, reversing 2002 WI App 109, 235 Wis. 2d 715, 647 N.W.2d 390

For Davison: Keith A. Findley, UW Law School, Criminal Appeals Project

CRIMES: § 940.225(2)(A), SECOND-DEGREE SEXUAL ASSAULT

SUFFICIENCY OF EVIDENCE – TIMING OF FORCE ELEMENT

State v. Obea S. Hayes, 2003 WI App 99, PFR filed 5/15/03

For Hayes: Philip J. Brehm

Element of “sexual contact with the victim by use or threat of force or violence ... is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact. Further, where more than one sexual act occurs, a single threat may suffice; there need not be a separate threat or use of force prior to each act.” ¶16. Ambiguities in witness’ testimony, including chronology of event, are for jury to resolve. ¶17.

CRIMES — § 943.201, IDENTITY THEFT

OBTAINING LOWER BAIL AS A RESULT OF MISAPPROPRIATING ANOTHER’S IDENTITY SOMETHING “OF VALUE,” AND THEREFORE COMES WITHIN THE STOLEN IDENTITY STATUTE

State v. Pamela L. Peters, 2003 WI 88, on certification

For Peters: Terry W. Rose

CRIMES – § 948.095, SEXUAL ASSAULT BY SCHOOL STAFF

DEFINITION OF “SCHOOL STAFF”

State v. David R. Kaster, <http://www.courts.state.wi.us/html/ca/02/02-2352.htm> 2003 WI App 105, PFR filed 5/20/03

For Kaster: Steven L. Miller

An individual coaching a swimming team is “school staff” within the meaning of § 948.095, even if not under contract. (The statute covers “any person who provides services to a school or a school board[.]” The court indicates that coverage “is broad,” sufficiently so “that volunteers are included within the statute’s definition of ‘school staff.’” ¶15. One of the charges against Kaster, it should be noted, occurred after his contract expired. ¶ 2.)

CRIMES – § 948.22, NON-SUPPORT

MODIFICATION OF SUPPORT PAYMENTS – FACTORS — INCARCERATION

State v. Terry L. Dumler, <http://www.courts.state.wi.us/html/sc/01/01-2213.htm> 2003 WI 62, affirming summary order

For Dumler: Todd G. Smith

¶ 1.... The central issue before this court is whether the circuit court erroneously exercised its discretion in refusing to reduce Dumler’s child support payments in light of Dumler’s incarceration and resulting change in income. Although we find it appropriate for a court to consider incarceration when reviewing a request for modification, we find that the fact of incarceration by itself neither mandates nor prevents modification. Incarceration is one factor that should be considered, but the determination should be made on a case-by-case basis, looking at the totality of the relevant circumstances. We conclude that under the circumstances presented in this case, the circuit court properly exercised its discretion under Wis. Stat. § 767.32 (1999-2000) in finding that the facts in this case did not constitute a substantial change in circumstances sufficient to warrant modification.

DEFENSES

STATUTE OF LIMITATIONS – SUPPORT ARREARAGES, § 893.40 – ACCRUAL UPON ENTRY OF SUPPORT JUDGMENT

State v. Walter Junior Benjamin, <http://www.courts.state.wi.us/html/sc/01/01-1014.htm> 2003 WI 50, affirming 2002 WI App 89

For Benjamin: Robert A. Ramsdell

¶4. We hold that Wis. Stat. § 893.40, which became effective on July 1, 1980, governs the time within which a party may bring an independent action to collect child support arrearages that accumulated after the statute’s effective date. In addition, we conclude that, under the statute, an action brought to enforce a child support judgment must be commenced within 20 years of the date when the judgment is entered. The period of limitation begins to run upon entry of judgment, irrespective of whether any payment under that judgment has been missed.

¶5. The last judgment ordering Walter to pay child support was entered on November 9, 1977. Consequently, the State had until November 9, 1997, to commence an action against Walter to collect arrears that accrued after July 1, 1980. Because the State’s action to collect arrearages was not initiated until May 2000, it must be deemed untimely and barred under Wis. Stat. § 893.40.

COMMON LAW – HOMICIDE: CAUSE OF DEATH – YEAR-AND-DAY RULE – PROSPECTIVE ABROGATION OF RULE

State v. Waylon Picotte, <http://www.courts.state.wi.us/html/sc/01/01-3063.htm> 2003 WI 42, on certification

For Picotte: John T. Wasielewski

Conviction for homicide barred because the victim did not die within a year and a day of infliction of the fatal injuries, as required by common law, and as preserved through Wis. Const. Art. XIV, § 13. However, the court possesses the authority to abrogate common law defenses and does so in this instance, albeit prospectively only (i.e., after May 16, 2003).

EX POST FACTO – CHANGE IN STATUTE OF LIMITATIONS – EXTENSION OF LIMITATION PERIOD FOR PROSECUTING CRIME, BEFORE PRIOR LIMITATION PERIOD HAS EXPIRED, DOESN'T VIOLATE EX POST FACTO CLAUSE OF THE WISCONSIN CONSTITUTION, ¶15.

State v. Jeffrey B. Haines, <http://www.courts.state.wi.us/html/sc/01/01-1311.htm> 2003 WI 39, affirming, 2002 WI App 139

For Haines: Mark A. Huesmann, Sonja Davig Huesmann

STATUTE OF LIMITATIONS, § 939.74(1), “DNA COMPLAINT” AS SATISFYING, 21-24

State v. Bobby R. Dabney, <http://www.courts.state.wi.us/html/ca/02/02-2445.htm> 2003 WI App 108, PFR filed 5/23/03

For Dabney: Lynn E. Hackbarth

DOUBLE JEOPARDY**MISTRIAL OVER DEFENSE OBJECTION**

State v. Brian D. Seefeldt, 2003 WI 47, affirming 2002 WI App 149

For Seefeldt: Donald T. Lang, SPD, Madison Appellate

The trial court erred in determining that the state met its burden of proving “manifest necessity” to support mistrial over defense objection, where the matter mentioned by the defense in its opening statement and spurring the mistrial related to evidence that would have been admissible anyway, notwithstanding a standing order not to mention the matter prior to an admissibility ruling. ¶39. Mere violation of an order “is not a basis for a mistrial unless the violation creates that high degree of necessity required by the double jeopardy clause”; the trial court should have gone on to determine admissibility of the referenced matter, something it did not do. ¶40. Nor did the trial court explore alternatives to mistrial, such as imposing sanctions on defense counsel. ¶41.

EVIDENCE**HEARSAY – STATEMENT OF RECENT PERCEPTION, § 908.045(2) – INTERVAL OF EIGHT DAYS BETWEEN PERCEPTION AND STATEMENT DOES NOT RENDER IT INADMISSIBLE, ¶¶16-18**

State v. Patricia A. Weed, 2003 WI 85, affirming unpublished opinion of court of appeals

For Weed: T. Christopher Kelly

MISCONDUCT, § 904.04(2) – CONTEXT; VICTIM’S STATE OF MIND; OPPORTUNITY AND MOTIVE

State v. John P. Hunt, <http://www.courts.state.wi.us/html/sc/01/01-0272.htm> 2003 WI 81, reversing unpublished order of court of appeals

For Hunt: Rex R. Anderegg

On charges of sexual assault of household members, where witnesses and victims recanted their original accusations against the defendant, misconduct evidence relating to physical and sexual abuse by defendant of various household members were admissible to show: “context” (the authority and control exercised by the defendant, and the victims’ and witness’ fear of defendant and their pattern of recantation), ¶58; the victims’

state of mind (as relevant to their credibility in light of their recantations), ¶59; preparation or plan, ¶59; opportunity or motive, ¶60.

MISCONDUCT, § 904.04(2) – GREATER LATITUDE RULE PERMITS MORE LIBERAL ADMISSION OF MISCONDUCT EVIDENCE IN SEXUAL ASSAULT CASES THAN OTHERS, PARTICULARLY WHERE CHILD VICTIM IS INVOLVED, ¶¶84-88

State v. John P. Hunt, 2003 WI 81, reversing unpublished order of court of appeals

For Hunt: Rex R. Anderegg

MISCONDUCT, § 904.04(2) – JUDGE’S DECISION ON ADMISSIBILITY: FAILURE TO SET FORTH ADEQUATE REASONING, REMEDY

State v. John P. Hunt, 2003 WI 81, reversing unpublished order of court of appeals

For Hunt: Rex R. Anderegg

When the trial court fails to set forth in sufficient detail the factors supporting its discretionary determination to admit misconduct evidence, the appropriate recourse is ordinarily for the court of appeal to review the record independently to determine the existence of a reasonable basis for the trial court’s decision. ¶¶43-44.

MISCONDUCT, § 904.03 – UNFAIR PREJUDICE LIMITED BY CAUTIONARY INSTRUCTION TO CONSIDER THE EVIDENCE FOR SPECIFIED PURPOSE AND NOT THAT DEFENDANT ACTED IN CONFORMITY WITH CHARACTER TRAIT, ¶¶72-74

State v. John P. Hunt, 2003 WI 81, reversing unpublished order of court of appeals

For Hunt: Rex R. Anderegg

PRIVILEGE — ATTORNEY-CLIENT, § 905.03(2)

State v. Jeffrey J. Meeks, <http://www.courts.state.wi.us/html/sc/01/01-0263.htm> 2003 WI 104, reversing 2002 WI App 65, <http://www.courts.state.wi.us/html/ca/01/01-0263.htm> 251 Wis. 2d 361, 643 N.W.2d 526

For Meeks: Christopher T. Van Wagner

An attorney’s “opinions, perceptions, and impressions” of a former client’s competency to proceed are protected by the attorney-client privilege. ¶40.

PRIVILEGE – CONFIDENTIAL INFORMANT, § 905.10(3)(B) – TEST

State v. Phonesavanh Vanmanivong, 2003 WI 299, reversing, 2001 WI App 299

For Vanmanivong: John J. Grau

The test for disclosing an informant’s identity under § 905.10(3)(b) is found in the concurrence to *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), namely:

a defendant must show that an informer’s testimony is necessary to the defense before a court may require disclosure. See *Outlaw*, 108 Wis. 2d at 139 (Callow, J., concurring). “Necessary” in this context means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt. See *id.* at 141-42. The court of appeals in the instant case relied upon the lead opinion for a point of law upon which the concurrence-majority opinion controls. As such, the court of appeals erred in its statement of the law.

In other words, “relevancy and admissibility” are not to be equated with “necessity,” but are separate inquiries. ¶26. § 905.10(3)(b) codifies the policies embodied by *Roviaro v. U.S.* 353 U.S. 53 (1957), which requires a case-by-case balancing rather than any fixed rule as to disclosure. ¶¶19-20, 27-28.

¶32. Based upon the above analysis of the law, the following procedures should be used by Wisconsin circuit courts when determining whether an informant’s identity should be disclosed. Once a defendant has made an initial showing that there is a reasonable probability that an informant may be able to give testimony necessary to the fair

determination of the issue of guilt or innocence, the state has the opportunity to show, in camera, facts relevant to determining whether or not the informant can, in fact, provide such testimony. If, and only if, the court determines that an informer's testimony is necessary to the defense in that it could create a reasonable doubt of the defendant's guilt in jurors' minds, must the privilege give way. *Outlaw*, 108 Wis. 2d at 141-42 (Callow, J., concurring).

PRIVILEGE – CONFIDENTIAL INFORMANT, § 905.10(3)(B) – PROCEDURE

State v. Phonesavanh Vanmanivong, 2003 WI 299, reversing, 2001 WI App 299

For Vanmanivong: John J. Grau

Trial court erred, under § 905.10(3)(b), in relying on unsworn memo in determining whether the identities of the confidential informants should be disclosed. The court further “erred by independently requesting additional information from law enforcement.” ¶¶33-34.

WITNESSES – IMPEACHMENT – PRIOR CONVICTIONS, § 906.09

State v. Gary M.B., 2003 WI App 72, PFR granted 5/5/03

For Gary M.B.: T. Christopher Kelly

¶27. Because the trial court did not weigh the probative value of the three oldest convictions against the danger of unfair prejudice after Gary objected to their admission, we conclude that it did not engage in a proper exercise of discretion. See, e.g., *State v. Smith*, 203 Wis. 2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996). Had it done so, the court might have concluded that Gary's three twenty-five-year-old convictions for relatively minor offenses were not sufficiently probative of his credibility to merit mention at trial. Although we may independently review the record to determine whether the proper legal standard applied to the facts of record support the trial court's ruling, we decline to do so here. Because there were no evidentiary proceedings (and only very brief argument) on the issue in the trial court, the record provides no basis for us to conclude that, had the court applied the correct legal standard, it would have reached the same result.

EXTRADITION & DETAINERS

INTERSTATE AGREEMENT ON DETAINERS, § 976.05 – WAIVER (BY CONDUCT) OF RIGHT TO SPEEDY TRIAL BY DISCHARGING COUNSEL SIX DAYS BEFORE THE SCHEDULED START OF TRIAL AND TWENTY-EIGHT DAYS BEFORE THE EXPIRATION OF THE TIME PERIOD, ¶¶12-14
State v. Andrew S. Miller, <http://www.courts.state.wi.us/html/ca/02/02-0851.htm> 2003 WI App 74, PFR filed 4/11/03

For Miller: Brian C. Findley, SPD, Madison Appellate

GUILTY PLEAS

PLEA BARGAINS – BREACH, BY PROSECUTOR: PRESSURING PSI AGENT TO CHANGE FAVORABLE RECOMMENDATION WHERE STATE HAD AGREED TO MAKE NO RECOMMENDATION

State v. Joshua L. Howland, <http://www.courts.state.wi.us/html/ca/02/02-2083.htm> 2003 WI App 104

For Howland: Paul G. LaZotte, SPD, Madison Appellate

¶37. We conclude that the district attorney's contacts with the Department of Probation and Parole, complaining about the PSI author's sentence recommendation, when the plea agreement required the State to make no sentence recommendation, resulted in a material and substantial breach of the plea agreement. Consequently, we reverse the order denying Howland's postconviction motion and we remand the cause to the circuit court for resentencing.

¶38. We further conclude that because of the nature of the past proceedings, Howland's resentencing would be best conducted by a new circuit court judge. Furthermore, to avoid any further taint in this case, we also conclude that a new presentence investigation should be conducted and a new report completed by a department from another county.

PLEA BARGAINS – JUDICIAL PARTICIPATION CREATES CONCLUSIVE PRESUMPTION OF INVOLUNTARY PLEA

State v. Corey D. Williams, <http://www.courts.state.wi.us/html/ca/02/02-1651.htm> 2003 WI App 116
For Williams: Michael J. Edmonds

PLEA BARGAINS – PARTIAL WITHDRAWAL CONSTITUTES REPUDIATION OF ENTIRE PLEA AGREEMENT – REMEDY IS REINSTATEMENT OF ORIGINAL CHARGES, RESTORING PARTIES TO PRE-AGREEMENT POSITIONS

State v. Corey D. Williams, 2003 WI App 116
For Williams: Michael J. Edmonds

JUDGES

BIAS — STAKE (NON-PECUNIARY) IN OUTCOME

State v. Terrance J. O'Neill, 2003 WI App 73

For O'Neill: Roger D. Sturdevant, SPD, Monroe

Judge's persistent and partisan efforts to require litigation on a recurrent issue on which the court of appeals had already reversed him in an unpublished case in which the judge actively appeared as a party on the appeal, didn't establish disqualifying bias. The judge intends to require litigation on the disputed issue in every case, unless and until a published, precedential decision binds him otherwise; therefore he isn't singling out O'Neill for special treatment. ¶16. Nor was it improper for the judge to intervene in the prior case, in that the circuit court was a named respondent in that writ petition. ¶17. Nor does the judge's position, even though adversarial to O'Neill's position, create a personal (and therefore disqualifying) stake in the outcome. ¶18.

JURISDICTION

"DNA COMPLAINT" – SUFFICIENCY, § 968.04(3)(A)4

State v. Bobby R. Dabney, 2003 WI App 108, PFR filed 5/23/03

For Dabney: Lynn E. Hackbarth

¶15. Here, the complaint and arrest warrant identified the suspect as "John Doe" and set forth a specific DNA profile. We conclude that for purposes of identifying "a particular person" as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible. "A genetic code describes a person with far greater precision than a physical description or a name." Meredith A. Bieber, Comment, Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations, 150 U. Pa. L. Rev. 1079, 1085 (2002). Thus, we agree with the State's arguments that the DNA profile satisfies the "reasonable certainty" requirements for an arrest warrant and answers the "who is charged" question for a complaint.

¶16. We are, however, persuaded by Dabney's suggestion that in addition to the DNA profile, the particular physical characteristics known to police would have further enhanced the completeness of the complaint and warrant. As Dabney points out, an individual would not necessarily recognize the DNA profile as his own. Thus, although the DNA profile satisfies the particularity requirements in identifying a suspect whose name is not known, it would be helpful, for notice purposes, to also include any known physical appearance characteristics.

The lack of a more particular physical description in this case, however, does not defeat the State's argument.

JURY

INSTRUCTIONS – OMITTED ELEMENT, HARMLESS ERROR

State v. Gary L. Gordon, 2003 WI 69, reversing 2002 WI App 53, 250 Wis. 2d 702, 641 N.W.2d 183

For Gordon: Steven P. Weiss, SPD, Madison Appellate

Failure to instruct the jury on an essential element of the crime is subject to harmless error analysis, rather than automatic reversal. ¶¶31-42. “We reverse *State v. Howard*, <http://www.courts.state.wi.us/html/sc/95/95-0770.htm> 211 Wis. 2d 269, 290-95, 564 N.W.2d 753 (1997), *State v. Avila*, 92 Wis. 2d 870, 891-93A, 532 N.W.2d 423 (1995), and *State v. Krueger*, <http://www.courts.state.wi.us/ca/opinions/00/pdf/00-1136.pdf> 240 Wis. 2d 644, 649-51, 632 N.W.2d 211 (Ct. App. 2000), to the extent that those cases established a rule of automatic reversal where a jury instruction omits an element of the offense.” ¶5. (Note: the cite to *Krueger* is slightly off; the public domain cite is 2001 WI App 14.) This result is compelled by *Neder v. United States*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=97-1985> 527 U.S. 1 (1999), and *State v. Harvey*, <http://www.courts.state.wi.us/html/sc/00/00-0541.htm> 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189. Id.

SELECTION – LANGUAGE COMPREHENSION

State v. Michael W. Carlson, 2003 WI 40, reversing, 2002 WI App 296

For Carlson: Steven L. Miller

¶2. We hold that an ability to understand the English language is necessary in order to satisfy the requirements Wis. Stat. § 756.02 and § 756.04 (1999-2000). If a potential juror indicates on the juror questionnaire that he or she is unable to understand English, his or her name shall be struck from the juror pool. If a juror who does not meet the statutory requirements of Wis. Stat. § 756.02 is impaneled, then the entire trial process may be nothing more than an “exercise in futility.” *State v. Coble*, 100 Wis. 2d 179, 216, 301 N.W.2d 221 (1981) (Coffey, J., concurring).

SELECTION – “BATSON” ISSUE – RACE-NEUTRAL REASONS: JUROR’S SURNAME AS WELL-KNOWN CRIMINAL NAME

State v. Nancy R. Lamon, <http://www.courts.state.wi.us/html/sc/00/00-3403.htm> 2003 WI 78, affirming unpublished decision of court of appeals

For Lamon: Timothy A. Provis

That a prospective juror’s last name “is a well-known criminal name” in the locality, and the juror’s address is in a high-crime area and has itself received police contacts are race-neutral reasons for striking the juror. ¶¶80-86. That the prosecutor did not direct individualized questions to this juror is not conclusive of discriminatory intent. ¶¶88-89. And that the juror’s employment record was admittedly spotty (“varies”) is race-neutral. ¶90.

JUVENILE PROCEEDINGS

DELINQUENCY – DISMISS-AND-REFER, § 938.21(7) (1999-2000) – CUSTODY OF JUVENILE NOT REQUIRED

State v. Lindsey A.F., <http://www.courts.state.wi.us/html/sc/01/01-0082.htm> 2003 WI 63, ¶7 n. 5, affirming 2002 WI App 223, 257 Wis. 2d 650, 653 N.W.2d 116

For Lindsey A.F.: Eileen Hirsch, SPD, Madison Appellate

¶25. Therefore, based on our examination of the statutory language, the legislative history, context, and purpose, we determine that the legislature did not intend the interpretation advanced by the State. Rather, we conclude that the legislature intended that a court would

have the authority to dismiss-and-refer under § 938.21(7) even when the juvenile is not in custody.

DELINQUENCY – DISMISS-AND-REFER, § 938.21(7) (1999-2000) – CONSENT OF PROSECUTOR NOT REQUIRED

State v. Lindsey A.F., 2003 WI 63, ¶7 n. 5, affirming 2002 WI App 223, 257 Wis. 2d 650, 653 N.W.2d 116
For Lindsey A.F.: Eileen Hirsch, SPD, Madison Appellate

¶34. Accordingly, we agree with the court of appeals that while § 938.245(6) authorizes a district attorney to override a determination made by an intake worker within 20 days after receipt of notice, it does not authorize a district attorney to override a determination made by the circuit court. *Lindsey A.F.*, 257 Wis. 2d 650, ¶¶13, 16. Based on a proper reading of the notice requirement of § 938.24(5), the scope of the district attorney’s ability to terminate a deferred prosecution agreement under § 938.245(6), and the authority granted to judges under § 938.21(7), we conclude that the district attorney did not have the authority to terminate the deferred prosecution agreement in this case.

OPEN RECORDS LAW, § 19.35 JOHN DOE PROCEEDING

State ex rel Unnamed Persons v. State, 2003 WI 30
For Unnamed Persons: Franklyn M. Gimbel, et al.

¶66. We agree that the public records law, Wis. Stat. § 19.35, is applicable to this issue and we reaffirm the general presumption that all public records shall be open to the public. Wis. Stat. §§ 19.31-19.39. ...

¶67. To that end, the public records law provides that a requester has a right to inspect any record “[e]xcept as otherwise provided by law.” Wis. Stat. § 19.35(1). The John Doe statute, Wis. Stat. § 968.26, which authorizes secrecy in John Doe proceedings, is a clear statement of legislative policy and constitutes a specific exception to the public records law. It is critical that when a John Doe judge issues a secrecy order pursuant to Wis. Stat. § 968.26, the judge must be assured that secrecy will be preserved when and if the matter reaches an appellate court. Seeking review in the court of appeals must not become a vehicle to undermine the secrecy or integrity of a John Doe proceeding.

¶68. Therefore, on review of a petition for a writ stemming from a secret John Doe proceeding, the court of appeals may seal parts of a record in order to comply with existing secrecy orders issued by the John Doe judge.

PRETRIAL PROCEEDINGS

CHARGING INSTRUMENT – “DNA COMPLAINT” – SUFFICIENCY, § 968.04(3)(A)4

State v. Bobby R. Dabney, 2003 WI App 108, PFR filed 5/23/03
For Dabney: Lynn E. Hackbarth

¶15. Here, the complaint and arrest warrant identified the suspect as “John Doe” and set forth a specific DNA profile. We conclude that for purposes of identifying “a particular person” as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible. “A genetic code describes a person with far greater precision than a physical description or a name.” Meredith A. Bieber, Comment, Meeting the Statute or Beating It: Using “John Doe” Indictments Based on DNA to Meet the Statute of Limitations, 150 U. Pa. L. Rev. 1079, 1085 (2002). Thus, we agree with the State’s arguments that the DNA profile satisfies the “reasonable certainty” requirements for an arrest warrant and answers the “who is charged” question for a complaint.

¶16. We are, however, persuaded by Dabney's suggestion that in addition to the DNA profile, the particular physical characteristics known to police would have further enhanced the completeness of the complaint and warrant. As Dabney points out, an individual would not necessarily recognize the DNA profile as his own. Thus, although the DNA profile satisfies the particularity requirements in identifying a suspect whose name is not known, it would be helpful, for notice purposes, to also include any known physical appearance characteristics. The lack of a more particular physical description in this case, however, does not defeat the State's argument.

CHARGING INSTRUMENT – NOTICE — “DNA COMPLAINT”

State v. Bobby R. Dabney, 2003 WI App 108, PFR filed 5/23/03

For Dabney: Lynn E. Hackbarth

¶28. First, the fact that the original complaint and arrest warrant were issued as “John Doe” and contained only a DNA profile does not create any lack of “notice” issues. A defendant is not entitled to specific notice that the state is issuing a complaint and seeking an arrest warrant. “[A]n arrest warrant issues when it is signed by a judge with intent that it be executed and the warrant leaves the possession of the judge.” *State v. Mueller*, 201 Wis. 2d 121, 129, 549 N.W.2d 455 (Ct. App. 1996). Thus, the warrant is issued without any involvement from the defendant and the defendant is not provided with any notice of the underlying charge until the warrant is executed. Here, the warrant was not executed until Dabney's name was substituted for “John Doe.” Thus, whether or not Dabney knew his specific DNA profile is irrelevant.

JOHN DOE, § 968.26

State ex rel Unnamed Persons v. State, 2003 WI 30

For Unnamed Persons: Franklyn M. Gimbel, et al.

Witnesses and person under investigation at a John Doe proceeding have substantial rights and protections, including argument by counsel when necessary to ensure procedural fairness. ¶51. But John Doe judges have the power to disqualify counsel for conflict of interest. ¶55. When this power is exercised, the judge “must create a record for possible review.” ¶57.

MOTION TO SUPPRESS STATEMENTS (MIRANDA-GOODCHILD) – ALTHOUGH RULES OF EVIDENCE DO NOT APPLY, STATE'S BURDEN OF PROOF WILL RARELY BE MET THROUGH EXCLUSIVE RELIANCE ON UNSWORN POLICE REPORT.

State v. Joseph F. Jiles, <http://www.courts.state.wi.us/html/sc/02/02-0153.htm> 2003 WI 66, reversing unpublished decision of court of appeals

For Jiles: Mark S. Rosen

SEARCH & SEIZURE

EXIGENCY – AUTOMOBILE TOWED FOR SAFEKEEPING BECAUSE IT WAS UNLOCKED AND THEREFORE AT RISK FOR THEFT: BECAUSE THE POLICE DID NOT ATTEMPT OTHER, LESS INTRUSIVE METHODS SUCH AS LOCKING THE CAR OR TRYING TO LOCATE THE OWNER, TOWING WAS UNREASONABLE

State v. Timothy T. Clark, <http://www.courts.state.wi.us/html/ca/02/02-2195.htm> 2003 WI App 121

For Clark: Rodney Cubbie

EXPECTATION OF PRIVACY – PUBLIC REST ROOM STALL

State v. Juan M. Orta, <http://www.courts.state.wi.us/html/ca/02/02-1008.htm> 2003 WI 93

For Orta: Glenn L. Cushing, SPD, Madison Appellate

¶2 ... (A)n individual who occupies a public restroom stall does not have a reasonable expectation of privacy when he or she occupies it with another individual, leaves the door

slightly ajar and unlatched, and evinces no indication that the stall is being used for its intended purpose.

(The court takes pains to distinguish foreign authority affording privacy rights in a public stall, on the basis of the multiple occupancy in this instance. ¶ 17. That seems to be the most important factor, more so than even leaving the door slightly ajar, cases cited ¶17 n. 3; you may have an expectation of privacy even with multiple occupancy if the door is locked, ¶22 n. 5.)

FORFEITURE – RIGHT TO SEEK ADJOURNMENT UNTIL AFTER “ADJUDICATION” OF UNDERLYING CRIME EXPIRES UPON TRIAL-LEVEL DISPOSITION, AND DOES NOT EXTEND TO APPEAL OF UNDERLYING CONVICTION

State v. One 1997 Ford and David Beck, <http://www.courts.state.wi.us/html/ca/02/02-2685.htm> 2003 WI App 128, PFR filed 6/6/03

For Beck: Adam B. Stephens, Alex Flynn

INVENTORY SEARCH REQUIRES ANALYSIS OF REASONABLENESS OF SEIZURE AND ALSO OF SEARCH ITSELF – EXISTENCE OF AND COMPLIANCE WITH POLICE POLICY RELATES ONLY TO REASONABLENESS OF SEARCH AND NOT THE SEIZURE, WHICH MUST BE SEPARATELY JUSTIFIED, ¶¶11-12; AND, EACH SEARCH MUST IN ANY EVENT BE INDEPENDENTLY EVALUATED FOR REASONABLENESS UNDER THE FOURTH AMENDMENT, ¶¶13-14

State v. Timothy T. Clark, 2003 WI App 121

For Clark: Rodney Cubbie

WARRANT – EXECUTION: NO-KNOCK – WARRANT APPLICATION ALONE INSUFFICIENT

State v. Isace A. Whiting, <http://www.courts.state.wi.us/html/ca/02/02-1721.htm> 2003 WI App 103

For Whiting: R. Michael Waterman

Although the affidavit in support of the search warrant established facts sufficient to justify a no-knock entry, the trial court “erred in upholding the no-knock entry without ascertaining whether the circumstances described in the warrant application had changed because of additional facts known to the officers at the time they executed the warrant.” ¶14. (The holding represents an important limitation on *State v. Eason*, <http://www.courts.state.wi.us/html/sc/98/98-2595.htm> 2001 WI 98 (good-faith rule applies to no-knock authorization in warrant) which, the court now holds, simply did not reach the present issue, as the discussion immediately following indicates.) No-knock entry may not be sustained merely on the information in the warrant application:

¶18. In short, the supreme court did not address in *Eason* the claim Whiting raises in this appeal. Given the court’s unequivocal statements in *Meyer* and *Henderson*, and those of the U.S. Supreme Court in *Richards*, we conclude that when the reasonableness of a no-knock entry is challenged, the State must present evidence of the circumstances known or reasonably suspected by police to exist at the time of warrant execution that would justify a no-knock entry. If those circumstances were described in the warrant application, the State’s evidence might consist of nothing more than testimony by an officer that nothing had come to the officers’ attention to lead them to believe that circumstances had changed. If, however, the warrant application is silent or lacking in regard to circumstances which might render an announced entry dangerous or futile, the State may still justify a no-knock entry by showing that officers possessed the requisite reasonable suspicion at the time of entry. See *Henderson*, 245 Wis. 2d 345, ¶3.

¶19. Next, because the Washington men were “the primary focus of the investigation,” and because they were actually found in the Whiting residence when the warrant was executed, the State would have this court infer that reasonable suspicion for a no-knock entry must have existed at the time of entry. The fact that a given search produces what was sought, however, cannot be used to establish the pre-search existence of the requisite knowledge or

belief to justify the search, or in this case, the manner of its execution. Cf. *State v. Ford*, 211 Wis. 2d 741, 750, 565 N.W.2d 286 (Ct. App. 1997) (“The fact that the officer’s suspicion was confirmed by evidence found during the unauthorized search cannot be used after the fact to bootstrap that suspicion into probable cause for an arrest.”).

¶20. Rather, we conclude that once a defendant has moved to suppress evidence because officers did not knock and announce their presence before executing a search warrant, the State must present evidence to establish the reasonable suspicion required for the no-knock entry. See *Meyer*, 216 Wis. 2d at 753 (“[R]easonable suspicion ... must be shown by the particular facts in each case.”). Neither this court nor the circuit court may “fill in the blanks” and relieve the State of its obligation to show that, under the circumstances existing at the time of entry, a no-knock entry was reasonable and thus permitted under the Fourth Amendment.

SENTENCING

ENHANCERS — MULTIPLE ENHANCERS — §§ 939.62(1)(B), 961.48(2)

State v. Paul R. Maxey, <http://www.courts.state.wi.us/html/ca/02/02-1171.htm> 2003 WI App 94
For Maxey: Douglas I. Henderson

Sentence may be enhanced by both the general repeater provision of § 939.62(1)(b) (1999-2000) and the specific repeat drug offender provision of § 961.48(2) (1999-2000), given the rationale of *State v. Richard W. Delaney*, <http://www.courts.state.wi.us/html/sc/01/01-1051.htm> 2003 WI 9:

¶14. In summary, the law of Wis. Stat. § 939.62 as explained in *Delaney* is as follows. A defendant is eligible for an enhanced sentence as a habitual criminal if: (1) the present conviction is for any crime allowing for imprisonment except escape or a failure to report; and (2) the prior conviction is for any felony or misdemeanor except motor vehicle offenses and offenses prosecuted in the juvenile court.

(*State v. Ray*, 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992) again limited to its facts, namely a single prior drug-related conviction. ¶¶19-20. Where there are two priors, one may be used to support the general repeater, and the other the drug enhancement. ¶21. Note that § 961.48(2) (1999-2000) was repealed as part of the Truth-in-Sentencing overhaul, see ¶ 2 n. 3.)

ENHANCERS – PLEADING – MISSTATEMENT OF DATE OF PRIOR CONVICTION BY ONE CALENDAR DAY DID NOT DEPRIVE DEFENDANT OF ADEQUATE NOTICE OF REPEATER ALLEGATION

State v. Robert J. Stynes, <http://www.courts.state.wi.us/html/sc/02/02-1143.htm> 2003 WI 65, reversing unpublished opinion
For Stynes: Patrick M. Donnelly, SPD, Madison Appellate

MODIFICATION/REVIEW –FACTORS: (PAC-RELATED, DISTRICT-BY-DISTRICT) SENTENCING GUIDELINES, VALIDITY

State v. Patty E. Jorgensen, <http://www.courts.state.wi.us/html/sc/01/01-2690.htm> 2003 WI 105, affirming unpublished opinion of court of appeals

For Jorgensen: Charles B. Vetzner, SPD, Madison Appellate

Sentencing guidelines for specified offenses (namely: §§ 346.63 (1) (b) or (5) [PAC offenses]) are within the authority granted by § 346.65(2m)(a). ¶¶16-18. However, the guidelines do not apply to an offense under § 346.63(1)(a) (OWI), therefore “it is inappropriate for a circuit court to simply apply the guidelines as the sole basis for its sentence in a § 346.63(1)(a) case.” ¶27. Nonetheless “in exercising its broad discretion in the area of sentencing, a court may refer to the sentencing guidelines for PAC offenses in sentencing a defendant convicted of OWI. These violations are similar and one cannot argue that the factors relevant to one offense are not a relevant consideration in sentencing for the other.” *Id.* Nor does use of these guidelines violate equal protection or due process. ¶¶38-39.

MODIFICATION/REVIEW – NEW FACTOR TEST, GENERAL

State v. Peter C. Ramuta, <http://www.courts.state.wi.us/html/ca/02/02-1431.htm> 2003 WI App 80, PFR filed 4/3/03

For Ramuta: Peter M. Koneazny, Richard D. Martin, SPD, Milwaukee Appellate

On-line Brief <http://www.wisspd.org/html/appellate/Briefbank/Briefs/021431.pdf>

¶8. The law appropriately recognizes that sentences may be based on what is unknowingly incomplete information, and, if they are, that there should be some mechanism to correct a resulting injustice. Thus, if after sentencing it turns out that there was something that would have been important to the sentencing court but was either unknown or unknowingly overlooked, the court may resentence the defendant to take the new matter into account. *State v. Macemon*, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). The hurdle, however, is fairly high: the new factor must be “highly relevant” to the sentence so that its newly revealed existence “frustrates” the court’s sentencing intent. *State v. Michels*, 150 Wis. 2d 94, 98-99, 441 N.W.2d 278, 280 (Ct. App. 1989). A defendant must prove by “clear and convincing evidence” that what he wants the sentencing court to consider is a “new factor.” *State v. Franklin*, 148 Wis. 2d 1, 9, 434 N.W.2d 609, 611 (1989).

¶9. We review de novo whether something is a new factor. *Id.*, 148 Wis. 2d at 8, 434 N.W.2d at 611. “[W]hether the new factor justifies modification of the sentence” is, however, within the trial court’s discretion. *Ibid.*

MODIFICATION/REVIEW – NEW FACTOR – SUBSEQUENT SENTENCE

State v. Peter C. Ramuta, 2003 WI App 80, PFR filed 4/3/03

For Ramuta: Peter M. Koneazny, Richard D. Martin, SPD, Milwaukee Appellate

Subsequent sentences on charges pending at the time of this sentencing didn’t amount to a new factor, *State v. Norton*, 2001 WI App 245, distinguished. ¶20.

MODIFICATION/REVIEW – NEW FACTOR – HEALTH PROBLEMS AND SHORTENED LIFE-EXPECTANCY NOT NEW FACTOR, ¶21

State v. Peter C. Ramuta, 2003 WI App 80, PFR filed 4/3/03

For Ramuta: Peter M. Koneazny, Richard D. Martin, SPD, Milwaukee Appellate

MODIFICATION/REVIEW – HARSH AND EXCESSIVE – SENTENCE EXCEEDING LIFE EXPECTANCY NOT IMPROPER, ¶25

State v. Peter C. Ramuta, 2003 WI App 80, PFR filed 4/3/03

For Ramuta: Peter M. Koneazny, Richard D. Martin, SPD, Milwaukee Appellate

PRESUMPTIVE MINIMUM – TIS-I SENTENCE

State v. Tommie L. Cole, 2003 WI 59, on certification

For Cole: Suzanne L. Hagopian, SPD, Madison Appellate

¶10. We hold that the circuit court erred when it construed the presumptive minimum sentence under Wis. Stat. §§ 961.41(1)(cm)3. and 973.01 (TIS-I) to be three years of confinement in prison. We conclude that the three-year presumptive minimum sentence under §§ 961.41(1)(cm)3. and 973.01 is a total sentence of three years, consisting of a term of 27 months of confinement and nine months of extended supervision. We therefore reverse the order of the circuit court denying the defendant’s postconviction motion and remand the case for resentencing consistent with this opinion.

PROBATION – CONDITIONS – SEX OFFENDER REGISTRATION, § 973.048, LIMITED TO ACTUAL CONVICTION AND SENTENCE FOR ENUMERATED CRIME – READ-IN WILL NOT SUPPORT REGISTRATION

State v. Peter R. Martel, <http://www.courts.state.wi.us/html/sc/02/02-1599.htm> 2003 WI 70, on certification

For Martel: Steven Zaleski

PROBATION – CONDITIONS – CIRCUIT COURT LACKS POWER TO PROHIBIT SHERIFF FROM ORDERING HOME MONITORING FOR PROBATIONER SERVING JAIL TIME AS PROBATION CONDITION, ¶2

State v. La Rae J. Schell, <http://www.courts.state.wi.us/html/ca/02/02-1394.htm> 2003 WI App 78

For Schell: Gregory A. Parker

PRESENTENCE REPORT – INDEPENDENT NATURE OF PROCESS OF PREPARATION LIMITS PARTY’S ABILITY TO ATTEMPT EX PARTE INFLUENCE

State v. Joshua L. Howland, 2003 WI App 104

For Howland: Paul G. LaZotte, SPD, Madison Appellate

¶32. We must also note that the inappropriate nature of the contact between the district attorney’s office and the Division of Community Corrections borders on ex parte communications. Our supreme court has acknowledged the importance of the PSI to the sentencing process. *State v. Suchocki*, <http://www.courts.state.wi.us/html/ca/96/96-1712.htm> 208 Wis. 2d 509, 518, 561 N.W.2d 332 (Ct. App. 1997). The securing of a PSI is an integral part of the sentencing function and is solely within the judicial function. *Young v. State*, 49 Wis. 2d 361, 368, 182 N.W.2d 262 (1971). The purpose of a PSI is to assist the judge in selecting the appropriate sentence for the individual defendant. *State v. Knapp*, 111 Wis. 2d 380, 384, 330 N.W.2d 242 (Ct. App. 1983). The Division of Community Corrections does not function as an agent of either the State or the defense in fulfilling its role but as an agent of the trial court in gathering information relating to a specific defendant. *Suchocki*, 208 Wis. 2d at 518.

¶33. The preparer of the PSI is to be a neutral and independent participant in this sentencing process. *State v. McQuay*, 154 Wis. 2d 116, 131, 452 N.W.2d 377 (1990). Presentence reports are designed to gather information concerning a defendant’s personality, social circumstances and general pattern of behavior so that the judge can make an informed sentencing decision. *Knapp*, 111 Wis. 2d at 386. In Wisconsin, the entire sentencing process is to be a search for truth and an evaluation of alternatives and any advance understanding between the prosecutor and defendant must not involve any persons conducting a presentence investigation for the court. *Farrar v. State*, 52 Wis. 2d 651, 657, 191 N.W.2d 214 (1971). ...

¶36. The integrity of the sentencing process demands that the report be accurate, reliable and, above all, objective. *Id.* at 518. A defendant’s cooperation and openness depend upon the objectivity of this report; a cooperative and open relationship would be impossible if the defendant perceives the probation officer to be a mere puppet of the district attorney’s office. Because of the requirement that the report be objective, it is of vital importance that the author of the report be neutral and independent from either the prosecution or the defense. *Id.*

RESENTENCING, AFTER GRANT OF PARTIAL RELIEF, UNNECESSARY WHERE INVALIDATION OF ONE COUNT “HAS NO AFFECT AT ALL ON THE OVERALL SENTENCE STRUCTURE,” ¶26

State v. William J. Church (II), <http://www.courts.state.wi.us/html/sc/01/01-3100.htm> 2003 WI 74, reversing 2002 WI App 212, 257 Wis. 2d 442, 650 N.W.2d 873

For Church: James L. Fullin, SPD, Madison Appellate

RESENTENCING – INCREASE IN ORIGINAL SENTENCE FOLLOWING GRANT OF RELIEF WAS PRESUMPTIVELY VINDICTIVE AND VIOLATED DUE PROCESS BECAUSE IT WAS MANIFESTLY INTENDED TO DEVIATE FROM THE ORIGINAL DISPOSITIONAL SCHEME, ¶¶48-56

State v. William J. Church (II), 2003 WI 74, reversing 2002 WI App 212, 257 Wis. 2d 442, 650 N.W.2d 873
For Church: James L. Fullin, SPD, Madison Appellate

SPEEDY TRIAL

PRE-CHARGE DELAY

State v. Bobby R. Dabney, 2003 WI App 108, PFR filed 5/23/03

For Dabney: Lynn E. Hackbarth

¶30. In order to demonstrate a due process violation on this basis, Dabney has to establish that he suffered: (1) actual prejudice as a result of the delay; and (2) that the delay arose as a result of an improper purpose, so as to afford the State a tactical advantage over him. *State v. Wilson*, 149 Wis. 2d 878, 903-05, 440 N.W.2d 534 (1989). Whether the pre-charging delay violated the due process clause is a constitutional question, which we review independent of the trial court. See generally *State v. McMorris*, 213 Wis. 2d 156, 165-66, 570 N.W.2d 384 (1997).

¶31. Dabney has failed to satisfy his burden. Although he alleges that “memories fade” and “witnesses become unavailable” as time passes, he does not set forth any specific facts to establish actual prejudice. Without any more specific factual allegations, he has failed to sufficiently present a claim of actual prejudice. See *State v. Monarch*, 230 Wis. 2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999). Rather, he relies primarily on his claim that the statute of limitations expired and, therefore, prejudice is “irrebuttably presumed.” We disagree based on our earlier conclusion that the statute of limitations was not violated in this case.

STATUTES

CONSTRUCTION – TITLE OF SECTION

State v. Lindsey A.F., 2003 WI 63, ¶7 n. 5, affirming 2002 WI App 223, 257 Wis. 2d 650, 653 N.W.2d 116
For Lindsey A.F.: Eileen Hirsch, SPD, Madison Appellate

As a general rule, this court will not consider an issue which will not have any practical effect upon an existing controversy. *State v. Leitner*, <http://www.courts.state.wi.us/html/sc/00/00-1718.htm> 2002 WI 77, ¶13, 253 Wis. 2d 449, 646 N.W.2d 341 (citing *State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Co.*, 15 Wis. 2d 220, 228, 340 N.W.2d 460 (1983)). However, moot cases may be decided in a variety of circumstances, including where the issues are of great public importance or should be resolved to avoid future uncertainty. *Leitner*, 253 Wis. 2d 449, ¶14.

CONSTRUCTION – RULE OF LENITY, ¶67

State v. Tommie L. Cole, <http://www.courts.state.wi.us/html/sc/02/02-0681.htm> 2003 WI 59, on certification

For Cole: Suzanne L. Hagopian, SPD, Madison Appellate

“(E)ven if one believes that the arguments on both sides are equally weighted, Wisconsin law provides that a court must favor a milder penalty over a harsher penalty when there is doubt concerning the severity of the penalty prescribed by statute.”

TPR

CONTINUANCE TO CONSULT ON SUBSTITUTION OF JUDGE, § 48.222(5)

Steven H. v. Kelley H., <http://www.courts.state.wi.us/html/ca/02/02-2860.htm> 2003 WI App 110, PFR granted 6/12/03

For Kelley H.: Phillip J. Brehm

Trial court has the duty to inform a TPR party of his/her right to a continuance and substitution of judge, ¶¶31-35, but failure to do so is subject to harmless error analysis, ¶41. Because it is undisputed that Kelley H. knew of her right to substitution, the question becomes whether her lack of knowledge that she could request continuance to further discuss substitution was prejudicial. It was not, given support in the record for the idea that she did not in fact want to substitute the trial court: thus, “there is not a reasonable possibility that the court’s failure to advise Kelley of her right to a continuance affected her decision not to request substitution.” ¶42.

(The court, it should be noted, questions whether the trial court is indeed obliged to give this advice, and indeed “invite(s) the supreme court to clarify” the issue. ¶35. (And, as the recent grant of review shows, the supreme court indeed took up this invitation.) A lengthy concurrence comes down against such a mandatory duty. ¶¶43-55.

GENERAL

Monroe County DHS v. Kelli B., 2003 WI App 88, PFR granted 6/12/03

For Kelli B.: Timothy A. Provis

¶8. A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child, and that interest is protected by the substantive due process clause of the Fourteenth Amendment to the United States Constitution. *Mrs. R. v. Mr. and Mrs. B.*, 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981); *L.K. v. B.B.*, 113 Wis. 2d 429, 447-48, 335 N.W.2d 846 (1983). Because termination of parental rights interferes with a fundamental liberty interest, we apply strict scrutiny and require the state to show that termination is narrowly tailored to serve a compelling state interest. *Winnebago County DSS v. Darrell A.*, 194 Wis. 2d 627, 639, 534 N.W.2d 907 (Ct. App. 1995). This standard is satisfied by the requirement that the state establish a parent’s unfitness in order to justify termination of parental rights. *Mrs. R.*, 102 Wis. 2d at 136. If a parent is unfit, the state’s compelling interest in protecting children from unfit parents warrants termination of parental rights.

GROUND – INCESTUOUS PARENTAGE, § 48.415(7) – UNCONSTITUTIONAL AS APPLIED TO MINOR VICTIM OF INCEST

Monroe County DHS v. Kelli B., 2003 WI App 88, PFR granted 6/12/03

For Kelli B.: Timothy A. Provis

Application of § 48.451(7) to terminate rights of mother to children born of her incestuous relationship with her father is unconstitutional as applied, where she was the minor victim of that relationship. *State v. Allen M.*, 214 Wis. 2d 302, 571 N.W.2d 872 (Ct. App. 1997) (TPR based on incestuous parentage doesn’t violate due process where parents were siblings who engaged in consensual incest) distinguished. ¶¶11-13. (Note: The holding is narrow. The only ground advanced was incestuous parentage, and the holding therefore says no more than that the fact of incestuous parenthood does not in and of itself demonstrate parental unfitness. ¶15. Otherwise noteworthy: the court reiterates that unfitness must first be found before proceedings to disposition – the best interests of the child, ¶12; the reservation of judicial discretion not to terminate at disposition doesn’t satisfy due process: “A parent must be found unfit before the court may consider whether it is in the best interest of the child to terminate parental rights.” ¶20.)

JURISDICTION – UCCJA STATUS EXCEPTION TO GENERAL PERSONAL JURISDICTION REQUIREMENTS

In re the Termination of Parental Rights to Thomas J.R.: Tammie J. C. v. Robert T. R., 2003 WI 61, reversing unpublished decision of court of appeals

For Robert T.R.: Duane M. Jorgenson

Wisconsin courts may terminate the parental rights of someone who has no contacts with Wisconsin, under the “status exception” to personal jurisdiction requirements afforded by the Uniform Child Custody Jurisdiction Act (UCCJA), Wis. Ch. 822. ¶37.

SUMMARY JUDGMENT – HARMLESS ERROR

Steven H. v. Kelley H., 2003 WI App 110, PFR granted 6/12/03

For Kelley H.: Phillip J. Brehm

Summary judgment is not appropriate on the grounds for a TPR even where there is no factual dispute, *Walworth Co. DHS v. Elizabeth W.*, 189 Wis. 2d 432 (Ct. App. 1995), and the trial court therefore erred in entering summary judgment on the ground. ¶¶13-22. However, the use of an improper procedure in a TPR is subject to harmless error analysis under § 805.18(2), and was in fact harmless. ¶28. (Ground for TPR was a prior order denying physical placement/visitation that went unmodified at least one year. Harmless error appears to follow from the undisputed nature of this ground along with its automatic consequence of termination. Nonetheless, the continued viability of *Elizabeth W.* is ratified, ¶16, though harmless error adds a rather large loophole.)

TRIAL PROCEDURE**DEFENDANT’S RIGHT TO TESTIFY – WAIVER**

State v. Patricia A. Weed, 2003 WI 85, affirming unpublished opinion of court of appeals

For Weed: T. Christopher Kelly

¶43. Accordingly, in order to determine whether a criminal defendant is waiving his or her right to testify, a circuit court should conduct an on-the-record colloquy with the defendant outside the presence of the jury. The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel. ■

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REVIEW GRANTED IN THE WISCONSIN SUPREME COURT

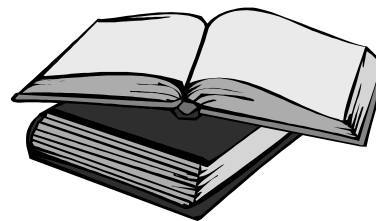


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RECENT LAW REVIEW ARTICLES



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