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

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## From the Editor...

This issue of the *Wisconsin Defender* contains a variety of information that will come in handy when preparing for certain aspects of sentencing.

First, Diana Felsmann, an attorney in the SPD's Milwaukee Appellate office, provides an overview of the laws related to restitution. As Diana points out in her article, restitution is not always the client's uppermost concern at sentencing. Rather, it may only become important when the client has to begin paying it. Diana reminds lawyers to think about restitution issues a little more and to do what we can to ensure that any restitution ordered by the court is fair and reasonable.

This issue also provides helpful information regarding recent changes made by the Department of Corrections to offender supervision as well as the boot camp.

Finally, readers are alerted to a bond book error related to the penalties for OWI 5th offense or greater and to the website where the sentencing guideline forms and worksheets for truth in sentencing offenses can be found.

In the coming months, please look for a survey which I will send to *Wisconsin Defender* readers. The survey is meant to evaluate whether the *Wisconsin Defender* is meeting your needs. I encourage you all to complete the survey (I promise it will be short!) and to share your thoughts and opinions about the *Wisconsin Defender*.

### 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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## An Overview of the Law on Restitution

By: Diana Felsmann\*

The law on restitution is confusing, at best. The statute is two pages long and is followed by another page of case citations. The question to answer then, is why is the law so complicated when the statute mandates that a trial court order restitution unless there is a “substantial reason not to do so?” Wis. Stat. 973.20(1r)

The catch is that the majority of cases on restitution have not dealt with the issue of whether there is a “substantial reason not” to order restitution. They have dealt with what the trial court may consider in ordering restitution and the issue of causation, i.e., whether the defendant caused damage to the victim.

### What the Trial Court May Consider

The court of appeals has held that the trial court may consider the totality of the defendant’s conduct in determining whether the defendant caused damage to the victim. *State v. Rodriguez*, 205 Wis.2d 620, 556 140 (Ct.App. 1996). Rodriguez presented an unusual restitution order. Two boys were on their bikes playing chicken in the road at 8:30 on a summer evening. One of the boys, Casey B., rode his bike into traffic and was struck by a vehicle. After he was struck, Casey B. slid further into traffic and was then hit by Rodriguez’ car. Rodriguez fled the scene and pled to hit and run in an accident causing death. Rodriguez was ordered to pay restitution for expenses incurred by Casey B.’s parents. *See id.* at 629.

The Rodriguez decision is difficult to understand. It does not necessarily seem logical that Rodriguez should be responsible for all of the expenses incurred by Casey B.’s family as a result of the hit and run. First, Casey B. was partly at fault for getting hit because he was irresponsibly playing chicken in traffic. Second, Rodriguez was not the first car to hit him. Yet the court of appeals upheld the restitution order because the totality of Rodriguez’ criminal conduct resulted in the death of the boy. *See id.* at 628.

Rodriguez argued that his only criminal conduct was leaving the scene of the accident. After all, Casey B. was the one playing in traffic. It certainly was only an accident that Rodriguez hit him. Yet the court opined that Rodriguez’ plea was an admission that the totality of his criminal conduct, including fleeing the scene, resulted in the death of Casey B. *See id.* at 628.

Think of it another way. Let’s say Casey B. had been in a car and driving erratically. Casey B.’s car collides with Rodriguez’ car, killing Casey B. Rodriguez then flees the scene. Should Rodriguez be responsible for restitution, just because of his criminal act of leaving the scene, when Casey B. caused the accident? *Rodriguez* would seem to say so.

**\*Diana Felsmann** has been an Assistant State Public Defender in the Milwaukee Appellate Office since September of 2000. Prior to her work for the State Public Defender’s Office, she spent a summer supervising students in the Legal Assistance to Institutionalized Persons Program. Diana attended the University of Wisconsin Law School where she participated in the LAIP program, the Defender Project, the Innocence Project and the Death Penalty Project.

A case like *Rodriguez* raises another question. What about the parent's pain and suffering over having lost their son? In that instance, the restitution statute specifically precludes recovery in the context of a restitution hearing. Wis. Stat. § 973.20 (5) allows a judge to order special damages if they could be proven in a civil case. Special damages are tangible things like a dented car or a missing stereo. General damages include pain and suffering. What special damages are restitutable though, leads to the issue of causation.

## Causation

Once the caselaw established that a trial court may consider the totality of the defendant's conduct in determining whether to order restitution, many of the cases turned to the issue of causation. The origins of the causation issue are embedded in the statute, which requires the victim requesting restitution to prove by a preponderance of the evidence the amount of loss sustained as a result of a crime considered at sentencing. Wis. Stat. §973.20(14)(a). This includes read-in crimes.

Before restitution can be ordered, a causal nexus must be established between the crime considered at sentencing and the disputed damage. See *State v. Canady*, 2000 WI App 87, 234 Wis.2d 261, 610 N.W.2d 147. The victim has the burden of proving causation. See *State v. Behnke*, 203 Wis.2d 43, 59, 553 N.W.2d 265 (Ct. App. 1996). But what does "causal nexus" mean?

In *Behnke*, the court of appeals held that, in proving causation, the victim needs to show that the defendant's criminal activity was a "substantial factor" in causing the damage, that the defendant's actions were the "precipitating cause of the injury" and that the injury was "the natural consequence of the actions." See *id.* at 59.

*Behnke* sexually assaulted and falsely imprisoned a woman. See *id.* at 47. The court of appeals affirmed the trial court's restitution order for the victim's mental health expenses. The court found that the victim proved that *Behnke's* actions were a substantial factor in causing her injury because (1) there was proof that *Behnke* attacked her and (2) she proved that her mental health had regressed as a result of the attack. See *id.* at 59. The court also found that the attack was the precipitating cause of her need for counseling and that her need for counseling was a natural consequence of the attack. See *id.* The statute has since been amended to specifically allow a trial court to order the defendant to pay up to \$10,000 for necessary psychological or psychiatric treatment if he or she has been convicted of one of the sex-related crimes listed in the statute.

*State v. Madlock*, 230 Wis.2d 324, 602 N.W.2d 104 (Ct. App. 1999), cited the same "causal nexus" standards as *Behnke*. See *id.* at 333. *Madlock* was ordered to pay restitution for damage done to a vehicle after he pled no contest to operating a motor vehicle without the permission of the owner. See *id.* at 327. Even though *Madlock* claimed he had not stolen the car and that the first time he drove the car was just prior to his arrest, the trial court still ordered restitution for damage done to the car. The trial court did so without a hearing. The court of appeals remanded the case to the trial court for a restitution hearing because the record was insufficient to show a nexus between *Madlock's* criminal conduct and the claimed damage. See *id.* at 336-37.

**[See "Restitution" continued on Page 6](#)**

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**“Restitution” continued from Page 5****The Evolution of Causal Nexus**

In 2000, the court of appeals decided that, even if a criminal defendant did not personally cause the damage for which restitution was ordered, that defendant may still have to pay for it. *State v. Canady*, 2000 WI App 87, 234 Wis.2d 261, 610 N.W.2d 147.. In *Canady*, the actual damage for which restitution was ordered was not caused by Canady, but by the police in apprehending him. One of the arresting officers, noticing that Canady had a pry bar in his pocket, grabbed the pry bar and tossed it aside, accidentally cracking the glass in a door pane. *See id.* at 268, ¶11.

To be fair, the court of appeals noted in its decision that Canady was convicted not only of burglary, but also for resisting an officer. *See id.* The court stressed that Canady’s resistance was a substantial factor in causing the property damage done by the police:

Canady’s actions were a substantial factor in causing the resultant damage because, “but for” his burglary and resisting arrest, the property damage would not have occurred.  
*See id.* at 268, ¶12.

The court then took this “but for” argument one step further in *State v. Rash*, 2003 WI App 32. One weekday at 10 a.m. in a supermarket parking lot, Rash pulled a man into his van and robbed him. *See id.* at ¶2. While Rash was robbing the victim, an actor unrelated to Rash damaged the victim’s car. *See id.* at ¶3. The court of appeals upheld the restitution order on the theory that “but for” Rash removing the victim from the parking lot, the victim’s car would not have been damaged. *See id.* at ¶8.

The *Rash* opinion cites to *Canady* in applying this “but for” analysis. *See id.* The opinion also cites *Madlock*, as *Madlock* stated that a criminal defendant cannot escape responsibility for restitution because he or she was not aware of the damage. *See Madlock*, 230 Wis.2d 336-337. What the opinion did not address was why Rash, in the criminal context, should be responsible for damage done to the victim’s car, when that damage was caused by an independent crime committed by an independent actor. In the civil context, it would be arguable that one person is not responsible for the independent criminal act of a second person. *See* Restatement of the Law (Second) Torts § 440.

In fact, the court of appeals did not pull this “causal nexus,” “substantial factor,” “but for” language out of the air. This language comes from a civil causation analysis. Again, the *Rash* decision begs the question of how far this “but for” analysis will extend. What if, after Rash pulled the victim into his van, a drunk driver had hit the victim’s car? Would Rash be responsible for the damage caused by the drunk driver? *Rash* would seem to say so.

There is a danger that this abbreviated causation analysis will remain as it is. However, the Wisconsin Supreme Court has not spoken on this issue. In fact, the Court has decided very few cases with restitution issues.

At this point, one argument that may be helpful to a defendant in a situation in which it is arguable

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that he or she did not actually cause certain damage to a victim is that the goal of restitution is two-fold: to make the victim whole and to rehabilitate the defendant. *State v. Sweat*, 208 Wis.2d 409, 422-23, 561 N.W.2d 695, 700 (1997). It does nothing to rehabilitate the defendant if the defendant is ordered to pay restitution for damage he or she did not actually cause. It only engenders a feeling that the system is unfair.

### **Ability to Pay**

An issue that might also go to the rehabilitation of the defendant is the defendant's ability to pay. This is an issue that often goes unaddressed at a restitution hearing, but is required by the statute. Wis. Stat. §973.20(a) provides that the trial court shall consider the financial resources, along with the present and future earning ability of the defendant.

More and more, it seems that money problems are costing our clients their success on probation, parole or extended supervision. A client under supervision is required to pay supervision fees. Add on restitution, fines, court costs, victim/witness fees and the client stands a good chance of being revoked due to the client's inability to pay. This presents a problem analogous to the one in an unpublished decision on extended supervision, *State v. Young*, 2002 WI App 292, 654 N.W.2d 94. In *Young*, the court of appeals determined that there was no way for Young to meet the conditions of extended supervision that the trial court had ordered. The court of appeals recognized that there were not enough hours in the day for Young to meet those conditions and, therefore, Young was set up for failure. That argument could also be made in restitution cases. A criminal defendant with a variety of other financial obligations could present a detailed description of how impossible it would be for him or her to pay restitution. One could also argue that the defendant only be ordered to pay partial restitution.

### **Timing of a Restitution Hearing**

A defendant may stipulate to restitution. In fact, if there is no specific objection at the time restitution is ordered, the defendant has constructively stipulated to it. *See State v. Hopkins*, 196 Wis.2d 36, 538 N.W.2d 543 (Ct. App. 1995). If the defendant does not stipulate to restitution, Wis. Stat. 973.20 (13) authorizes the trial court to order the restitution amount not in dispute, adjourn the hearing for up to 60 days pending resolution of the amount, or refer the case to a third party arbitrator. The issue on this list that is most frequently litigated is the time constraint issue. The 60-day time limit is directory, not mandatory. *See State v. Perry*, 181 Wis.2d 43, 510 N.W.2d 722 (Ct. App. 1993). In fact, restitution orders from proceedings held outside of the statutory time period for valid reasons may be upheld, provided that doing so will not result in prejudice to the defendant. *See State v. Johnson*, 2002 WI App. 256 Wis.2d 871, 649 N.W.2d 284.

In *Johnson*, the court of appeals found that there were valid reasons for the delay between his sentencing hearing and the restitution order and there was no prejudice to him. First, Johnson agreed at sentencing that restitution was appropriate, and his attorney acquiesced to the circuit court's decision to postpone a final decision on restitution, as expenses were still accumulating. Second, Johnson did not raise a timeliness objection until the day of the restitution hearing. Those factors led the court to decide that Johnson was not prejudiced by delaying the restitution hearing.

Another issue with respect to the timing of a restitution order arises as a result of Wis. Stat.

§973.20(13)(c)(1), which authorizes a court to direct an appropriate agency to file a proposed restitution order within 90 days of a sentencing hearing. If that proposed order is disputed by the defendant, the court may then return to either holding a restitution hearing within 60 days or referring the disputed amount to a third-party arbitrator. Wis. Stat. §973.20 (13). Please keep in mind that the proposed restitution order submitted by the Department of Corrections will indicate whether the defendant agrees to or disputes the amount of restitution. It is good practice to check with your client about whether he or she agrees to what is indicated on the proposed order.

## Conclusion

Though the trial court's authority to order restitution is broad, it is not limitless. The statute contains certain limitations and the caselaw must be subject to the limitations of reasonableness. Otherwise, a defendant who commits a hit and run, causing a traffic jam, will be responsible for the repercussions to all of the people stuck in the traffic jam with him. After all, "but for" the defendant's hit and run, the traffic jam would not have happened.

In conclusion, restitution tends to be a side issue in many cases because the potential incarceration time, not restitution, is the most important issue on the defendant's mind. Restitution only becomes an issue when the defendant has to start paying it. This issue may be avoided by trying to ensure the restitution order is fair and by determining in advance whether there is a likelihood the defendant will be able to afford it. ■

## WEBSITE OF THE MONTH

<http://www.drugabuse.gov>



This issue's featured website is <http://www.drugabuse.gov>, the website for the National Institute on Drug Abuse (NIDA). NIDA, established in 1974 and part of the National Institutes of Health, Department of Health and Human Services, supports over 85% of the world's research on the health aspects of drug abuse and addiction. NIDA works to ensure the transfer of scientific drug-related data to policy makers, drug abuse practitioners, other health care practitioners, and the general public.

NIDA's website is organized into sections containing information of specific interest to students and young adults, parents and teachers, and researchers and health professionals. For example, the researchers and health professionals section of the website includes research about drug abuse treatment and prevention, trends and statistics, and information about NIDA's international program, training programs and various committees and workgroups. The students and young adults section includes research information about the effects of drug abuse on the brain and interactive activities to help you learn more about various drugs and how they affect your brain's functions.

The website also has a publications section, which allows you to access NIDA publications online as well as obtain information on ordering hard copies of NIDA publications. Materials in the publications section are public domain and may be reproduced, unless otherwise noted. ■

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## Information Related to the Penalties for 5th and Subsequent OWI

The state bond book written by the Wisconsin Judicial Council contains an error related to the penalties for 5th and subsequent offense OWI. The bond book shows no mandatory minimum penalties. As of February 1, 2003, 5th and subsequent offense OWI is a Class H felony, but carries mandatory minimum penalties of a \$600 fine and 6 months imprisonment.

Last year's state budget, 2001 Wis. Act 109 s. 457 amended s. 346.65(2)(e) as follows:

346.65(2)(e) Except as provided in pars. (f) and (g), is guilty of a Class H felony and shall be fined not less than \$600 ~~nor more than \$2,000~~ and imprisoned for not less than 6 months ~~nor more than 5 years~~ if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1), equals 5 or more, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

The standard penalties for a Class H felony are fines of \$0 - \$10,000 and imprisonment for 0 - 6 years. s. 939.50(3)(h), Stats. Section 346.65(2)(e), which deals specifically with 5<sup>th</sup> offense OWI modifies those standard penalties to impose mandatory minimum sentences consistent with the other mandatory minimum sentences for OWI offenses. The amendment eliminated the old maximum penalties for 5<sup>th</sup> offense OWI and inserted the new Class H categorization, but retained the mandatory minimum penalties that existed under the old law.

The Director of State Courts' office is aware of the discrepancy in the bond book and concurs in the opinion that the book is in error.

If you use the bond book, you may wish to pencil the appropriate minimum penalties into the book on page 78:

**(NOTE: Effective 2/1/03 the penalty becomes \$600-\$10,000 and 6 mos.- 6 yrs.)**

*The Wisconsin Defender thanks John Sobotik, Assistant General Counsel at the Wisconsin Department of Transportation, for bringing this to our attention.*

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## DOC Changes Offender Supervision

By: Richard F. Raemisch\*

The Division of Community Corrections (DCC) began workload modification for probation agents that changes the way certain non-assaultive offenders are supervised.

The DCC currently supervises nearly 66,000 persons in the community who are on probation, parole or extended supervision.

A number of factors have led to the changes. First, the budget adjustment bill passed by the Legislature last year reduced the DCC by 90 positions, 76 of which were probation and parole agents. Second, the offender population continues to grow; in October and November 2002, this population increased by more than 2,500 new offenders. Third, the DOC completed a new time study of agents' workloads. Since 1989, when the last study was conducted, many new initiatives have affected agent workload. These include, but are not limited to: electronic monitoring, intensive supervision of sex offenders, and changes in the Fair Labor Standards Act.

In November and December 2002, the DCC briefed the Committee of Chief Judges and the district court administrators, in addition to the public defenders and district attorneys, on the supervision changes.

There are six levels of supervision for offenders on probation, parole, or extended supervision ([see page 11](#)). The DCC has made the following modifications:

- 1) Non-assaultive misdemeanor cases with no assaultive history are to be supervised no higher than medium. Misdemeanors with enhanced penalties will be treated the same as felonies.
- 2) Offenders serving more than 60 days of jail time will be supervised no higher than medium until the last 30 days of the confinement.
- 3) All cases on an extension for financial reasons only will not exceed medium.
- 4) All non-assaultive probations with no assaultive history, serving a probation of one year or less, will be supervised at minimum.

Some of the types of cases that might be affected are listed below. During 2001, the department opened misdemeanor probation cases for these offenses, which accounted for more than 10,000 new probation cases that year:

- 3,750 thefts and shoplifting
- 2,600 simple possession of controlled substances
- 1,300 misdemeanor bail jumping
- 1,700 damage to property
- 660 worthless checks
- 400 trespass to building

Here is the process: During the initial 30 days of supervision, a person placed on probation for a non-assaultive misdemeanor will meet with a Probation and Parole agent, receive and sign rules of supervision,

**\*Richard F. Raemisch**, a former Dane County sheriff, is the newly appointed administrator of the Division of Community Corrections. He can be reached at 608.240.5304.

and complete a brief social history questionnaire. The agent will review the judgment of conviction and criminal complaint, verify the offender's prior criminal history, and visit the offender's residence.

The agent then will complete an initial classification document, assessing risk and need factors and developing a case plan to address court-ordered conditions, financial obligations and risk/need. The plan will articulate the expectations for the next six months, including treatment participation, a reasonable schedule of payments for restitution, other court obligations and supervision fees, and a reporting plan.

In the monthly contacts with the agent, the offender must report residence and employment status, earnings, any police contacts, vehicle changes, school attendance and any required treatment attendance. The agent reviews and evaluates progress toward the objectives specified in the case plan. At any point, the case plan may be modified to reflect changed circumstances.

If the agent's review of the offense and the prior criminal history reveals no assaultive, dangerous, violent or threatening behavior, the offender's classification will be set at medium, minimum, or administrative supervision. At most, the offender will be required to meet with his or her agent one time per month, with a home visit required every 60 days.

If the non-assaultive misdemeanor, with no violent prior offenses, has a probation term of one year or less, the supervision level will be set at minimum, requiring mailed-in reports each month and a face-to-face meeting with the agent every third month.

*This article first appeared in the Winter 2003 issue of The Third Branch, the quarterly newsletter of the Wisconsin judiciary. It is reprinted here with their permission.*

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### The Six Levels of Supervision

There are six levels of supervision for offenders on probation, parole, or extended supervision. They are:

#### **Intensive (used for sex offenders only)**

One face-to-face contact every seven days; one home visit every 30 days (no waivers; offender or collateral contact required); two collateral contacts every 30 days. Monthly contact with employer.

#### **High risk**

One face-to-face contact every seven days; one home visit every 30 days (agent must enter the home); monthly verification of employment and other collaterals as appropriate.

#### **Maximum**

One face-to-face contact by an agent every 14 days; home visits once every 30 days; collateral contacts as appropriate.

#### **Medium**

One face-to-face contact every 30 days; home visits every 60 days.

#### **Minimum**

One face-to-face contact every 90 days, with report form mailed by offender during non-report months. Home visits as appropriate.

#### **Administrative**

One face-to-face contact every six months, with reports by mail or phone during non-report months. Home visits as appropriate.

## NEWS BRIEFS

### Challenge Incarceration Program Now Available to Women

The Challenge Incarceration Program (CIP) is now available to women. The mission of the CIP is to provide inmates the opportunity to gain the personal resources they need to return to the community, to successfully complete parole/extended supervision, and to remain crime and drug-free. While the CIP is voluntary, all program elements are mandatory. Program elements include military bearing, individual and group counseling, education, a chemical abuse assessment with subsequent treatment, and work. The CIP is one of many options available to assist in saving prison bed days by ensuring release upon completion of the program. The program's mission is to be accomplished while maintaining a recidivism rate equal to or better than similar inmate populations that are released through other release mechanisms.

The program is designed for twelve women and in a manner in which a participant may successfully complete all program components in a minimum of 180 days. There are several criteria for admission in the program including the inmate must be under age 30 at the time of admission, must have an identified substance abuse treatment need, must not have any physical limitations, and, for truth-in-sentencing convictions, must be deemed eligible for participation by the sentencing judge.

If you have any questions about the CIP, please call Jo Ann Skalski at 715.246.6971.

#### **Truth in Sentencing Wisconsin Sentencing Guidelines, Forms, and Procedures Found on Court System's Website**

Posted at the court system's website are the worksheets and notes developed by the Criminal Penalties Study Committee that support the temporary advisory felony sentencing guidelines. Also at the website are links to the forms and procedures revised or created by the Records Management Committee to comply with the 2001 Wisconsin Act 109 truth in sentencing laws. The sentencing guidelines worksheets and notes and forms and procedures can be found at:

<http://www.courts.state.wi.us/circuit/TruthInSentencing.htm>.

Please note that the sentencing guidelines should be used for crimes committed on or after February 1, 2003. The sentencing guidelines worksheets and notes are being made available at the court system's website as an accommodation since Act 109 did not specify the entity responsible for providing this information other than the Sentencing Commission, which is not operational at this time. Once it is operational the responsibility for providing this information will be transferred to the Commission.

The sentencing guidelines apply to eleven offenses (listed at the website). The worksheets for the covered offenses are documents for the court to accurately record the factors relied on at sentencing. The notes explain and give meaning to the worksheets, guide counsel argument, and guide the court in its exercise of discretion at sentencing.

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## CRIMINAL JURY INSTRUCTION COMMITTEE REPORT

By: Chuck Vetzner\*

The following is a summary of significant actions of the Criminal Jury Instruction Committee at its meetings in February and April 2003.

The Committee considered revisions in the pattern instruction for obstructing an officer where the defendant was alleged to have given false information (J.I. No. 1766A). The discussion centered on three recent court of appeals decisions that arguably narrowed the circumstances in which a person could be charged with obstruction. In *State v. Espinosa*, 2002 WI App 51, 250 Wis.2d 804, 641 N.W.2d 484, the court affirmed dismissal of a criminal complaint that alleged the defendant had lied in asserting that the police “had the wrong guy” when they questioned him about an attempted theft. The Committee had previously concluded that this case should be mentioned in the footnote to the instruction.

Two subsequent unpublished decisions involved the same subject. In *State v. Meyer*, the court reversed a jury verdict involving a denial of guilt, stating, “The legislature did not intend to include within § 946.61 all false answers or false statements which a defendant utters intending to exculpate himself or herself against a charge of a crime and to prevent his or her prosecution.” In *State v. Vetos*, the defendant not only denied being the person who made a 911 call but also claimed to have been home at the time of the call. The decision observed that jurors had not been instructed that they could not find the defendant guilty if they concluded that Vetos’s statements, even though false, were made “simply out of a good faith desire to defend against an accusation of crime.” The decision further suggested that the Jury Instruction Committee might wish to consider adding an optional paragraph to the pattern instruction explaining this point.

The Committee concluded that such an optional paragraph was not necessary. It felt that the issue raised by all three cases would usually arise as a legal issue before the case was submitted to the jury. The Committee further concluded that the need for any special instruction was sufficiently raised by the footnoted mention of *Espinosa*—a circumstance unknown at the time *Vetos* was decided (since the new version of No. 1766A had not yet been disseminated).

The Committee approved a revision in SM—16, concerning “Collateral Attack on Prior Convictions.” While the new material is not especially controversial, its existence is worth noting as a handy compendium of the law in an area that has changed substantially in the past few years. The procedure is especially common to challenge prior OWI convictions that were obtained without counsel.

\***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.

In *State v. Tucker*, 2003 WI 12, the Wisconsin Supreme Court held that a trial court could not use an anonymous or a “numbers” jury unless particularized circumstances in an individual case warranted such action and reasonable precautions were taken to avoid prejudicing the defendant by the procedure. The Committee responded both by including a discussion of *Tucker* in SM—20 “Voir Dire,” and by drafting a new curative instruction to be utilized when a trial court does conclude that some type of anonymity for jurors is warranted. The instruction explains that the reference to individual jurors by means other than their names is “for the convenience of the court and counsel.” This wording precipitated substantial discussion because of concern that the stated rationale was not entirely true.

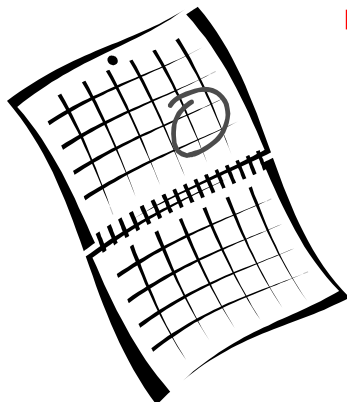
The second round of “truth-in sentencing” altered the structure of the statutes concerning operating a motor vehicle without owner’s consent. Those changes were dealt with by the Committee. The revised law recreated an affirmative defense of abandoning the vehicle without damage within 24 hours. That defense reduces the grade of certain variations of the crime to a Class A misdemeanor. The Committee created a special verdict for consideration of the defense when it has been raised. The statutes do not define “abandonment.” The Committee concluded that the definition should require “voluntary relinquishment of possession,” as held in *State v. Olson*, 106 Wis.2d 572, 317 N.W.2d 448 (1982), when a similar affirmative defense existed.

There are currently two pattern instructions for felony murder: one general instruction, J.I. No. 1030, and one for use where the defendant is alleged to be a party to the underlying felony, J.I. No. 1032. The Committee used the numbering gap to create a third pattern instruction where the underlying felony is attempted, rather than completed, J.I. No. 1031. This additional option and some slight revisions in the language of the previously existing instructions should help make this complex crime more comprehensible to attorneys, as well as jurors.

I previously reported on a revision in J.I. No. 1014 in light of *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. *Head* held that imperfect self-defense does not require an objectively reasonable belief that force was necessary; an actual subjective belief is sufficient. Pattern instruction No. 1014 is used where self-defense is the basis for submitting a lesser included offense of second degree intentional homicide to charged first degree intentional homicide. The Committee has now approved similar revisions in J.I. Nos. 1016 and 1017. These involve additional lesser included offense options of first degree and second degree reckless homicide. ■

[Return to In This Issue](#)

# SAVE THE DATE!



## Juvenile Sexual Offenders: Best Practices for Adjudication and Treatment

Friday July 25, 2003  
9:00 a.m. to 4:00 p.m.  
Country Inn Hotel  
Pewaukee, Wisconsin

*Presented by the Wisconsin Council on Children & Families in association with  
the Wisconsin Department of Health & Family Services  
and the Office of the Wisconsin State Public Defender*

### FEATURING:

- ◆ **Dr. James Worling**, Director of the SAFE-T Program in Thistleton, Ontario  
Juvenile Sexual Development and Offender Assessment
  
- ◆ **Attorney Ray Dall'Osto**  
Juvenile Court Practice and Legal Issues
  
- ◆ **Steve Gilbertson**, Milwaukee Wraparound
- ◆ **Dr. Christy Diorio**, Family Options  
Community-Based versus Institutional Options in Court Dispositions
  
- ◆ **Grace Roberts**, Department of Corrections  
Sex Offender Registry

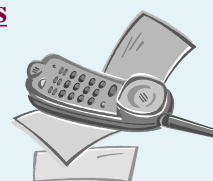
Fee is \$75 and includes lunch.

CLE credits will be applied for.

#### For more information, contact:

Gina Pruski, SPD  
608.266.6782  
[pruskig@mail.opd.state.wi.us](mailto:pruskig@mail.opd.state.wi.us)

Mark Wehrly, WCCF  
608.284.0580 ext. 308  
[mwehrly@wccf.org](mailto:mwehrly@wccf.org)



## ASSIGNED COUNSEL DIVISION NEWS

### *Thank You to Pro Bono Attorneys*

The Wisconsin State Public Defender would like to give a special thank you to the attorneys in the following firms who have recently signed up to take cases pro bono.

- ◆ Quarles & Brady - Milwaukee
- ◆ Crivello, Carlson & Mentkowski SC
- ◆ Law offices of Alan Eisenberg

Attorneys from Foley & Lardner - Milwaukee and Michael, Best & Friedrich - Milwaukee also attended training to take termination of parental rights cases and will be certified soon.

Their generosity is greatly appreciated. If you are interested in taking cases pro bono, please contact Deb Smith at 608.261.8856 or [smithd@mail.opd.state.wi.us](mailto:smithd@mail.opd.state.wi.us).

### *Private Bar Advisory Committee*

The Wisconsin State Public Defender is convening a private bar advisory committee. We asked WACDL and the Criminal Law Section of the State Bar to select members who are also on the Public Defender certification list to serve on the advisory committee.

The following attorneys have been selected by WACDL:

- ◆ Keith Belzer - La Crosse
- ◆ Anthony Delyea - Madison
- ◆ Robert Henak - Milwaukee
- ◆ Robert Vanderloop - Oshkosh
- ◆ Pam Moorshead - Glendale
- ◆ Robert Dvorak - Milwaukee



The following attorneys have been selected by the Criminal Law Section of the State Bar:

- ◆ Mark Hersh - Milwaukee
- ◆ Craig Mastantuono - Milwaukee
- ◆ Geneva McKinley - Milwaukee
- ◆ Ramon Valdez - Milwaukee

The Wisconsin State Public Defender thanks these attorneys for their willingness to participate on the advisory committee. The committee will be scheduling its first meeting shortly.

### *Time to Boot Up*

Access to a computer and internet service is more important than ever. The Wisconsin State Public Defender now offers online billing, online expense requests, online CLE reporting, updates and alerts, and much more through email and the internet. The ACD web pages have been redesigned and improved. More information than ever is available online. In the next several months, attorneys will be able to request DMV records through our website and search a new database of experts, investigators, and interpreters. We encourage all of our private bar members to make this investment in their practice. ■





## Review Granted in the Wisconsin Supreme Court

(November 21, 2002 through April 11, 2003)

For a complete list of the cases that the Wisconsin Supreme Court has accepted for review, visit the Court's website at:

[http://www.courts.state.wi.us/supreme/sc\\_tabpend.asp](http://www.courts.state.wi.us/supreme/sc_tabpend.asp)

### **State v. E. Burris** 00-1425

RE VW 01/14/2003

District 4/Rock County

2002 WI App 262/258 Wis 2d 454/654 NW2d 866

Whether a circuit court is required to consider alternatives to commitment before the revocation of supervised release of a person committed as a sexual violent person under ch. 980 when a finding has been made that the safety of others requires revocation?

### **State v. S. Burgess** 00-3074

RE VW 01/14/2003

District 3/Vilas County

2002 WI App 264/258 Wis 2d 548/654 NW2d 81

Does the state have jurisdiction over an Indian living on a reservation in commitments under Ch. 980, the sexually violent persons statute?

Should ch. 980 proceedings and records be closed to the public?

Was there sufficient evidence presented at trial to support a finding that the petitioner is a sexually violent person?

### **State v. C. Gallion** 01-0051-CR

RE VW 02/19/2003

District 1/Milwaukee County

2002 WI App 265/258 Wis 2d 473/654 NW2d 446

Did the circuit court abuse its discretion by giving undue weight to the victim's character, or to the comparative characteristics of the victim and the defendant in determining the defendant's sentence under truth-in-sentencing (TIS)?

What is the appropriate standard of review that should be used by an appellate court in determining whether a sentence is too harsh under TIS?

### **State v. C. Hampton** 01-0509-CR

RE VW 02/19/2003

District 1/Milwaukee County

2002 WI App 293/655 NW2d 131

When taking a guilty plea, must the circuit court personally tell the defendant that the court is not bound by the parties' agreement regarding sentencing recommendations?

Is the circuit court required to conduct an evidentiary hearing on a motion for a plea withdrawal when the

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defendant states that it was not understood that the court could impose a sentence greater than the maximum requested in a plea agreement?

**State v. P. Stuart** 01-1345-CR

(see #01-3303-CR)

CERT 12/11/2002

District 2/Kenosha County

Did the circuit court err by admitting the preliminary hearing testimony of a witness who refused to testify at trial by pleading the Fifth Amendment?

When an appellate court issues an opinion resolving a discretionary ruling of the circuit court, is its decision the law-of-the-case?

Whether an unpublished Wisconsin Supreme Court order reversing a decision of the court of appeals, without legal reasoning or legal authorities, established the law-of-the-case?

**State v. J. Thiel** 01-1589-CR

RE VW 01/14/2003

District 4/La Crosse County

Did the court of appeals err in determining that the totality of trial counsel's representation of the defendant was not constitutionally deficient?

If so, what standard of review should be used in determining ineffective assistance of trial counsel?

**State ex rel. P. Griffin v. J. Smith** 01-2345

CERT 03/21/03

District 1/Milwaukee County

(Consol. w/ 02-1320)

Whether a probationer has a right to the effective assistance of counsel on appeal from a probation revocation decision when counsel has promised to file a certiorari petition?

**In re the Commitment of W. Morford: State v. W. Morford** 01-2461

RE VW 03/13/2003

District 1/Milwaukee County

Did the circuit court abuse its discretion when it reconsidered its order for supervised release of a person committed under Ch. 980 pursuant to a motion filed by the State under Wis. Stat. § 806.07(1)(h)?

**State v. J. Norman** 01-3303-CR

RE VW 12/11/2002

District 3/Oneida County

(see #01-1345-CR)

Did the circuit court erroneously preclude the defendant from impeaching a witness with prior inconsistent statements?

Did the circuit court err by admitting the preliminary hearing testimony of a witness who was not present at trial?

Did the circuit court fail to properly instruct the jury?

Was there sufficient evidence to convict?

**State v. J. Jiles** 02-0153-CR

REVW 02/19/2003

District 1/Milwaukee County

Is live testimony from the arresting officer necessary at a *Miranda-Goodchild* hearing, or can the circuit court rely exclusively on written police reports?

Does the failure of trial counsel to object to the exclusive use of written police reports in determining that the defendant had been properly advised of his rights support a claim of ineffective assistance of counsel?

**State ex rel. Grzelak v. D. Bertrand** 02-0678

REVW 12/02/2002

District 3/Brown County

Was the circuit court deprived of subject-matter and personal jurisdiction to review the procedural issues raised in a petition for writ of certiorari because the petitioner improperly named the warden, rather than the secretary of the Department of Corrections, as the respondent as set forth under *State ex rel. Kulike v. Town Clerk*, 132 Wis. 103, 111 N.W. 1129 (1907)?

**State v. T. Cole** 02-0681-CR

CERT 12/10/2002

District 1/Milwaukee County

Whether a presumptive minimum sentence for a felony conviction that is subject to bifurcated sentencing, under the Truth in Sentencing revisions to the criminal code, defines the minimum amount of time an individual must spend in prison or whether the presumptive minimum applies to both time spent in prison and on extended supervision?

**State ex rel. M. Glenn v. J. Litscher** 02-1320

CERT 03/21/03

District 1/Milwaukee County

(Consol. w/ 01-2345)

Whether a probationer has a right to the effective assistance of counsel on appeal from a probation revocation decision when counsel has promised to file a certiorari petition?

**State v. P. Martel** 02-1599-CR

CERT 03/13/2003

District 4/Columbia County

Can a circuit court order a defendant to register as a sex offender when the defendant is convicted of bail jumping with a sex offense charge dismissed but read in?

**Unnamed Person No. 4 v. State of Wisconsin, et al** 02-3063-W

CERT 02/27/2003

District 4/Dane County

Does Wis. Stat. § 13.96 create a privilege against a John Doe subpoena for legislative data on Legislative Technology Services Bureau (LTSB) back-up tapes?

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Does a subpoena to LTSB for confidential legislative data contained on LTSB created emergency back-up tapes violate the doctrine of separation of powers?

Is Wis. Stat. § 13.96 a rule of proceeding under Wis. Const. Art. IV, § 8, which may only be questioned through the internal political process of the Legislature?

Does a secret subpoena to LTSB for confidential legislative data contained on LTSB created emergency back-up tapes violate Wis. Const. Art. IV, § 16, when a member of the legislature is denied the opportunity to assert his or her privilege on behalf of LTSB?

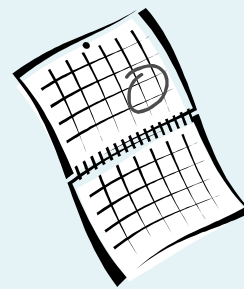
Is the subpoena overbroad and oppressive? ■

## 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](mailto:training@mail.opd.state.wi.us)

Tel. 608.261.8853



### **Can't Trust the Message: Exploring, Exposing, and Exploiting the Evidence to Exonerate**

State Bar of Wisconsin/WACDL

June 19 & 20, 2003

State Bar Center

Madison, Wisconsin

### **Networking Neurons: Making Connections**

#### **Healthy Kids + Healthy Families = Healthy Communities**

Wisconsin Council on Children and Families

June 23 & 24, 2003

Monona Terrace Convention Center

Madison, Wisconsin

### **Juvenile Sexual Offenders: Best Practices for Adjudication and Treatment**

Wisconsin Council on Children and Families

July 25, 2003

Country Inn Hotel

Pewaukee, Wisconsin

**(see page 15 for more information)**

### **2003 Annual Criminal Defense Conference**

State Public Defender

October 9 & 10, 2003

Hilton City Center

Milwaukee, Wisconsin

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## CASE DIGEST

By: Bill Tyroler, Assistant State Public Defender, Milwaukee Appellate Office

*This Case Digest includes United States Supreme Court and Wisconsin appellate decisions released/published November 21, 2002 to April 1, 2003.*

### UNITED STATES SUPREME COURT OPINIONS

#### COLLATERAL ATTACK (HABEAS CORPUS)

TIME LIMIT FOR FILING COLLATERAL ATTACK UNDER 28 USC § 2255 DOESN'T BEGIN RUNNING UNTIL DEADLINE FOR *CERTIORARI* PETITION HAS EXPIRED, WHETHER OR NOT ACTUALLY PURSUED

*Clay v. United States*, <http://www.supremecourtus.gov/opinions/02pdf/01-1500.pdf> 01-1500 (3/4/03)

AMENDMENTS MADE TO 28 U.S.C., CH. 153, BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA) DO NOT APPLY TO CASES "PENDING" IN FEDERAL COURT ON APRIL 24, 1996—AEDPA'S EFFECTIVE DATE. "PENDING" MEANS FILING OF AN ACTUAL PETITION, SEEKING ADJUDICATION ON THE MERITS. PROCEDURAL MOTIONS (FOR COUNSEL AND FOR STAY OF DEATH PENALTY) DON'T MAKE A "PENDING" CASE.

*Woodford v. Garceau*, <http://www.supremecourtus.gov/opinions/02pdf/01-1862.pdf> 01-1862 (3/25/03)

#### CRIMES: CONSPIRACY

CONSPIRACY DOESN'T NECESSARILY TERMINATE WITH DEFEAT OF ITS OBJECTIVE

*United States v. Jimenez Recio*, <http://www.supremecourtus.gov/opinions/02pdf/01-1184.pdf> 01-1184 (1/21/03)

#### CRUEL AND UNUSUAL

THREE-STRIKES LAW, RESULTING IN LIFE SENTENCE FOR OTHERWISE RELATIVELY MINOR OFFENSE DOESN'T VIOLATE 8<sup>TH</sup> AMENDMENT CRUEL AND UNUSUAL CLAUSE

*Lockyer v. Andrade*, <http://www.supremecourtus.gov/opinions/02pdf/01-1127.pdf> 01-1127 (3/5/03);

*Ewing v. California*, <http://www.supremecourtus.gov/opinions/02pdf/01-6978.pdf> 01-6978 (3/5/03)

#### DOUBLE JEOPARDY

DOUBLE JEOPARDY DOESN'T BAR IMPOSITION OF DEATH PENALTY ON RETRIAL AFTER SUCCESSFUL APPEAL OF DEFENDANT ORIGINALLY SENTENCED TO LIFE

*Sattazahn v. Pennsylvania*, <http://www.supremecourtus.gov/opinions/02pdf/01-7574.pdf> 01-7574 (1/14/03)

#### JURY

PROSECUTOR'S STRIKING ALMOST ALL AFRICAN-AMERICANS ON PANEL, ALONG WITH LOCAL HISTORY OF DISCRIMINATION, RAISED SUFFICIENT QUESTION OF DISCRIMINATORY INTENT TO REQUIRE *BATSON* HEARING

*Miller-El v. Cockrell*, <http://www.supremecourtus.gov/opinions/02pdf/01-7662.pdf> 01-7662 (2/25/03)

**SEX OFFENDER**

SEX OFFENDER REGISTRATION REQUIREMENT IS NON-PUNITIVE AND THEREFORE DOESN'T VIOLATE DUE PROCESS AND EX POST FACTO CLAUSES

*Smith v. Doe*, <http://www.supremecourtus.gov/opinions/02pdf/01-729.pdf> 01-729 (3/5/03);

*Connecticut Dept. of Public Safety v. Doe*, <http://www.supremecourtus.gov/opinions/02pdf/01-1231.pdf> 01-1231 (3/5/03)

**WISCONSIN SUPREME COURT AND COURT OF APPEALS OPINIONS****APPELLATE PROCEDURE****BINDING PRECEDENT**

*State v. Steven G. Walters*, <http://www.courts.state.wi.us/html/ca/01/01-1916.htm> 2003 WI App 24, PFR (AG) filed 2/14/03

For Walters: Jenelle L. Glasbrenner, David A. Danz

¶25. We cannot ignore the arguments offered by the State at the trial court level at both the motion to exclude before Judge Race and the motion for reconsideration before Judge Carlson. We are troubled by the district attorney's arguments that a trial court is free to ignore published decisions of the court of appeals. Walworth County District Attorney Phillip Koss argued on numerous occasions, and the trial court implicitly agreed, that *Richard A.P.* was "obviously" wrongly decided and need not be followed. While the district attorney may think that *Richard A.P.* <http://www.courts.state.wi.us/ca/opinions/97/PDF/97-2737.PDF> was an "obviously" wrong decision and contrary to nationwide precedent, it is the law. Our supreme court has upheld the tenets of *Richard A.P.* in *Davis* <http://www.courts.state.wi.us/html/sc/00/00-2916.htm>

¶26. Officially published opinions of the court of appeals have statewide precedential effect. Wis. Stat. §§ 752.41(2), 809.23; see also *Cook v. Cook* <http://www.courts.state.wi.us/html/sc/95/95-1963.htm> 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997). Lower courts are bound by the precedent of our published decisions and the decisions of the Wisconsin Supreme Court, whether the lower courts agree with the law or not. A district attorney who may disagree with the law is still obligated to follow it.

**HARMLESS ERROR – TEST: WHETHER THERE IS A REASONABLE POSSIBILITY THE ERROR CONTRIBUTED TO THE VERDICT, ¶16**

*State v. Ervin Burris*, <http://www.courts.state.wi.us/html/ca/00/00-1425.htm> 2002 WI App 262, PFR filed 11/11/02

For Burris: Joseph L. Sommers

**MOOTNESS — JIPS ORDERS**

*State v. Jeremiah C.* <http://www.courts.state.wi.us/html/ca/02/02-1740.htm> *State v. Katie H.*, <http://www.courts.state.wi.us/html/ca/02/02-2295.htm> 2003 WI App 40

For Juveniles: Susan E. Alesia, SPD, Madison Appellate

Although the challenged JIPS orders have expired, making the appeal moot,

¶11. This issue will not only recur, but with such short-term dispositional orders, the term of supervision will most likely expire pending appellate review. The question is thus one that repeats itself yet evades review. See *id.* For these reasons, we will address the issue even though our decision will have no practical effect on these two cases.

**PROCESSING APPEALS – PETITION FOR REVIEW DEADLINE – PRISON MAILBOX RULE, *State***

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*ex rel. Nichols v. Litscher*, <http://www.courts.state.wi.us/html/sc/00/00-0853.htm> 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292, HAS LIMITED RETROACTIVITY  
*State ex rel Norman O. Brown v. Bradley*, <http://www.courts.state.wi.us/html/sc/01/01-3324.htm> 2003 WI 14, on original petition for writ of habeas corpus  
For Brown: Greg J. Carman

REMEDY FOR MULTIPLICITOUS CHARGE (FELONY MURDER AND UNDERLYING FELONY): VACATING PLEA-BARGAIN BASED CONVICTION AND (CONCURRENT) SENTENCE FOR MULTIPLICITOUS CHARGE, AS OPPOSED TO REINSTATING ALL NOT GUILTY PLEAS, ADEQUATE REMEDY, ¶¶34-35

*State v. Theodore J. Krawczyk*, <http://www.courts.state.wi.us/html/ca/02/02-0156.htm> 2003 WI App 6, PFR filed 1/21/03  
For Krawczyk: John T. Wasielewski

(The court's terse discussion is problematic, because the trend certainly seems to be that one "bad" sentence taints the entire package and requires resentencing. *Rutledge v. United States*, <http://www.ca7.uscourts.gov/op3.fwx?yr=99&num=1686&Submit1=Request+Opinion> 230 F.3d 1041, 1048 (7th Cir. 2000). The trial court didn't formally resentence, but it might have done so in a functional sentence (i.e., look at the entire package closely), ¶33, which is one reasonable construction of the holding – i.e., a rule-based, predictable approach. Another possibility is that resentencing is required only when necessary to effectuate the original sentencing intent — a discretionary and therefore much more unpredictable approach.)

RETROACTIVE APPLICATION OF NEW HOLDING –NEW RULE GIVEN FULLY RETROACTIVE EFFECT IF IT RELATES TO “TRUTH-FINDING FUNCTION” (RATHER THAN MERE PROCEDURE), ¶¶8-9

*State v. Olayinka Kazeem Lagundoye*, <http://www.courts.state.wi.us/html/ca/02/02-2137.htm> 2003 WI App 63, PFR filed 2/25/03  
For Lagundoye: Geoffrey Y. Muwonge

STANDARD OF REVIEW – CONSTITUTIONAL CHALLENGE TO STATUTE RAISES QUESTION OF LAW, ¶11

*State v. Alan R. Radke*, <http://www.courts.state.wi.us/html/sc/01/01-1879.htm> 2003 WI 7, affirming 2002 WI App 146  
For Radke: William E. Schmaal, SPD, Madison Appellate

STANDARD OF REVIEW — ATTORNEY DISQUALIFICATION

*State v. Peter G. Tkacz*, <http://www.courts.state.wi.us/html/ca/02/02-0192.htm> 2002 WI App 281, PFR filed 11/14/02

For Tkacz: Mark S. Rosen

¶8. We first address Tkacz's claim that the trial court erred when it failed to disqualify Jones based on the alleged conflict of interest. Tkacz asserts that the trial court erred by using the "substantial relationship" test to determine the issue. Whether the trial court used the proper standard is a question of law that we review independently of the trial court. *See Lane v. Sharp Packaging Sys., Inc.*, <http://www.courts.state.wi.us/html/sc/00/00-1797.htm> 2002 WI 28, ¶19, 251 Wis. 2d 68, 640 N.W.2d 788. However, the trial court's decision of whether attorney disqualification is required in a particular case is an exercise of discretion and the scope of our review is limited accordingly. *Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Generally, we will not find that the trial court's exercise of discretion was erroneous if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the trial court's decision. *Jesse v. Danforth*, 169 Wis. 2d 229, 245-46, 485 N.W.2d 63 (1992).

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STANDARD OF REVIEW — COMPETENCY OF TRIAL COURT PRESENTS QUESTION OF LAW, ¶¶5-6

*State v. George Schertz*, <http://www.courts.state.wi.us/html/ca/02/02-0789.htm> 2002 WI App 289  
For Schertz: Barbara A. Cadwell

STANDARD OF REVIEW — SENTENCING — ACCURATE INFORMATION

*State v. Jeffrey R. Groth*, <http://www.courts.state.wi.us/html/ca/01/01-3000.htm> 2002 WI App 299, PFR filed 12/11/02

For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

¶21. A defendant has a due process right to be sentenced based on accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)). Whether a defendant has been denied the due process right to be sentenced based on accurate information is a “constitutional issue” presenting “a question of law which we review de novo.” *State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993)....

¶23. ... Where, however, a defendant fails to object to allegedly erroneous information presented at sentencing, and fails to challenge the information when exercising the right of allocation (*sic*), *see* Wis. Stat. § 972.14(2), we determine whether the sentencing court erroneously exercised discretion in considering the information. *See Mosley*, 201 Wis. 2d at 45-46.

STANDARD OF REVIEW — WAIVER, 6TH AMENDMENT RIGHT TO COUNSEL

*State v. Christopher D. Anson*, <http://www.courts.state.wi.us/html/ca/01/01-2907.htm> 2002 WI App 270  
For Anson: Steven J. Watson

¶8. This appeal involves the application of facts to federal constitutional principles. We review the trial court’s application of constitutional principles to historical facts de novo. *State v. Hornung*, <http://www.courts.state.wi.us/html/ca/99/99-0300.htm> 229 Wis. 2d 469, 475, 600 N.W.2d 264 (Ct. App. 1999). However, historical factual determinations made by the trial court will be affirmed unless clearly erroneous. *Id.* at 475-76.

STANDARD OF REVIEW – WAIVER, RIGHT TO COUNSEL – DE NOVO, ¶11

*State v. Louis J. Thornton*, <http://www.courts.state.wi.us/html/ca/01/01-0727.htm> 2002 WI App 294

STANDARD OF REVIEW — ASSERTION OF RIGHT TO COUNSEL

*State v. Richard K. Fischer*, <http://www.courts.state.wi.us/html/ca/02/02-0147.htm> 2003 WI App 5, PFR filed 1/15/03

For Fischer: Mark S. Rosen

¶12. The first issue before us concerns the sufficiency of Fischer’s invocation of the right to counsel. This is a question of constitutional fact that we review under a two-part standard. *State v. Jennings*, <http://www.courts.state.wi.us/html/sc/00/00-1680.htm> 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142. We must uphold the trial court’s findings of historical or evidentiary fact unless they are clearly erroneous. *Id.* However, we independently review the trial court’s application of constitutional principles to those facts. *Id.* The legal sufficiency of a defendant’s invocation of the right to counsel is determined by the application of a constitutional standard to historical facts. *Id.* at ¶25.

STANDARD OF REVIEW — JURY INSTRUCTIONS

*State v. Jeffrey R. Groth*, 2002 WI App 299, PFR filed 12/11/02

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For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

¶8. A trial court has broad discretion in instructing a jury but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). Whether a crime charged was a natural and probable consequence of the crime with (*sic*) which a defendant allegedly assisted is a factual issue for the jury. *State v. Ivy*, 119 Wis. 2d 591, 601, 350 N.W.2d 622 (1984). Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review. See *State v. Pettit*, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992).

¶9. Whether a jury instruction violated a defendant's right to due process is a question of law subject to our de novo review. *Id.* at 639. In reviewing a claimed jury instruction error, we do not view the challenged words or phrases in isolation. *Id.* at 637. Rather, jury instructions "must be viewed in the context of the overall charge." *Id.* Relief is not warranted, however, unless the court is "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury" in the manner asserted by the challenger to the instruction. *Id.* at 638.

#### STANDARD OF REVIEW — PLEA BARGAIN BREACH

*State v. Victor Naydihor*, <http://www.courts.state.wi.us/html/ca/01/01-3094.htm> 2002 WI App 272, PFR filed 11/25/02

For Naydihor: Philip J. Brehm

¶14. In reviewing a breach of plea agreement case, this court will uphold the circuit court's determination of historical facts—the terms of the plea agreement and the State's conduct in question—unless they are clearly erroneous. *State v. Williams*, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. However, whether the State's conduct constitutes a substantial and material breach of the plea agreement presents a question of law. *Id.*

#### STANDARD OF REVIEW — CLAIM/ISSUE PRECLUSION

*State v. Kenneth Parrish*, <http://www.courts.state.wi.us/html/ca/00/00-2524.htm> 2002 WI App 263, PFR filed 11/11/02

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

¶14. Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties or their privies involving all matters litigated, and all matters that could have been litigated, in the proceeding leading to the judgment. *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Under the doctrine of issue preclusion, a final judgment bars the relitigation of a factual or legal issue that actually was litigated and decided in the earlier action. *Id.* Whether either preclusion doctrine applies to bar an action is a legal issue we review *de novo*. *Mayonia M.M. v. Keith N.*, <http://www.courts.state.wi.us/html/ca/95/95-2838.htm> 202 Wis. 2d 460, 464, 551 N.W.2d 31 (Ct. App. 1996).

#### STANDARD OF REVIEW – LIMITED CROSS-EXAMINATION

*State v. Bernell Ross*, <http://www.courts.state.wi.us/html/ca/02/02-0121.htm> 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

¶43. Lastly, Ross contends the trial court erred by improperly limiting the cross-examination of his former attorney, Gundy. The extent and scope of cross-examination allowed for impeachment purposes is a matter within the sound discretion of the trial court. *State v. McCall*, 202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996). We shall reverse a trial court's

determination to limit or prohibit a certain area of cross-examination attempting to show bias only if the trial court's determination represents an erroneous exercise of discretion that is prejudicial. *State v. Lindh*, 161 Wis. 2d 324, 348-49, 468 N.W.2d 168 (1991). No erroneous exercise of discretion will be found if a reasonable basis exists for the trial court's determination. *State v. Oberlander*, 149 Wis. 2d 132, 141, 438 N.W.2d 580 (1989).

#### STANDARD OF REVIEW — EXCLUSION OF DEFENDANT'S TESTIMONY, LACK OF NOTICE OF ALIBI

*State v. Shon D. Brown*, <http://www.courts.state.wi.us/html/ca/02/02-1000.htm> 2003 WI App 34, *PFR* filed 2/3/03

For Brown: Robert T. Ruth

¶12. We first address whether trial court erred in excluding Brown's testimony for lack of a notice of alibi pursuant to Wis. Stat. § 971.23(8). We review the trial court's decision to exclude Brown's testimony under the erroneous exercise of discretion standard, and if it has a reasonable basis, we will not disturb it. *State v. Guzman*, <http://www.courts.state.wi.us/html/ca/99/99-2249.htm> 2001 WI App 54, ¶19, 241 Wis. 2d 310, 624 N.W.2d 717, review denied, 2001 WI 88, 246 Wis. 2d 166, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 99-2249-CR). Brown asserts that the testimony he proposed to give was not an "alibi" within the meaning of § 971.23(8)(a), a claim which presents a question of statutory interpretation subject to our de novo review. See *State v. Gribble*, <http://www.courts.state.wi.us/html/ca/00/00-1821.htm> 2001 WI App 227, ¶¶26-27 n.10, ¶31, 248 Wis. 2d 409, 636 N.W.2d 488, review denied, 2002 WI 2, 249 Wis. 2d 580, 638 N.W.2d 589 (Wis. Dec. 17, 2001) (No. 00-1821-CR). If the trial court's discretionary decision to exclude Brown's proposed testimony was based on an error of law, the court acted "beyond the limits of discretion." *State v. Wyss*, 124 Wis. 2d 681, 734, 370 N.W.2d 745 (1985) (citation omitted), overruled on other grounds by *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

#### STANDARD OF REVIEW — INEFFECTIVE ASSISTANCE OF COUNSEL

*State v. Harold C. Pote, III*, <http://www.courts.state.wi.us/html/ca/00/02-0670.htm> 2003 WI App 30

For Pote: John A. Pray, Remington Law Center

¶13 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his trial counsel's performance was deficient and that this performance prejudiced his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether trial counsel's actions constitute ineffective assistance presents a mixed question of law and fact. See *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's factual findings regarding counsel's actions at trial unless those findings are clearly erroneous. See *id.* at 634.

¶14 Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense, however, are questions of law which we review de novo. See *id.* In analyzing an ineffective assistance claim, this court may choose to address either the "deficient performance" component or the "prejudice" component first. See *Strickland*, 466 U.S. at 697. If we determine that the defendant has made an inadequate showing on either component, we need not address the other. See *id.*

#### STANDARD OF REVIEW — PRE-SENTENCE PLEA WITHDRAWAL

*State v. Todd W. Timblin*, <http://www.courts.state.wi.us/html/ca/02/02-0275.htm> 2002 WI App 304

For Timblin: Alex Flynn

¶19. The decision to accept conviction via a voluntary plea is a grave and solemn act and should not be lightly treated. *State v. Damaske*, <http://www.courts.state.wi.us/html/ca/96/96-1762.htm> 212 Wis. 2d 169, 191, 567 N.W.2d 905 (Ct. App. 1997). Nevertheless, prior to

sentencing, a motion to withdraw a guilty plea should be freely allowed if the defendant presents a “fair and just reason” to justify the withdrawal. *State v. Garcia*, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). “But ‘freely’ does not mean automatically. A fair and just reason is some ‘adequate reason for defendant’s change of heart ... other than the desire to have a trial.’” *Id.* at 861-62 (citation omitted).

¶20. While the “fair and just” reason test is a liberal test, the defendant must still demonstrate a “genuine misunderstanding of the plea’s consequences” or “haste and confusion in entering the plea” or “coercion on the part of trial counsel.” *State v. Shimek*, <http://www.courts.state.wi.us/html/ca/99/99-0291.htm> 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). It is within the trial court’s discretion to determine whether a defendant’s reason adequately explains his or her change of heart. *State v. Kivioja*, <http://www.courts.state.wi.us/html/sc/97/97-2932.htm> 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). We review a trial court’s discretionary decision under the erroneous exercise of discretion standard. Thus, we will uphold a discretionary decision if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. *Id.*

#### STANDARD OF REVIEW – POST-SENTENCE PLEA WITHDRAWAL

*State v. Richard A. Lange*, <http://www.courts.state.wi.us/html/ca/01/01-2584.htm> 2003 WI App 2  
For Lange: Daniel F. Snyder

¶15. Whether to permit a defendant to withdraw a no contest plea lies within the sound discretion of the trial court. *State v. Giebel*, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). Postconviction plea withdrawal is permitted only to correct a manifest injustice. *Id.* A plea which is not knowingly, voluntarily and intelligently entered is a manifest injustice. *Id.* The defendant bears the burden of showing the necessity for plea withdrawal by clear and convincing evidence. See *id.*

¶16. When a defendant moves to withdraw his or her plea based on the trial court’s failure to comply with the requirements of Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), the defendant must (1) make a prima facie showing that the trial court violated § 971.08 and (2) allege that he or she did not know or understand the information that the court should have provided at the plea hearing. *Giebel*, 198 Wis. 2d at 216 (citing *Bangert*, 131 Wis. 2d at 274). Whether a defendant has established a prima facie case for plea withdrawal presents a question of law that we review de novo. *State v. Hansen*, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992).

#### STANDARD OF REVIEW – POST-SENTENCE PLEA-WITHDRAWAL: UNDERSTANDING ELEMENTS

*State v. Theodore J. Krawczyk*, 2003 WI App 6, PFR filed 1/21/03  
For Krawczyk: John T. Wasielewski

¶10. Generally, we review a trial court’s denial of a motion to withdraw a guilty plea for an erroneous exercise of discretion. See *Black*, 2001 WI 31 at ¶9. Here, however, the issue is not what Krawczyk knew or understood regarding the elements of felony murder, but whether the information undisputedly provided to him was legally correct. Our interpretations of the felony murder statute, and of pertinent jury instructions and case law, present only questions of law which we decide de novo. See, e.g., *State v. Neumann*, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993) (Whether jury instructions are a correct statement of the law is a question of law that we review de novo.).

#### STANDARD OF REVIEW — RESENTENCING

*State v. Victor Naydihor*, 2002 WI App 272, PFR filed 11/25/02

For Naydihor: Philip J. Brehm

¶23. While sentencing lies within the sound discretion of the trial court, whether an increased sentence on resentencing violates due process presents a question of law which we review de novo. *State v. Church*, 2002 WI App 212, ¶16, \_\_\_ Wis. 2d \_\_\_, 650 N.W.2d 873.

#### STANDARD OF REVIEW – RESTITUTION

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

¶53. We review the propriety of an order for restitution by the erroneous exercise of discretion standard. We shall reverse a trial court's exercise of discretion "only if the [trial] court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *State v. Canady*, <http://www.courts.state.wi.us/html/ca/99/99-1457.htm> 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147.

#### STANDARD OF REVIEW – RESTITUTION

*State v. Oscar A. Rash*, <http://www.courts.state.wi.us/html/ca/02/02-0841.htm> 2003 WI App 32, PFR filed 2/25/03

For Rash: Peter Koneazny, Diana Felsmann, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/020841.pdf>

¶5. A trial court's assessment of restitution is within its discretion; whether a restitution order comports with the statute, however, is subject to our *de novo* review. *State v. Canady*, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 266, 610 N.W.2d 147, 149; *Smith v. Dodgeville Mut. Ins. Co.*, <http://www.courts.state.wi.us/html/ca/96/96-3352.htm> 212 Wis. 2d 226, 233, 568 N.W.2d 31, 34 (Ct. App. 1997) (application of statute is a question of law). *But see Canady*, 2000 WI App 87 at ¶12, 234 Wis. 2d at 268, 610 N.W.2d at 150 (in trial court's discretion whether there is sufficient nexus between the defendant's criminal conduct and damage for which restitution is ordered).

#### STANDARD OF REVIEW — SENTENCE CREDIT

*State v. Richard A. Lange*, 2003 WI App 2

For Lange: Daniel F. Snyder

¶41 Whether a defendant is entitled to sentence credit pursuant to Wis. Stat. § 973.155 is a question of law which we review de novo. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). In order to receive sentence credit, an offender must establish: (1) that he or she was in "custody"; and (2) that the custody was in connection with the course of conduct for which the sentence was imposed. *State v. Dentici*, 2002 WI App 77, ¶5, 251 Wis. 2d 436, 643 N.W.2d 180....

¶46 Without the benefit of documentation as to the State's calculations or the trial court's reasoning, we lack sufficient evidence to make a determination as to the proper sentence credit due Lange. Therefore, in the event that Lange's plea is ultimately deemed valid, it will be necessary on remand for the trial court to hold a hearing to determine Lange's sentence credit prior to reinstating the judgment of conviction.

#### STANDARD OF REVIEW — SUFFICIENCY OF EVIDENCE

*State v. Michael J. Forster*, <http://www.courts.state.wi.us/html/ca/02/02-0602.htm> 2003 WI App 29, PFR filed 1/31/03

For Forster: Martha K. Askins, SPD, Madison Appellate, PFR 1/31/03

¶2. An appellate court views facts in the light most favorable to sustain the verdict and where more than one inference might be drawn from the evidence presented at trial, we are bound to

accept the inference drawn by the jury. *Burch v. Am. Family Mut. Ins. Co.*, 198 Wis. 2d 465, 474, 543 N.W.2d 277 (1996). Thus, we will relate the facts in a light most favorable to the jury verdict. See *State v. Bauer*, <http://www.courts.state.wi.us/html/ca/99/99-2589.htm> 2000 WI App 206, ¶3, 238 Wis. 2d 687, 617 N.W.2d 902. ...

¶12. We will reverse a conviction based on insufficient evidence only if, as a matter of law, the probative value and force of the evidence presented is such that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). However, questions of statutory interpretation, such as the meaning of “intimate parts” within Wis. Stat. ch. 939, are questions of law that we review de novo. See *State v. Pablo R.*, <http://www.courts.state.wi.us/html/ca/00/00-0697.htm> 2000 WI App 242, ¶7, 239 Wis. 2d 479, 620 N.W.2d 423. When we interpret a statute, our goal is to ascertain and give effect to the intent of the legislature. *Id.* at ¶7. We first look to the language of the statute itself. *Id.* If the language of the statute is unambiguous in its meaning, we go no further. *Id.* A cardinal rule of statutory construction is that statutes must be construed to avoid an absurd or unreasonable result. *State v. Mendoza*, 96 Wis. 2d 106, 115, 291 N.W.2d 478 (1980). We will not find a statute ambiguous simply because the parties differ as to its meaning. *State ex rel. Girouard v. Circuit Court for Jackson County*, 155 Wis. 2d 148, 154-55, 454 N.W.2d 792 (1990). “The plain meaning of a statute takes precedence over all extrinsic sources and rules of construction.” *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 282 n.2, 548 N.W.2d 57 (1996).

#### STANDARD OF REVIEW — SUFFICIENCY OF EVIDENCE — SEXUALLY VIOLENT PERSONS

*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

¶23. In determining whether the evidence in a Wis. Stat. ch. 980 commitment is sufficient to sustain the jury’s verdict, we view the evidence in the light most favorable to commitment. *State v. Kienitz*, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999). We will not overturn the verdict unless the evidence is so insufficient in probative value and force that no reasonable trier of fact could have found the person to be sexually violent beyond a reasonable doubt. *Id.* In addition, the jury is sole judge of credibility; it weighs the evidence and resolves any conflicts. *Id.* at 435.

#### WAIVER RULE — SENTENCE — FAILURE TO OBJECT TO INACCURATE INFORMATION

*State v. Jeffrey R. Groth*, 2002 WI App 299, PFR filed 12/11/02

For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

Reviewing court may address merits of attack on sentence based on inaccurate information, notwithstanding absence of contemporaneous objection. ¶25. It is appropriate here for the court to overlook waiver, where the state concedes that it can’t support the information now challenged; and defendant’s postconviction motion showed that information was inaccurate and also established a basis for believing that he didn’t have an adequate opportunity to refute the information. ¶26.

#### WAIVER RULE — INADEQUATE OFFER OF PROOF: DEFENDANT FAILED TO SUBMIT AFFIDAVIT OR REQUEST OPPORTUNITY TO GIVE PROPOSED TESTIMONY OUTSIDE JURY’S PRESENCE, AND COUNSEL’S TERSE SUMMARY FAILED TO PROVIDE “CERTAINTY WHAT THE CONTOURS OF BROWN’S TESTIMONY WOULD HAVE BEEN,” ¶¶16-20

*State v. Shon D. Brown*, 2003 WI App 34, PFR filed 2/3/03

For Brown: Robert T. Ruth

#### WAIVER RULE — SUPPRESSION ISSUE SURVIVES GUILTY PLEA

*State v. James S. Riedel*, 2003 WI App 18, PFR filed 1/27/03

For Riedel: Ralph A. Kalal

¶8. At the outset, we reject the State's threshold argument that Riedel is precluded from challenging the trial court's suppression ruling based on Riedel's conviction on the OWI charge and the dismissal of the PAC charge. The State reasons that Riedel's appeal lacks a justiciable controversy because he has failed to argue that he would not have pled to the OWI charge if the trial court had granted the suppression motion or that the OWI evidence would have been insufficient absent the blood test results. We reject the State's argument. In pleading to the OWI charge, Riedel undoubtedly considered all incriminating evidence against him, including the blood test results.

## CIVIL COMMITMENTS

NGI — THE PROVISION IN [§ 971.17\(3\)\(e\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100027&infobase=stats.nfo&j1=971.17(3)(e)&jump=971.17(3)(e)&softpage=Browse_Frame_Pg) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100027&infobase=stats.nfo&j1=971.17\(3\)\(e\)&jump=971.17\(3\)\(e\)&softpage=Browse\\_Frame\\_Pg](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100027&infobase=stats.nfo&j1=971.17(3)(e)&jump=971.17(3)(e)&softpage=Browse_Frame_Pg) FOR HEARING WITHIN 30 DAYS A PETITION FOR REVOCATION OF NGI CONDITIONAL RELEASE IS DIRECTORY, NOT MANDATORY, ¶¶7-14

*State v. George Schertz*, 2002 WI App 289

For Schertz: Barbara A. Cadwell

SEXUALLY VIOLENT PERSONS — COMPETENCY OF COURT, NOT AFFECTED BY POST-PETITION GRANT OF JAIL CREDIT ADVANCING RELEASE DATE, ¶¶17-18

*State v. Shawn Virlee*, 2003 WI App 4, PFR filed 1/3/03

For Virlee: Jack E. Schairer

SEXUALLY VIOLENT PERSONS – CONDITIONS OF CONFINEMENT – BLANKET POLICY OF RESTRAINT DURING TRANSPORT: “WE AGREE THAT [§ 51.61\(1\)\(i\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=51.61(1)(i)&jump=51.61(1)(i)) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100036&infobase=stats.nfo&j1=51.61\(1\)\(i\)&jump=51.61\(1\)\(i\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=51.61(1)(i)&jump=51.61(1)(i)) GIVES DHFS THE AUTHORITY TO DECIDE WHETHER TO USE FULL RESTRAINTS DURING TRANSPORT AND THAT IT DOES NOT PROHIBIT EXERCISING THIS AUTHORITY THROUGH A POLICY THAT COVERS ALL CH. 980 PATIENTS WITHIN ITS CARE,” ¶8

*Richard Thielman v. Leean*, <http://www.courts.state.wi.us/html/ca/02/02-0888.htm> 2002 WI App 33

Companion case: *Thielman v. Leean*, <http://www.ca7.uscourts.gov/op3.fwx?yr=01&num=2081&Submit1=Request+Opinion> 282 F.3d 478 (7<sup>th</sup> Cir. 2002)

For Thielman: Mary Kennelly

(Note: The 7<sup>th</sup> Circuit, in the case cited above, held that this policy doesn't violate the constitution. This case says that the policy doesn't violate statutory proscription, namely, § 51.61(1)(i).)

SEXUALLY VIOLENT PERSONS — SUPERVISED RELEASE — CONDITION OF SUPERVISED RELEASE PROSCRIBING “ALL CONDUCT ... NOT IN THE BEST INTEREST OF THE PUBLIC'S WELFARE OR YOUR REHABILITATION” PROVIDED ADEQUATE NOTICE THAT OBTAINING A VIAGRA PRESCRIPTION WITHOUT INFORMING THE AGENT WOULD BE GROUND FOR REVOCATION

*State v. Ervin Burris*, 2002 WI App 262, PFR filed 11/11/02

For Burris: Joseph L. Sommers

SEXUALLY VIOLENT PERSONS — SUFFICIENCY OF EVIDENCE — VOLITIONAL CAPACITY

*State v. Kenneth Parrish*, 2002 WI App 263, PFR filed 11/11/02

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

Although evidence of volitional impairment is required and in this bench trial the trial court erred in commenting

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to the contrary, ¶35, the court in fact found the existence of such evidence, ¶36.

**SEXUALLY VIOLENT PERSONS — SUPERVISED RELEASE — REVOCATION – ACTUAL NOTICE CURES VAGUENESS IN REVOCATION ALLEGATION**

*State v. Ervin Burriss*, 2002 WI App 262, PFR filed 11/11/02

For Burriss: Joseph L. Sommers

**SEXUALLY VIOLENT PERSONS — SUPERVISED RELEASE — REVOCATION — TIME TO PREPARE**

*State v. Ervin Burriss*, 2002 WI App 262, PFR filed 11/11/02

For Burriss: Joseph L. Sommers

Receipt of notice nine days before the hearing of an additional ground for revocation gave adequate time to prepare a defense to that allegation. ¶¶11-13.

**SEXUALLY VIOLENT PERSONS — SUPERVISED RELEASE — REVOCATION – COURT NEED NOT CONSIDER ALTERNATIVES TO REVOCATION, ¶¶22-25**

*State v. Ervin Burriss*, 2002 WI App 262, PFR filed 11/11/02

For Burriss: Joseph L. Sommers

**SEXUALLY VIOLENT PERSONS — JURISDICTION — CH. 980 JURISDICTION ATTACHES TO NATIVE AMERICANS WHO: ARE MEMBERS OF A TRIBE, RESIDENTS OF THE TRIBE'S RESERVATION, AND COMMIT THE ACTS INVOLVED IN THE QUALIFYING CONVICTION ON THE RESERVATION**

*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

**SEXUALLY VIOLENT PERSONS — SUFFICIENCY OF EVIDENCE – SERIOUS DIFFICULTY CONTROLLING BEHAVIOR SHOWN, DESPITE STATE EXPERT'S CONCESSION THAT RESPONDENT COULD CONFORM HIS CONDUCT TO REQUIREMENTS OF THE LAW, ¶¶22-25**

*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

**SEXUALLY VIOLENT PERSONS — SUFFICIENCY OF EVIDENCE — RELIANCE ON ACTUARIAL INSTRUMENTS**

*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

¶27. Our review of the record reveals sufficient evidence to allow the jury to infer Burgess would reoffend because of his mental disorder. Both of the State's experts concluded in their testimony and reports that Burgess is likely to commit sexually violent acts because of his pedophilia and antisocial disorder. Expert witnesses may testify to ultimate issues to be decided by the trier of fact. Wis. Stat. § 907.04 [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100036&infobase=stats.nfo&j1=907.04&jump=907.04](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=907.04&jump=907.04) These opinions were not based merely on the actuarial instruments, but also on interviews with Burgess, his prior diagnoses and treatment records, and conversations with other professionals involved with Burgess's treatment history. Viewing the testimony in a light most favorable to upholding the commitment and allowing the jury to weigh the evidence and assess witness credibility, we determine a reasonable jury could have found Burgess sexually violent beyond a reasonable doubt.

**SEXUALLY VIOLENT PERSONS — INSTRUCTIONS — VOLITIONAL CONTROL**

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*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

The issue on instructions re: serious difficulty controlling behavior is the same as, and therefore controlled by, *State v. Laxton*, <http://www.courts.state.wi.us/html/sc/99/99-3164.htm> 2002 WI 82. ¶29.

#### SEXUALLY VIOLENT PERSONS — EQUAL PROTECTION — AUTOMATIC SECURE CONFINEMENT

*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

Automatic secure confinement (1999 Wis Act 9) doesn't violate equal protection, in comparison to ch. 51 or NGI procedure, the issue being controlled by *State v. Williams*, 2001 WI App 263. ¶¶36-37.

#### SEXUALLY VIOLENT PERSONS — TRIAL PROCEDURE — CLOSED PROCEEDING

*State v. Steven J. Burgess*, 2002 WI App 264, PFR filed 11/8/02

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

There is neither a statutory nor constitutional basis for closing 980 proceedings. Although a 980 respondent is considered a "patient" under § 51.61(1) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100036&infobase=stats.nfo&j1=51.61\(1\)&jump=51.61\(1\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=51.61(1)&jump=51.61(1)) the right to a closed proceeding is not within the rights enumerated in that section. ¶33. Nor does the failure to afford such a right to a 980 respondent violate equal protection: ¶¶34-35.

#### SEXUALLY VIOLENT PERSONS — INSTRUCTIONS — SERIOUS DIFFICULTY CONTROLLING BEHAVIOR

*State v. Bernard G. Tainter*, <http://www.courts.state.wi.us/html/ca/01/01-2644.htm> 2002 WI App 296, PFR filed 12/23/02

For Tainter: Jack E. Schairer, SPD, Madison Appellate

Specific instruction on necessity of finding respondent's serious difficulty controlling behavior not required. *State v. Laxton*, 2002 WI 82 controlling. ¶9.

#### SEXUALLY VIOLENT PERSONS — INSTRUCTIONS — SUBSTANTIVE DUE PROCESS

*State v. Bernard G. Tainter*, 2002 WI App 296, PFR filed 12/23/02

For Tainter: Jack E. Schairer, SPD, Madison Appellate

The pattern instruction — JI-Crim 2502 — didn't violate substantive due process. *State v. Laxton*, 2002 WI 82 controlling. ¶10.

#### SEXUALLY VIOLENT PERSONS — VENUE — TRIAL IN COUNTY OF PREDICATE OFFENSE, ¶14

*State v. Bernard G. Tainter*, 2002 WI App 296, PFR filed 12/23/02

For Tainter: Jack E. Schairer, SPD, Madison Appellate

#### SEXUALLY VIOLENT PERSONS — EVIDENCE — ACTUARIAL INSTRUMENTS

*State v. Bernard G. Tainter*, 2002 WI App 296, PFR filed 12/23/02

For Tainter: Jack E. Schairer, SPD, Madison Appellate

The trial court properly exercised discretion in admitting into evidence actuarial instruments (by determining that they were of the type commonly relied on by experts to assess sex offender risk; and by allowing Tainter to cross-examine on the instruments). ¶20. In Wisconsin, trial courts have a limited "gatekeeper" function regarding expert testimony; if the evidence is relevant and the witness qualified as an expert, reliability is for the jury. ¶¶21-22.

#### SEXUALLY VIOLENT PERSONS — DUE PROCESS — NEXUS BETWEEN DISORDER AND DANGEROUSNESS

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*State v. Shawn Virlee*, 2003 WI App 4, PFR filed 1/3/03

For Virlee: Jack E. Schairer

Ch. 980's requirement of proving a nexus between mental disorder and dangerousness implicitly requires proof of serious difficulty controlling behavior, and is therefore constitutional. ¶8. (*State v. Laxton*, 2002 WI 82, ¶¶22-23, controls.)

#### SEXUALLY VIOLENT PERSONS — JURY INSTRUCTIONS — SERIOUS DIFFICULTY CONTROLLING BEHAVIOR

*State v. Shawn Virlee*, 2003 WI App 4, PFR filed 1/3/03

For Virlee: Jack E. Schairer

Wis JI Crim — 2502 upheld. ¶10. (*State v. Laxton*, 2002 WI 82, ¶27, controls.)

#### SEXUALLY VIOLENT PERSONS — EQUAL PROTECTION — AUTOMATIC SECURE CONFINEMENT

*State v. Shawn Virlee*, 2003 WI App 4, PFR filed 1/3/03

For Virlee: Jack E. Schairer

Automatic secure confinement doesn't violate equal protection. ¶12. (*State v. Williams*, 2001 WI App 263, controls.)

#### SEXUALLY VIOLENT PERSONS — DUE PROCESS & EQUAL PROTECTION NOT VIOLATED BY BAR ON PRETRIAL RELEASE, ¶14

*State v. Shawn Virlee*, 2003 WI App 4, PFR filed 1/3/03

For Virlee: Jack E. Schairer

### CONSTITUTION

#### CONSTRUCTION

*State v. Brian B. Burke*, <http://www.courts.state.wi.us/html/ca/02/02-0046.htm> 2002 WI App 291, PFR filed 11/29/02

For Burke: Robert H. Friebert

¶4. First, as the trial court noted, we may not read our 1848 constitution using modern definitions and syntax. We are to examine:

- (1) The [nineteenth century] plain meaning of the words in the context used;
- (2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution, and;
- (3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution.

*State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984) (citations omitted).

¶5. This case requires us to interpret language in the Wisconsin Constitution. We do so de novo. *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996).

### COUNSEL

#### CONFLICT OF INTEREST — PROSECUTOR'S PRIOR REPRESENTATION OF DEFENDANT IN A CIVIL FORFEITURE NOT SUBSTANTIALLY RELATED TO CURRENT PROSECUTION, THEREFORE DIDN'T WORK A DISQUALIFYING CONFLICT OF INTEREST, ¶¶13-17

*State v. Peter G. Tkacz*, 2002 WI App 281, PFR filed 11/14/02

For Tkacz: Mark S. Rosen

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**INEFFECTIVE ASSISTANCE — FAILURE TO IMPEACH WITNESS WITH PRIOR CONVICTIONS NOT PREJUDICIAL, ¶¶18-25**

*State v. Peter G. Tkacz*, 2002 WI App 281, PFR filed 11/14/02

For Tkacz: Mark S. Rosen

**INEFFECTIVE ASSISTANCE — FAILURE TO OBTAIN EXPERT — LACK OF PREJUDICE – FACT-FINDER’S DETERMINATION THAT EXPERT WOULD NOT HAVE ALTERED OUTCOME, ¶¶37-42**

*State v. Kenneth Parrish*, 2002 WI App 263, PFR filed 11/11/02

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

**INEFFECTIVE ASSISTANCE — GUILTY PLEA – INVESTIGATION OF POTENTIAL DEFENSE**

*State v. Harold C. Pote, III*, 2003 WI App 30

For Pote: John A. Pray, Remington Law Center

¶19 Pote is correct that to provide effective representation to a person charged with a crime, an attorney is obligated to adequately investigate any potential defenses and discuss them with his or her client. *See Pitsch*, 124 Wis. 2d at 638. Defense counsel should also thoroughly discuss any proposed plea agreement and its advantages and disadvantages with the client. *See State v. Rock*, 92 Wis. 2d 554, 563-64, 285 N.W.2d 739 (1979). The trial court found that counsel did precisely these things in this case. We disagree with Pote’s suggestion that his counsel was obligated to recommend to him that he reject the offer because of the possibly meritorious defense to one of the two counts with which he was charged, or that counsel should have ignored Pote’s instruction to obtain an overall disposition involving no jail time. Even though Pote established at the postconviction hearing that the medical defense to count two may have been stronger than Pote or his counsel believed prior to Pote’s plea, as the trial court noted, this would not have diminished Pote’s exposure to a felony conviction on count one.

**INEFFECTIVE ASSISTANCE – SENTENCING**

*State v. Harold C. Pote, III*, 2003 WI App 30

For Pote: John A. Pray, Remington Law Center

Counsel performed deficiently at sentencing by failing to offer known mitigation, ¶¶34-35. (*State v. Divanovic*, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996), distinguished, in that no showing here that “Pote had received and considered counsel’s advice regarding what actions might be in his best interest.” The deficiency was prejudicial, because Pote got the maximum (which is reserved for “more aggravated” cases), despite the presence of unargued mitigators. ¶41.)

**INEFFECTIVE ASSISTANCE — GUILTY PLEA**

*State v. Louis J. Thornton*, 2002 WI App 294

The trial court’s denial of a claim of ineffective assistance of counsel in support of a motion to withdraw guilty pleas, without hearing testimony from the trial attorney, wasn’t error where the motion was conclusory and didn’t explain why the defendant would have gone to trial absent the asserted attorney-deficiencies. ¶27.

**PRETRIAL, POST-CHARGE ATTACHMENT OF RIGHT TO COUNSEL**

*State v. Christopher D. Anson*, 2002 WI App 270

For Anson: Steven J. Watson

¶10. The Sixth Amendment right to counsel extends to pretrial interrogations. *Dagnall*, 2000 WI 82 at ¶30. The Sixth Amendment right thus protects a defendant during the early stages of the adversarial process “where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.” *Id.* (citation omitted). Police and prosecutors have an affirmative duty not to circumvent or exploit the protections guaranteed by the right. *Id.*

¶11. In Wisconsin, the right to counsel arises after the State initiates adversarial proceedings by the filing of a criminal complaint or the issuance of a warrant. *Id.* Although the right to counsel attaches at the time a charge is made, it is not self-executing. A charged defendant who does not have counsel must invoke, assert or exercise the right to counsel to prevent the interrogation. *Id.* at ¶46. The attachment of the Sixth Amendment right to counsel, coupled with the accused's invocation of the right, prohibit the State from initiating any contact or interrogation concerning the charged crime and any subsequent uncounseled waivers by a defendant during police-initiated contact or interrogation are deemed invalid. *Hornung*, 229 Wis. 2d at 476.

¶12. A defendant can waive the right to counsel as long as the waiver is "knowing and intelligent." *Patterson*, 487 U.S. at 292. If a defendant "knowingly and intelligently" decides to face the State's officers during questioning without the aid of counsel, then the uncounseled statements the defendant makes can be admitted at trial. *Id.* at 291. If the waiver is invalid, however, any uncounseled statements elicited from the accused after the right to counsel has attached violate the accused's Sixth Amendment rights and cannot be admitted at trial. *See Hornung*, 229 Wis. 2d at 480. Thus, at the onset of a post-charge, pretrial interrogation, the accused must make a determination as to whether he or she will assert the right to counsel and terminate the questioning until an attorney is present or waive the right to counsel and proceed with the interrogation without the assistance of counsel.

#### PRETRIAL, POSTCHARGE WAIVER OF RIGHT TO COUNSEL

*State v. Christopher D. Anson*, 2002 WI App 270

For Anson: Steven J. Watson

¶19. From the above cited waiver cases, coupled with our supreme court's observation in *Dagnall*, we reach the following conclusion: At the onset of post-charge pretrial police interrogations, the accused must be made aware that the adversarial process has begun and that he or she can request the assistance of counsel at the onset of post-charge pretrial police interrogations. This can be accomplished by informing the accused that he or she has been formally charged with a crime, by reading to the accused the *Miranda* warnings, or by anything else that would inform the accused that the adversarial process has begun. By giving *Miranda* warnings, the *Patterson* Court reasoned that an individual is told that he or she has the right to an attorney and any statement he or she makes can be used in subsequent criminal proceedings. *Patterson*, 487 U.S. at 293. Or, by telling the accused that a complaint has been filed or that an arrest warrant has been issued, a reasonable layperson would comprehend that the government has committed itself to prosecute and the positions of the adversaries have solidified. *See Kirby*, 406 U.S. at 689. As a result, any further interrogation can only be designed to buttress the government's case; authorities are no longer simply attempting "to solve a crime." *United States v. Mohabir*, 624 F.2d 1140, 1148 (2<sup>nd</sup> Cir. 1980), *overruled on other grounds by Patterson*, 487 U.S. at 285. Any voluntary, uncounseled statements made after such knowledge or after a *Miranda* warning can constitute a valid waiver of the Sixth Amendment right to counsel.

(Note: Court also rejects ideas that interrogation setting must be custodial in order to require suppression on 6th amendment grounds, ¶23, citing *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980); and that attorney's presence at post-charge interrogation would be too unimportant to require meaningful waiver, ¶24.)

#### POSTCONVICTION WAIVER

*State v. Louis J. Thornton*, 2002 WI App 294

(After canvassing relevant caselaw, *State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994); *Oimen v. McCaughtry*, 130 F.3d 809 (7th Cir 1997); *Wisconsin ex rel. Toliver v. McCaughtry*, 72 F.Supp.2d 960 (E.D. Wis. 1999:)

¶21. The State offers the following synthesis of the foregoing decisions. Before a court may conclude that a criminal defendant has knowingly and voluntarily waived his or her right to counsel on direct appeal, it must satisfy itself that the defendant is aware: (1) of the *Flores* rights (to an appeal, to the assistance of counsel for the appeal, and to opt for a no-merit report); (2) of the dangers and disadvantages of proceeding pro se; and (3) of the possibility that if appointed counsel is permitted to withdraw, successor counsel may not be appointed to represent the defendant in the appeal. We agree with the State that ensuring a defendant has received and understands the listed information is both necessary and sufficient to support a determination that the defendant's tendered waiver of counsel is knowing and voluntary.

## CRIMES: BAIL JUMPING

WHEN A BAIL JUMPING CHARGE IS PREMISED ON THE COMMISSION OF AN ADDITIONAL CRIME, THE JURY MUST BE PROPERLY INSTRUCTED AS TO THE ELEMENTS OF THAT CRIME,

¶23

*State v. Wyatt Daniel Henning*, <http://www.courts.state.wi.us/html/ca/02/02-1287.htm> 2003 WI App 54, (AG) PFR filed 3/20/03

For Henning: Jack E. Schairer, SPD, Madison Appellate

## CRIMES: FELONY MURDER

ELEMENTS: DEFENDANT'S OWN CONDUCT NEED NOT BE SUBSTANTIAL FACTOR CAUSING DEATH

*State v. Theodore J. Krawczyk*, 2003 WI App 6, PFR filed 1/21/03

For Krawczyk: John T. Wasielewski

Felony murder does not require proof that the defendant's "own, personal conduct was a substantial factor in causing" the victim's death. In particular, *State v. Chambers*, 183 Wis. 2d 316, 515 N.W.2d 531 (Ct. App. 1994) was not overruled by *State v. Oimen*, 184 Wis. 2d 423, 516 N.W.2d 399 (1994). ¶¶11-24.

ELEMENTS: PTAC ALLEGATION SUPERFLUOUS

*State v. Theodore J. Krawczyk*, 2003 WI App 6, PFR filed 1/21/03

For Krawczyk: John T. Wasielewski

¶25. Krawczyk next argues that he was incorrectly charged as "a party to the crime" of felony murder and that this error also rendered his plea to that offense unknowing. We agree with Krawczyk that the State did not need to include the party-to-a-crime allegation in the felony murder charge. Because "[a] person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony," it is "redundant and unnecessary" to charge a defendant with felony murder as a party to the crime. *Oimen*, 184 Wis. 2d at 449. Krawczyk, however, does not explain how or why the inclusion of a "redundant" aspect in a charge deprives a defendant of information necessary to enter a knowing plea. We conclude, as did the supreme court in *Oimen*, that "no prejudice has been demonstrated" by reason of the party-to-a-crime allegation in the felony murder charge, and thus it does not justify a withdrawal of Krawczyk's plea. *Id.*

(Note: Keep in mind that this is a guilty-plea case, and that failure to give PTAC instruction may give jury false impression that the death is a *necessary* cause of the felony. See *Perry v. McCaughtry*, <http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=01-3867.PDF> 308 F.3d 682 (7<sup>th</sup> Cir. 1982), esp. dissent.)

## CRIMES: OWI

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**IMPLIED CONSENT LAW – POLICE REQUIRED TO OFFER ALTERNATIVE CHEMICAL TEST – TRIAL COURT’S FINDING THAT THIS WAS DONE UPHELD**

*State v. James W. Keith*, <http://www.courts.state.wi.us/html/ca/02/02-0583.htm> 2003 WI App 47, *PFR* filed 3/5/03

For Keith: Christopher A. Mutschler

**SUMMARY JUDGMENT NOT AVAILABLE IN CH. 343 HEARINGS**

*State v. Darin W. Baratka*, <http://www.courts.state.wi.us/html/ca/02/02-0770.htm> 2002 WI App 288, *PFR* filed 10/20/02

For Baratka: Michael C. Witt

**PBT — PROBABLE CAUSE TO ADMINISTER**

*State v. Guy W. Colstad*, <http://www.courts.state.wi.us/html/ca/01/01-2988.htm> 2003 WI App 25

For Colstad: T. Christopher Kelly

Authority to administer a preliminary breath test requires probable cause to believe a drunk driving law has been violated. ¶23. Probable cause existed here, given the driver’s (mild) odor of intoxicants; the “suspicious circumstance” of the collision (i.e., with a child on an unobstructed street, and the driver allegedly watching for children); and the fact “that Colstad erred on each of the sobriety tests.” ¶25.

**REFUSAL – RIGHT TO COUNSEL**

*State v. Richard L. Verkler*, <http://www.courts.state.wi.us/html/ca/02/02-1545.htm> 2003 WI App 37

For Verkler: Christopher A. Mutschler

¶1. In *State v. Reitter*, <http://www.courts.state.wi.us/html/sc/98/98-0915.htm> 227 Wis. 2d 213, 217-18, 595 N.W. 2d 646 (1999), our supreme court held that law officers are under no affirmative duty to advise custodial defendants that the right to counsel does not apply to the implied consent setting. However, the court also appears to have held that, as a matter of due process, if an officer either explicitly assures or implicitly suggests that a custodial defendant has a right to counsel, then the officer may not thereafter mark down a refusal if the defendant acts upon that assurance or suggestion. *See id.* at 240-42. The defendant in this case, Richard L. Verkler claims that the officer, by his actions, at least implicitly suggested that Verkler had the right to consult with an attorney before deciding whether to submit to a breath test. Verkler further contends that the officer then marked him down as having refused because he insisted on consulting with his attorney first. We do not agree that the officer implicitly suggested a right to counsel before taking the test. In fact, the facts show that just the opposite occurred. We affirm.

(For a different result, albeit under state rather than federal constitution, see *State v. Durbin* <http://www.publications.ojd.state.or.us/S48501.htm> (Ore. 2/13/03):

In summary, we hold that a driver arrested for DUII has, upon invoking the right to counsel, the right to a reasonable opportunity to consult privately with counsel before deciding whether to submit to a breath test. To obtain evidence of an arrested driver’s blood alcohol level without violating the driver’s right to counsel, police might find it preferable to inform the driver of their intent to administer the breath test and then, if the driver requests counsel, to allow the driver a reasonable time in which to seek legal advice, in private, before beginning the required observation period.)

**REFUSAL**

*State v. Darin W. Baratka*, 2002 WI App 288, *PFR* filed 10/20/02

For Baratka: Michael C. Witt

¶14. While the officer was mistaken regarding the right to require Baratka to perform field tests, there was no misinformation regarding the request for chemical testing. The officer’s

right to request the test was properly stated when the officer read the Informing the Accused form. In fact, Baratka does not identify how any misinformation about the field tests affected his understanding of the chemical testing.

¶15. Additionally, Baratka argues that he never verbally or physically refused testing. However, when asked to submit to a test, rather than respond he twice requested to speak to an attorney. Repeated requests for an attorney can amount to a refusal as long as the officer informs the driver that there is no right to an attorney at that point. *State v. Reitter*, 227 Wis. 2d 213, 235, 595 N.W.2d 646 (1999). The officer did so inform Baratka. We therefore conclude that the evidence supports the trial court's finding that Baratka refused chemical testing, and its order revoking Baratka's operating privileges.

## CRIMES: SEXUAL ASSAULT

DEFINITION OF "CHEST," § 939.22(19) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=111809&infobase=stats99.nfo&j1=939.22\(19\)&jump=939.22\(19\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=111809&infobase=stats99.nfo&j1=939.22(19)&jump=939.22(19)) — APPLICABLE TO MALES AS WELL FEMALES, SO THAT TOUCHING OF A MALE BREAST MAY CONSTITUTE SEXUAL ASSAULT WITHIN THE MEANING OF WIS. STAT. § 948.02(2) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=111809&infobase=stats99.nfo&j1=948.02\(2\)&jump=948.02\(2\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=111809&infobase=stats99.nfo&j1=948.02(2)&jump=948.02(2)) ¶¶15-18.

*State v. Michael J. Forster*, 2003 WI App 29, PFR filed 1/31/03

For Forster: Martha K. Askins, SPD, Madison Appellate, PFR 1/31/03

SECOND-DEGREE SEXUAL ASSAULT, § 948.02(2) — SUFFICIENCY OF EVIDENCE

*State v. Michael J. Forster*, 2003 WI App 29, PFR filed 1/31/03

For Forster: Martha K. Askins, SPD, Madison Appellate, PFR 1/31/03

The male victim's testimony that the defendant "rubbed his nipple in a circular motion, while kissing [his] neck, for approximately twenty-five minutes," established that the defendant touched an intimate part (chest) with illicit intent. ¶¶19-20.

CRIMES: THEFT BY FRAUD, § 943.20(1)(d) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=162403&infobase=stats.nfo&j1=943.20%281%29%28d%29&jump=943.20%281%29%28d%29](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=162403&infobase=stats.nfo&j1=943.20%281%29%28d%29&jump=943.20%281%29%28d%29)

ELEMENTS — AGENCY

*State v. Todd W. Timblin*, 2002 WI App 304

For Timblin: Alex Flynn

Agency isn't necessarily becomes an element of theft by fraud, § 943.20(1)(d), even if the defendant obtains the property through an intermediary. The intermediary must actually be an agent before an agency relationship is necessary to state's proof. Where, as here, the intermediary acted as a mere "conduit" for delivering money between defrauded victims and defendant — where the victims self-managed the money by maintaining control over when and to whom the money would be turned over; and where there was no "manifestation" of an intent to establish an agency relationship — agency was not an element of the offense. ¶¶22-30.

MULTIPLICITY – SEPARATE COUNTS CHARGING THEFT BY FRAUD AGAINST SAME VICTIM OCCURRING OVER PERIOD OF TIME NOT MULTIPLICITOUS BECAUSE EACH INVOLVED A DISTINCT FALSE REPRESENTATION AND SEPARATE VOLITIONAL ACT, ¶¶31-47

*State v. Jesse H. Swinson*, <http://www.courts.state.wi.us/html/ca/02/02-0396.htm> 2003 WI App 45, PFR filed 3/24/03

For Swinson: Pamela Pepper

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**DEFENSES**

CLAIM/ISSUE PRECLUSION — SEXUALLY VIOLENT PERSONS PROCEEDING – DISMISSAL OF PRIOR PETITION AT TRIAL FOR INSUFFICIENT PROOF DIDN'T BAR SUBSEQUENT PETITION BASED ON NEW CIRCUMSTANCES (CHIEFLY, PAROLE REVOCATION), ¶22

*State v. Kenneth Parrish*, 2002 WI App 263, *PFR filed 11/11/02*

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

STATUTE OF LIMITATIONS, § 939.74(1) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=90582&infobase=stats99.nfo&j1=939.74\(1\)&jump=939.74\(1\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=90582&infobase=stats99.nfo&j1=939.74(1)&jump=939.74(1)) – FILING OF COMPLAINT COMMENCES PROSECUTION OF ALREADY-INCARCERATED DEFENDANT

*State v. Kevin D. Jennings*, <http://www.courts.state.wi.us/html/sc/01/01-0507.htm> 2003 WI 10, reversing 2002 WI App 16, 250 Wis. 2d 138, 640 N.W.2d 165

For Jennings: Steven M. Compton

STATUTORY DOUBLE JEOPARDY, § 939.71 [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=220347&infobase=stats99.nfo&j1=939.71&jump=939.71](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=220347&infobase=stats99.nfo&j1=939.71&jump=939.71) – LESSER PROTECTION THAN AFFORDED DRUG PROSECUTIONS, § 961.45 [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=220347&infobase=stats99.nfo&j1=961.45&jump=961.45](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=220347&infobase=stats99.nfo&j1=961.45&jump=961.45) DOESN'T VIOLATE EQUAL PROTECTION, ¶55

*State v. Jesse H. Swinson*, 2003 WI App 45, *PFR filed 3/24/03*

For Swinson: Pamela Pepper

**DOUBLE JEOPARDY**

ACQUITTAL OF GREATER OFFENSE BARS RETRIAL ON LESSER INCLUDED OFFENSE: THIS PRINCIPLE EXTENDED TO BAIL JUMPING CHARGE BASED ON LESSER OFFENSE AFTER JURY HAS ACQUITTED OF THE GREATER OFFENSE

*State v. Wyatt Daniel Henning*, 2003 WI App 54, (AG) *PFR filed 3/20/03*

For Henning: Jack E. Schairer, SPD, Madison Appellate

**DUE PROCESS**

PROSECUTOR'S MAKING MORE ONEROUS PLEA OFFER AFTER DEFENDANT OBTAINED RELIEF NOT VINDICTIVE, GIVEN ADDITIONAL EVIDENCE ESTABLISHING STRONGER CASE, ¶¶26-32

*State v. Peter G. Tkacz*, 2002 WI App 281, *PFR filed 11/14/02*

For Tkacz: Mark S. Rosen

**EVIDENCE**

CROSS-EXAMINATION — MOTIVE TO LIE

*State v. Bernell Ross*, 2003 WI App 27, *PFR filed 2/21/03*

For Ross: Andrew Mishlove

¶44. The State charged Gundy as an accomplice to Ross's criminal activity. Gundy was arrested in Maryland, and brought back to Milwaukee where he was held in custody. Ross contends that pursuant to a plea agreement, Gundy was released from custody, and secured leniency in return for his testimony against Ross. Ross argues that he should have been allowed to make inquiry about Gundy's release from custody as a possible motive for false testimony. If that were the case, indeed Ross's counsel would have been entitled to question

Gundy about his release from custody. The error of this contention, however, as pointed out by the trial court, is that Gundy had secured his release before a plea agreement had been reached.

#### EXPERT/RELEVANCE — “PROFILE CHARACTER” (*Richard A.P.*: ABSENCE OF SEX OFFENDER CHARACTERISTICS)

*State v. Steven G. Walters*, 2003 WI App 24, PFR (AG) filed 2/14/03

For Walters: Jenelle L. Glasbrenner, David A. Danz

The trial court erroneously exercised discretion in excluding *Richard A.P.* evidence. (¶15: “*Richard A.P.* evidence is defined as evidence introduced by a defendant to show that he or she lacked the psychological characteristics of a sex offender and therefore was unlikely to have committed the charged crime. *Davis*, 2002 WI 75 at ¶1.) As with all character evidence, this evidence must be relevant (relate to a consequential fact or proposition; and, have probative value), and may be introduced through opinion testimony. ¶18. Admissibility of expert testimony, though broad, depends on relevancy and the expert’s qualifications. ¶19. The offer of proof in this case “is nearly identical” to the one in *Davis*, and admissibility is therefore compelled:

#### EXPERT — MEMORY AND SUGGESTIBILITY, CHILD WITNESS

*State v. Steven G. Walters*, 2003 WI App 24, PFR (AG) filed 2/14/03

For Walters: Jenelle L. Glasbrenner, David A. Danz

¶29. The trial court properly exercised its discretion in granting the State’s motion to exclude Dr. Underwager’s testimony. In doing so, the trial court provided three bases. First, the trial court found that the majority of Dr. Underwager’s testimony would cover matters within the knowledge and general experience of the community which would not require expert testimony. In addition, the trial court found that Dr. Underwager’s proffered testimony would not have highlighted specific examples of improper techniques used by the police nor explained how these techniques could have affected the children’s statements. Finally, the trial court concluded that because the State was planning on using live witnesses and would not rely on the children’s statements to police, evidence regarding the interviewing techniques would be, at best, minimally relevant. On this issue, the trial court considered the relevant facts, applied a correct standard of law and arrived at a reasonable result through a rational thought process, and we affirm. See *Peters*, 192 Wis. 2d at 685.

#### CHARACTER — EXTRINSIC PROOF, [§ 906.08\(2\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=906.08(2)&jump=906.08(2))

*State v. Troy D. Moore*, 2002 WI App 245

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

Extrinsic evidence offered by the state solely to bolster a witness’s credibility, by showing that he had provided reliable information leading to the arrests of other drug dealers, violated § 906.08(2). ¶15. (Note: the court holds open the question of whether such evidence might be admissible under [§ 904.04\(2\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=904.04(2)&jump=904.04(2)) ¶15 n. 2.)

#### HEARSAY –STATEMENT DIDN’T SATISFY AGAINST-INTEREST EXCEPTION, [§ 908.045\(4\)](http://www.courts.state.wi.us/html/sc/00/00-3354.htm), WHERE DECLARANT NEVER ACTUALLY TOOK RESPONSIBILITY FOR THE DRUGS, ¶¶32-34

*State v. Sherrie S. Tucker*, <http://www.courts.state.wi.us/html/sc/00/00-3354.htm> 2003 WI 12, [on certification](http://www.courts.state.wi.us/html/sc/00/00-3354.htm)

For Tucker: Paul LaZotte, SPD, Madison Appellate

#### LOSSES INCURRED BY DEFRAUDED INVESTORS — RACKETEERING CHARGE

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

Evidence of investor losses is relevant to a charge of racketeering, [§ 946.83 http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=111376&infobase=stats97.nfo&j1=946.83&jump=946.83](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=111376&infobase=stats97.nfo&j1=946.83&jump=946.83) ¶37.

MISCONDUCT — IN PROSECUTION FOR BATTERY AGAINST THE DEFENDANT’S LIVE-IN GIRLFRIEND, EVIDENCE OF THE DEFENDANT’S DOMESTIC ABUSE OF HIS FORMER WIFE WAS ADMISSIBLE, ¶22

*State v. Joseph F. Volk*, <http://www.courts.state.wi.us/html/ca/01/01-3342.htm> 2002 WI App 274

For Volk: Charles B. Vetzner, SPD, Madison App

PRIVILEGE — HUSBAND-WIFE — 3rd-PARTY EXCEPTION

*State v. Richard G.B.*, <http://www.courts.state.wi.us/html/ca/02/02-1302.htm> 2003 WI App 12, *PFR filed 1/13/03*

For Richard G.B.: Bridget E. Boyle

The “third-party exception” to spousal privilege — which overrides the privilege for crimes committed “against” the spouse, [§ 905.05\(3\) http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=161905&infobase=stats.nfo&j1=905.05%283%29&jump=905.05%283%29](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=161905&infobase=stats.nfo&j1=905.05%283%29&jump=905.05%283%29)

is triggered by sexual assault of a non-spouse, on the theory that such an act amounts to adultery, [§ 944.16\(1\) http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100036&infobase=stats.nfo&j1=944.16\(1\)&jump=944.16\(1\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100036&infobase=stats.nfo&j1=944.16(1)&jump=944.16(1)) hence a crime against the spouse. ¶¶15-16.

(Note: The court’s wholly appropriate recognition that adultery is no longer prosecuted indeed ought to raise a red flag. More precisely, adultery may no longer be *prosecutable*. In some states, such an archaic “offense” would violate a state constitutional privacy right. *E.g., In re: J.M.*, S02A1432 (Ga. 1/13/03) (fornication statute violates privacy). And, there is currently pending in the Supreme Court the *federal* question of whether a sodomy statute on its face violates equal protection and/or privacy. *Lawrence v. Texas*, 02-102. Wisconsin doesn’t have a specific privacy provision but the federal question remains, if nothing else. In addition, the conceded absence of prosecutions triggers the doctrine of “desuetude”: “a statute may be abrogated because of its long disuse.” The statutory exception doesn’t speak of “transgressions against” — which has a broad, even moralistic coloration — but of “crime(s) against,” which clearly suggests something more technical; that is, there first must *be* a crime. If the “crime” relates to a statute which *has been abrogated through non-use*, then is it really a “crime”?)

## GUILTY PLEA

ADMONISHMENTS—DEPORTATION – RULE OF *State v. Douangmala*, 2002 WI 62, REQUIRING ON-RECORD COLLOQUY WITH RESPECT TO DEPORTATION, DOESN’T APPLY RETROACTIVELY TO DEFENDANTS WHO HAVE EXHAUSTED DIRECT APPEAL REMEDIES

*State v. Olayinka Kazeem Lagundoye*, 2003 WI App 63, *PFR filed 2/25/03*

For Lagundoye: Geoffrey Y. Muwonge

ADMONISHMENTS—ELEMENTS

*State v. Richard A. Lange*, 2003 WI App 2

For Lange: Daniel F. Snyder

Where the plea form made reference to an “attached sheet” which was not in fact attached, and the trial court did not go over the elements with the defendant, “the record is barren as to any explanation or detailing to Lange of the elements of the offense,” and Lange has established a prima facie case for plea-withdrawal. ¶¶19-22. Remedy is remand for a hearing where state will have opportunity to prove that Lange in fact understood the elements. ¶¶28-30.

## ADMONISHMENTS — RIGHTS

*State v. Richard A. Lange*, 2003 WI App 2

For Lange: Daniel F. Snyder

Trial court's colloquy sufficiently established defendant's understanding of rights waived by guilty plea. ¶¶23-27.

## ADMONISHMENTS – COURT MUST PERSONALLY INFORM DEFENDANT THAT PLEA BARGAIN NOT BINDING

*State v. Corey J. Hampton*, <http://www.courts.state.wi.us/html/ca/01/01-0509.htm> 2002 WI App 293, (AG's) PFR granted 2/19/03

For Hampton: Melinda A. Swartz, SPD, Milwaukee Appellate

On-line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/010509.pdf>

## PLEA BARGAIN — PARTIAL WITHDRAWAL: REPUDIATION OF ENTIRE BARGAIN

*State v. Richard A. Lange*, 2003 WI App 2

For Lange: Daniel F. Snyder

Partial relief against a plea bargain-based guilty plea “constitutes a repudiation of the entire plea agreement,” ¶32, a principle which is now extended to instances where there are multiple judgments of conviction not all of which are under appeal, under the rationale of *State v. Briggs*, <http://www.courts.state.wi.us/html/ca/97/97-1558.htm> 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998):

¶36 We see no reason why the same logic should not apply to the instant case where the convictions covered by a plea agreement are recited in multiple judgments of convictions as opposed to a single judgment of conviction. All of the convictions stemmed from a singular, global plea agreement and thus were “interconnected” within the meaning of *Briggs*. The multiple convictions could have been entered in a single judgment of conviction, which would clearly allow us to apply *Briggs*. Commonsense dictates that jurisdictional bars should rest on substantive and meaningful principles, not on the ministerial and artificial choice as to how the judgments of conviction were clerically entered.

¶37 Therefore, if the State fails to satisfy its shifted burden under *Bangert* at the remand proceedings, the trial court is authorized to vacate both judgments of conviction and to reinstate the original charges alleged against Lange in both cases.

(Note: One of the major landmines for appellate counsel, *see, e.g., State v. William J. Church (II)*, 2002 WI App 212, PFR granted 10/21/02. This isn't an especially startling development, *see, e.g., United States v. Binford*, <http://www.ca7.uscourts.gov/op3.fwx?yr=96&num=2419&Submit1=Request+Opinion> 108 F.3d 723 (7th Cir. 1997) (in federal system, partial relief on appeal causes “sentencing package” to become “unbundled”). But sauce for the goose ought to be sauce for the gander, so that in some instances the defendant might want to argue entitlement to resentencing after grant of partial relief. The issue here is broader than mere resentencing, namely vacating a plea-based judgment altogether at the state's behest, but that might be a difference of degree rather than kind. Note, though, that vacating the judgment is discretionary, not mandatory. ¶47 n. 14.)

## PLEA BARGAIN – PROSECUTOR'S RETENTION OF “FREE HAND” AS TO PROBATION CONDITIONS ALLOWED ARGUMENT THAT DEFENDANT PRESENTED DANGER TO COMMUNITY, IN SUPPORT OF MAXIMUM JAIL TIME AS PROBATIONARY CONDITION, ¶¶17-21

*State v. Victor Naydihor*, 2002 WI App 272, PFR filed 11/25/02

For Naydihor: Philip J. Brehm

(*State v. Williams*, 2002 WI 1, ¶¶47-48, 249 Wis. 2d 492, 637 N.W.2d 733, distinguished.)

## WITHDRAWAL — FELONY MURDER — MULTIPLICITOUS CHARGE (FELONY MURDER AND UNDERLYING FELONY)

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*State v. Theodore J. Krawczyk*, 2003 WI App 6, PFR filed 1/21/03

For Krawczyk: John T. Wasielewski

¶29. We conclude that Krawczyk's plea to both felony murder and the underlying armed robbery, the latter conviction having been set aside, does not provide a basis for withdrawal of his plea to felony murder. First and foremost, the record is devoid of any evidence establishing that Krawczyk would not have pled guilty to felony murder (and to the other two offenses of which he remains convicted) had he known of the multiplicity of the felony murder and armed robbery charges. Krawczyk's failure to testify that he would not have pled guilty to felony murder had he known of the multiplicity is not a minor omission. Had he so testified, he would have been subject to cross-examination on the point, and the State might have seen fit to present rebuttal testimony from Krawczyk's trial counsel. Moreover, the failure to testify in this regard deprives us of the trial court's assessment of the credibility of a claim by Krawczyk that he would not have pled guilty to felony murder had he known of the double jeopardy violation.

#### WITHDRAWAL — PLEADING REQUIREMENTS

*State v. Corey J. Hampton*, 2002 WI App 293, (AG's) PFR granted 2/19/03

For Hampton: Melinda A. Swartz, SPD, Milwaukee Appellate

On-line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/010509.pdf>

The pleading requirements for a hearing imposed by *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996) aren't applicable to a motion for plea-withdrawal based on defective colloquy, ¶20:

#### JUDGE

#### COMMENT ON DEFENDANT-WITNESS

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

The trial court's "brief admonitory remarks" to defendant, during his testimony on direct, regarding his "sarcasm" and "flippancy," "were well within the proper range of the court's power to take all necessary steps to aid in the discovery of the truth," and not comments on his credibility. Hence, mistrial wasn't necessary.

¶¶46-51.

#### JURISDICTION

WHERE AN OFFENSE IS COMPRISED OF MULTIPLE ACTS, VENUE IN A PARTICULAR COUNTY IS ESTABLISHED PER [§ 971.19\(2\) http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=161828&infobase=stats99.nfo&j1=971.19%282%29&jump=971.19%282%29](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=161828&infobase=stats99.nfo&j1=971.19%282%29&jump=971.19%282%29)

WHEN ANY ACT OCCURS IN THAT COUNTY, ¶¶22-23

*State v. Jesse H. Swinson*, 2003 WI App 45, PFR filed 3/24/03

For Swinson: Pamela Pepper

#### JURY

ANONYMOUS JURY – TEST: TRIAL COURT'S FAILURE TO MAKE INDIVIDUALIZED DETERMINATION THAT JURY NEEDED PROTECTION OF ANONYMITY WAS ERROR, THOUGH HARMLESS

*State v. Sherrie S. Tucker*, <http://www.courts.state.wi.us/html/sc/00/00-3354.htm> 2003 WI 12, on certification

For Tucker: Paul LaZotte, SPD, Madison Appellate

INSTRUCTIONS – LESSER OFFENSE – JURY MAY NOT ASSIGN GUILT ON LESSER OFFENSE WITHOUT SPECIFIC INSTRUCTION, ¶¶23-24

*State v. Wyatt Daniel Henning*, 2003 WI App 54, (AG) PFR filed 3/20/03

For Henning: Jack E. Schairer, SPD, Madison Appellate

INSTRUCTIONS — TERRITORIAL DEFENSE, § 939.03 [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=112870&infobase=stats99.nfo&j1=939.03&jump=939.03](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=112870&infobase=stats99.nfo&j1=939.03&jump=939.03)

*State v. Shon D. Brown*, 2003 WI App 34, PFR filed 2/3/03

For Brown: Robert T. Ruth

¶23. The question of whether or when a jury must be instructed on the State's burden to establish its territorial jurisdiction over a defendant for charged offenses appears to be one of first impression in Wisconsin. See Wis JI-Criminal 268. We conclude that a jury instruction on territorial jurisdiction is required only when a genuine dispute exists regarding the facts necessary to establish Wisconsin's territorial jurisdiction over a charged crime. Because no such dispute existed in this case, the trial court did not err in failing to instruct the jury on the jurisdictional issue....

INSTRUCTIONS — PTAC — “NATURAL AND PROBABLE CONSEQUENCES” — EVIDENTIARY SUPPORT

*State v. Jeffrey R. Groth*, 2002 WI App 299, PFR filed 12/11/02

For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

The evidence supported an instruction assigning ptac liability if the jury found that the charged offense (second-degree reckless homicide while armed) was a “natural and probable consequences” of the intended crime (second-degree reckless endangering while armed). ¶¶12-15 (court stressing that recklessness common to both offenses; and: overwhelming evidence of Groth's intent to seek “armed retaliation”; Groth secured gun and handed it to direct actor after he disparaged Groth's willingness to fire it).

INSTRUCTIONS – VENUE INSTRUCTION NEED BE GIVEN ONLY WHEN VENUE IS CONTESTED, ¶26

*State v. Jesse H. Swinson*, 2003 WI App 45, PFR filed 3/24/03

For Swinson: Pamela Pepper

SELECTION — *Batson*

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

¶15. In a challenge to a *Batson* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=476&invol=79> ruling, we review the trial court's determination as to whether the State had a discriminatory intent as a finding of historical fact, which we shall not disturb unless clearly erroneous. *State v. Gregory*, <http://www.courts.state.wi.us/html/ca/00/00-0961.htm> 2001 WI App 107, ¶5, 244 Wis. 2d 65, 630 N.W.2d 711. The methodology we employ is a three-step process that may involve shifting burdens, depending upon the evidence presented. In the first step, the accused must make a prima facie showing that the State acted with discriminatory intent by establishing that it exercised peremptory strikes on the basis of race, gender, or any other prohibited category. *State v. Jagodinsky*, <http://www.courts.state.wi.us/html/ca/96/96-2927.htm> 209 Wis. 2d 577, 580, 563 N.W.2d 188 (Ct. App. 1997). The trial court may consider all relevant factors in determining whether the accused made a prima facie case. *State v. Walker*, 154 Wis. 2d 158, 173-74, 453 N.W.2d 127 (1990).

(The victims were African-American; the state struck three African-Americans, one Hispanic and three

whites; the trial court's ruling that Ross had failed to make a prima facie *Batson* showing is upheld as not clearly erroneous. ¶¶19-21.)

#### INSTRUCTIONS — THEORY OF DEFENSE — TEST

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

¶23. Granting the request of an accused for a specific instruction is required where there is any foundation in the evidence for the giving of such instruction, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. In determining whether the requested instruction is required, we must not weigh the evidence or look to the totality of the evidence; rather, we must view the evidence in the light most favorable to the accused. See *State v. Giminski*, <http://www.courts.state.wi.us/html/ca/00/00-3073.htm> 2001 WI App 211, ¶8, 247 Wis. 2d 750, 634 N.W.2d 604. Whether the evidence, viewed in the light most favorable to Ross, supplies a sufficient basis to include the proposed instruction is a question of law, and will be reviewed independently. *Id.* at ¶11.

#### INSTRUCTIONS — THEORY OF DEFENSE — “ADVICE OF COUNSEL,” AS NEGATING WILLFULNESS

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

¶24. To warrant an advice-of-counsel theory of defense instruction, both parties agree that Ross was required to show that:

(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, and (5) then acted strictly in accordance with the advice of his attorney who had been given a full report. *United States v. Cheek*, 3 F.3d 1057, 1061 (7th Cir. 1993) (citation omitted). For two reasons, we reject this claim of error...

¶27. Here, under neither the securities fraud statutes nor WOCCA is the State required to prove that the accused acted with intent to defraud or with knowledge that the law was violated. All that the State is required to prove is that the accused acted intentionally in the sense that he or she was aware of the act that he or she was performing. See generally *State v. Mueller*, 201 Wis. 2d 121, 549 N.W.2d 455 (Ct. App. 1996). Because Ross's specific state of mind was not relevant to any of the elements of the crimes with which he had been charged, the advice-of-counsel theory of defense instruction would not have been applicable.

¶28. Second, the trial court concluded that the evidence did not warrant the instruction. The *Cheek* five-part test is couched in conjunctive, not disjunctive, terms. Ross had to present evidence, which when viewed in a light most favorable to him, demonstrated that he fulfilled all five requirements of the test. He claims that “[t]he record is replete with testimony upon which a jury could have found, if properly instructed, that [he] relied on the advice of counsel and, hence, did not willfully violate the law.” We are not convinced.

### JUVENILE PROCEEDINGS

#### DELINQUENCY – EXTENSION OF “ORIGINAL DISPOSITIONAL ORDER”

*State v. Terry T.*, <http://www.courts.state.wi.us/ca/opinions/02/pdf/02-2502.pdf> 2002 WI App 21

For Terry T.: Michael Yovovich, SPD, Madison Appellate

Original dispositional order of placement in secure correctional facility can't be extended if order expires after juvenile is 17. ¶1. This is an appeal after remand, in *State v. Terry T.*, 2002 WI App 81, which overruled a revised placement. On remand, the trial court for the first time ordered secure correctional placement. The

court of appeals regards this as an “original” secure placement, because it was the first time the necessary findings had been made. Because § 938.355(4)(a) provides that an “original dispositional order” can’t be extended beyond the juvenile’s 17<sup>th</sup> birthday, and because Terry T. turned 17 during the period covered by the remand order, the order couldn’t be extended beyond its expiration date. ¶¶11-13.

#### JIPS — TRUANCY

*State v. Jeremiah C.*; *State v. Katie H.*, 2003 WI App 40

For Juveniles: Susan E. Alesia, SPD, Madison Appellate

¶15. By the plain language of the statutes, a juvenile cannot be found habitually truant, and thus in need of protection or services subject to the court’s jurisdiction, for failing to attend school after the end of the school term in which the juvenile turns eighteen because the juvenile is not required to attend school after the end of the school term in which he or she turns eighteen. Logically, then, a JIPS order based solely on habitual truancy cannot extend past the time frame in which the juvenile is required to attend school.

#### PRISON CONDITIONS AND PRISON LITIGATION REFORM ACT

FILING FEE – CONSTITUTIONALITY – NO IMPAIRMENT ON RIGHT OF ACCESS TO COURTS, RELIGIOUS FREEDOM, OR EQUAL PROTECTION

*State ex rel. Nathaniel A. Lindell v. Litscher*, <http://www.courts.state.wi.us/html/ca/02/02-1389.htm>  
2003 WI App 36

GOOD-TIME – SENTENCE OF WISCONSIN PRISONER TRANSFERRED TO OUT-OF-STATE PRISON REGULATED BY WISCONSIN LAW, SO THAT S/HE NOT ENTITLED TO AWARD OF GOOD-TIME CREDIT UNDER THE OTHER STATE’S LAW

*State ex rel Darrell W. Griffin v. Litscher*, <http://www.courts.state.wi.us/html/ca/02/02-1704.htm> 2003 WI App 60

JUDICIAL REVIEW OF VALIDITY OF RULE MUST BE BROUGHT AS DECLARATORY JUDGMENT IN DANE COUNTY

*Michael S. Johnson v. Berge*, 2003 WI App 51

LEGAL MAIL – ENVELOPE ADDRESSED TO INMATE AND MARKED “LEGAL PAPERS” DIDN’T CREATE 6<sup>th</sup> AMENDMENT RIGHT TO COUNSEL SO AS TO REQUIRE INMATE’S PRESENCE WHEN AUTHORITIES OPENED ENVELOPE, ¶15

*State v. Joseph Steffes*, <http://www.courts.state.wi.us/html/ca/02/02-1300.htm> 2003 WI App 55, PFR filed 3/13/03

For Steffes: Daniel P. Ryan

MAIL –WIS. ADMIN. CODE § [DOC 309.04\(3\)\(a\)](http://folio.legis.state.wi.us/cgi-bin/om_isapidll?clientID=255626&infobase=codenfo&jl=doc%20309.04(3)(a)&jump=doc%20309.04(3)(a)&softpage=Browse+Frame+Pg) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapidll?clientID=255626&infobase=codenfo&jl=doc%20309.04\(3\)\(a\)&jump=doc%20309.04\(3\)\(a\)&softpage=Browse Frame Pg](http://folio.legis.state.wi.us/cgi-bin/om_isapidll?clientID=255626&infobase=codenfo&jl=doc%20309.04(3)(a)&jump=doc%20309.04(3)(a)&softpage=Browse+Frame+Pg)  
DOESN’T CREATE 14<sup>TH</sup> AMENDMENT LIBERTY INTEREST IN APPARENT LEGAL MAIL, THEREFORE ENVELOPE MAY BE OPENED OUTSIDE THE ADDRESSEE-INMATE’S PRESENCE., ¶23

*State v. Joseph Steffes*, 2003 WI App 55, PFR filed 3/13/03

For Steffes: Daniel P. Ryan

#### PROBATION/PAROLE

COMPUTATION OF GOOD-TIME ON MISDEMEANOR PRISON SENTENCE

*State ex rel. Vonnie D. Darby*, <http://www.courts.state.wi.us/html/ca/02/02-1018.htm> 2002 WI App 258  
Place of confinement, rather than nature of underlying conviction, controls. Because [§ 302.11\(7\)\(a\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100382&infobase=stats99.nfo&j1=302.11(7)(a)&jump=302.11(7)(a)) doesn't distinguish between felony and misdemeanor portions, and because all sentences being served jointly are treated as a single aggregate sentence, that provision controls. Moreover, [§ 302.43](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100382&infobase=stats99.nfo&j1=302.43&jump=302.43) on its face is clearly limited to inmates of county jails. ¶¶13-14.

#### REJECTION OF PROBATION BY DEFENDANT, AFTER IMPOSITION – NEED NOT BE CLEAR AND UNEQUIVOCAL, ¶28

*State v. Harold C. Pote, III*, 2003 WI App 30  
For Pote: John A. Pray, Remington Law Center

#### REJECTION OF PROBATION BY DEFENDANT, PROCEDURE

*State v. Harold C. Pote, III*, 2003 WI App 30  
For Pote: John A. Pray, Remington Law Center

Rejection of probation is not tantamount to revocation, ¶30. Therefore, “It is sufficient that the record show that the defendant knew the possible consequences of refusing probation, a showing typically supplied (as in this case) by the plea colloquy.” ¶32. Pote was advised *months earlier at the plea colloquy* of the maximum sentence and of the potential for incarceration upon revocation; “no additional colloquy was required at the time Pote rejected probation.” *Id.*

#### REVOCAION — NECESSITY OF SEPARATE APPEAL OF VIOLATED CONDITION

*State ex rel Gary Tate*, <http://www.courts.state.wi.us/html/ca/00/00-1635.htm> 2002 WI 127, *reversing* 2001 WI App 131, 246 Wis. 2d 293, 630 N.W.2d 761

For Tate: Jerome F. Buting, Pamela S. Moorshead and Buting & Williams  
For amicus: Robert R. Henak

Probationer revoked for violating a condition later deemed unconstitutional isn't required to separately attack that condition through attempts at modification, but may raise the attack through certiorari challenge to the revocation. ¶¶23-25 (overruling court of appeals on this point).

### SEARCH & SEIZURE

#### APPLICABILITY OF EXCLUSIONARY RULE – VIOLATION OF ADMINISTRATIVE CODE DOESN'T SUPPORT SUPPRESSION, ¶¶9, 25

*State v. Joseph Steffes*, 2003 WI App 55, *PFR filed 3/13/03*  
For Steffes: Daniel P. Ryan

#### ARREST – PROBABLE CAUSE, OWI: POLICE HAD PROBABLE CAUSE TO ARREST WHERE DRIVER INVOLVED IN SERIOUS CRASH ADMITTED DRINKING AND SMELLED STRONGLY OF ALCOHOL, ¶15

*State v. Cara A. Erickson*, <http://www.courts.state.wi.us/html/ca/01/01-3367.htm> 2003 WI App 43, *PFR filed 2/14/03*

For Erickson: Stephen J. Eisenberg

#### APPLICABILITY OF EXCLUSIONARY RULE – VIENNA CONVENTION DOESN'T CREATE PRIVATELY ENFORCEABLE RIGHT

*State v. Jose Carlos Navarro*, <http://www.courts.state.wi.us/html/ca/02/02-0850.htm> 2003 WI App 50,

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*PFR filed 3/5/03*

For Navarro: Michael S. Holzman

APPLICABILITY OF EXCLUSIONARY RULE – EVIDENCE RECOVERED AS RESULT OF INVESTIGATIVE STOP OUTSIDE OFFICER’S JURISDICTION NOT SUBJECT TO SUPPRESSION

*State v. James W. Keith*, 2003 WI App 47, *PFR filed 3/5/03*

For Keith: Christopher A. Mutschler

ARREST — EXEMPTION — LEGISLATOR

*State v. Brian B. Burke*, 2002 WI App 291, *PFR filed 11/29/02*

For Burke: Robert H. Friebert

¶22. We conclude that the members of the Wisconsin Constitutional Convention did not intend to create a legislative privilege from criminal arrest and prosecution when they included article IV, section 15 in the Wisconsin Constitution. The phrase “treason, felony and breach of the peace” in that section was intended to mean “all crimes.” We therefore agree with the trial court that Burke is not privileged from criminal prosecution. Accordingly, the trial court correctly denied his motion for a stay of proceedings.

ARREST — PROLONGED DETENTION TO PROCESS SCENE

*State v. Guy W. Colstad*, 2003 WI App 25

For Colstad: T. Christopher Kelly

The prolonged detention of the driver at the scene of a fatal accident did not transmute a temporary stop into an arrest:

¶17 Colstad argues that the duration of his detention was unreasonable because the officer directed him to wait, instead of questioning Colstad sufficiently to dispel or confirm the officer’s suspicions, and because Colstad was made to wait approximately thirty to forty-five minutes before the officer resumed questioning. The State responds that the duration of the detention was reasonable given the chaotic accident scene and need for the officer to attend to the victim and process the scene. We agree with the State.

ARREST — PROLONGED DETENTION TO ADMINISTER FIELD SOBRIETY TESTS

*State v. Guy W. Colstad*, 2003 WI App 25

For Colstad: T. Christopher Kelly

Continued detention, in order to administer field sobriety tests, was supported by reasonable suspicion, given the defendant-driver’s mild odor of alcohol as well as ambiguity surrounding the cause of the fatal accident. “Thus, one reasonable possibility was that Colstad struck the child with his pickup truck because his judgment and driving skills were impaired by alcohol.” ¶21.

EXIGENCY — BLOOD ALCOHOL – ACTUAL ARREST UNNECESSARY FOR WARRANTLESS DRAW: PROBABLE CAUSE TO ARREST FOR DRUNK-DRIVING RELATED CRIME SUFFICES,

¶12

*State v. Cara A. Erickson*, 2003 WI App 43, *PFR filed 2/14/03*

For Erickson: Stephen J. Eisenberg

EXIGENCY — BLOOD ALCOHOL

*State v. James S. Riedel*, <http://www.courts.state.wi.us/html/ca/02/02-1772.htm> 2003 WI App 18, *PFR filed 1/27/03*

For Riedel: Ralph A. Kalal

Police not required to obtain warrant in order to test blood seized pursuant to Implied Consent Law; *State v. VanLaarhoven*, <http://www.courts.state.wi.us/html/ca/01/01-0222.htm> 2001 WI App 275 extended

(VanLaarhoven consented to initial seizure, Riedel didn't). ¶¶11-16.

#### REASONABLE SUSPICION ISSUES — INITIAL DETENTION, CIVIL TRAFFIC VIOLATION

*State v. Guy W. Colstad*, 2003 WI App 25

For Colstad: T. Christopher Kelly

Although some United States Supreme Court cases seemingly assume that probable cause is required to support a stop for civil infractions, state precedent allows such a stop on reasonable suspicion. ¶12. The stop in this case is upheld:

¶14 The undisputed testimony demonstrates that the collision occurred on a straight road with “absolutely clear” conditions and no trees, obstructions, or parked cars on the side of the road. Colstad explained that, although he was driving slowly because he knew children were in the area, a child ran into the road and into the side of his pickup truck. One possible explanation is that provided by Colstad: Colstad was exercising due care and the child darted into his path. However, another reasonable explanation is that Colstad hit the child because Colstad was not exercising proper attentiveness. The officer was not required to believe Colstad's explanation. Therefore, we conclude that the officer possessed a reasonable suspicion that Colstad was guilty of inattentive driving, contrary to WIS.

STAT. § 346.89(1) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=161709&infobase=stats97.nfo&j1=346.89%281%29&jump=346.89%281%29](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=161709&infobase=stats97.nfo&j1=346.89%281%29&jump=346.89%281%29)

#### REASONABLE SUSPICION ISSUES — STOP – BASIS – DRIVER PROPERLY STOPPED WHERE OFFICER KNEW HE DIDN'T HAVE LICENSE

*State v. Bruce A. Kassube*, <http://www.courts.state.wi.us/html/ca/02/02-2334.htm> 2003 WI App 64

For Kassube: Leonard D. Kachinsky

#### REASONABLE SUSPICION ISSUES — STOP — DURATION

*State v. Vernell T. Williams*, <http://www.courts.state.wi.us/html/ca/02/02-0384.htm> 2002 WI App 306

For Williams: Michael A. Haakenson

Having lawfully stopped a vehicle that matched the description of one sought in a domestic abuse incident, the officer was entitled to make a report of the stop, even if the driver was determined not to be the suspect. It was therefore reasonable to ask the driver for identification and, once he stated he had no identification with him, the officer had reasonable ground for further detention to determine through dispatch if the driver had a valid license. ¶¶21-22. However, this was the *only* basis for further detention at this point and, because the record isn't clear, remand is necessary to determine whether, under *State v. Gaulrupp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), a request for consent to search the car turned the lawful stop into an unlawful one. ¶¶23-37.

#### REASONABLE SUSPICION ISSUES — STOP – SUPPORTED BY REASONABLE SUSPICION, FOUR DAYS AFTER REPORTED DOMESTIC ABUSE INCIDENT, BECAUSE DEFENDANT'S CAR GENERALLY MATCHED THE DESCRIPTION OF THE SUSPECT'S CAR, ¶¶14-15

*State v. Vernell T. Williams*, 2002 WI App 306

For Williams: Michael A. Haakenson

(Note: The court casually lists the various factors articulated by *State v. Guzy*, 139 Wis. 2d 663, 677, 407 N.W.2d 548 (1987), but discards most as irrelevant to this case, ¶17 n. 2. The only factors involved here are particularity of the description and place of stop. As to the first, the car did match up in terms of make and model, but this is still pretty generic. Though not stressed by the court, what may have tipped the balance is that both described and stopped cars had a red pinstripe — arguably a distinctive enough characteristic to take the car out of the category of generic-description. As to the second factor, the court emphasizes the proximity to the reported crime, as overcoming the passage of time. ¶¶16-17.)

#### SUPPRESSION HEARING — PBT RESULT — EXPERT NOT NECESSARY

*State v. Guy W. Colstad*, 2003 WI App 25

For Colstad: T. Christopher Kelly

Expert testimony is not a prerequisite for admission of a PBT result at a suppression hearing. ¶29.

#### SUPPRESSION RULE — DEFENDANT'S TESTIFYING IN RESPONSE TO ILLEGALLY OBTAINED STATEMENTS

*State v. Christopher D. Anson*, 2002 WI App 270

For Anson: Steven J. Watson

¶27. This issue is governed by *Harrison v. United States*, 392 U.S. 219 (1968). *Harrison* teaches us that when a defendant takes the stand in order to overcome the impact of illegally obtained and used statements, his or her testimony is tainted by the same illegality that rendered the statements themselves inadmissible. See *State v. Middleton*, 135 Wis. 2d 297, 302, 399 N.W.2d 917 (Ct. App. 1986). If such is the case, the defendant does not waive his or her right against self-incrimination and the testimony should be suppressed. See *id.* at 316-17. The factual basis for such a finding, however, is for the trial court. See *id.* at 322.

¶28. Even where the trial court finds that the defendant would have decided to testify regardless of whether or not his or her statements had been suppressed, *Harrison* tells us it does not necessarily follow that the defendant's testimony is purged of the taint of the underlying illegality. On the contrary, *Harrison* teaches us that the natural inference is that the defendant would not have taken the stand and repeated the damaging statements if the prosecutor had not already placed the statements before the jury. See *Harrison*, 392 U.S. at 225-26.

(A *Harrison*-type problem is presented by the recent grant of *certiorari* in 02-6320, *John J. Fellers v. United States*, lower court decision, *United States v. Fellers*, <http://www.ca8.uscourts.gov/opndir/02/04/012045P.pdf> which questions whether a *Mirandized* statement following a confession in violation of the 6<sup>th</sup> amendment is voluntary.)

#### WARRANTLESS ENTRY OF RESIDENCE — EXIGENT CIRCUMSTANCES — DOMESTIC VIOLENCE INVESTIGATION

*State v. Mark S. Mielke*, <http://www.courts.state.wi.us/html/ca/01/01-3116.htm> 2002 WI App 251, *PFR* filed 10/3/02

For Mielke: David J. Van Lieshout

Warrantless entry of a residence by the police, to investigate a domestic violence report concededly providing probable cause, was supported by exigent circumstances where the police could reasonably conclude that the safety of the reported victim was being compromised.

#### SELF-INCRIMINATION

##### MIRANDA — EQUIVOCAL ASSERTION, RIGHT TO COUNSEL

*State v. Richard K. Fischer*, 2003 WI App 5, *PFR* filed 1/15/03

For Fischer: Mark S. Rosen

¶19. Applying *Davis* and *Jennings* here, we conclude that Fischer's statement to detectives that if the officers read him his rights he would not answer any questions and would request an attorney is sufficiently ambiguous or equivocal such that a reasonable officer in light of the circumstances would have understood only that Fischer might be invoking the right to counsel. See *Jennings*, 2002 WI 44 at ¶36. Fischer's request was conditional, as it depended upon something that had not yet happened but might happen in the future. His *Miranda* rights had not yet been read to him and thus he was not yet requesting counsel. A conditional and futuristic request for counsel is a statement that a reasonable officer in light of the circumstances would have understood only that Fischer might be invoking the right to counsel, see *Jennings*, 2002 WI 44 at ¶36, and thus is not a clear and unequivocal request for

counsel.

(Note: That is, a suspect already in custody who says he'll invoke his right to counsel once his rights are read hasn't unequivocally invoked that right.)

#### MIRANDA — FUNCTIONAL EQUIVALENT OF INTERROGATION

*State v. Richard K. Fischer*, 2003 WI App 5, *PFR* filed 1/15/03

For Fischer: Mark S. Rosen

Where “the entire exchange consisted of Fischer asking Vento about the evidence against him, and Vento merely responding to Fischer’s questions, after which Fischer would implicate himself ... Vento’s words and conduct in merely responding to Fischer’s questions regarding the evidence against him in the two robberies are not interrogation under the *Innis* test.” ¶¶33-36. (Nonetheless, Vento *did* engage in one instance of “express questioning,” Fischer’s answer to which is suppressible, but harmless. ¶¶37-40.)

#### SENTENCING

##### ARTICULATION OF REASONS FOR SENTENCE — TRUTH-IN-SENTENCING

*State v. Curtis E. Gallion*, <http://www.courts.state.wi.us/html/ca/01/01-0051.htm> 2002 WI App 265, *PFR* granted 2/19/03

For Gallion: Howard B. Eisenberg; Randall E. Paulson, SPD, Milwaukee App

Sentencing courts are not constitutionally required to justify with great specificity the particular sentence imposed under truth-in-sentencing. Nor are sentencing guidelines constitutionally required. ¶¶6-14.

##### ENHANCERS – MOTOR VEHICLE OFFENSE, CHS. 341-349, IS SUBJECT TO § 939.32 ENHANCEMENT BUT MAY NOT ITSELF SERVE AS ENHANCER

*State v. Richard W. Delaney*, <http://www.courts.state.wi.us/html/sc/01/01-1051.htm> 2003 WI 9, affirming **unpublished decision**

For Delaney: Joseph R. Cincotta

##### ENHANCERS — § 939.62(2m)(a), PERSISTENT REPEATER — DUE PROCESS SATISFIED, THOUGH GREATER PENALTY IMPOSED ON AN OFFENDER CONVICTED OF A SECOND CLASS B NON-FATAL CHILD SEXUAL ASSAULT THAN THE STATUTES REQUIRE TO BE IMPOSED ON AN OFFENDER CONVICTED OF A SECOND CLASS A FELONY HOMICIDE OFFENSE

*State v. Alan R. Radke*, 2003 WI 7, affirming **2002 WI App 146**

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

##### ENHANCERS — SUFFICIENCY OF PROOF

*State v. Razzie Watson, Sr.*, <http://www.courts.state.wi.us/html/ca/01/01-2674.htm> 2002 WI App 247

For Watson: Dennis Schertz

¶5 An admission from a defendant stating, “I am a repeater,” without more, is insufficient to constitute an admission of a prior conviction under WIS. STAT. § 973.12(1). As the circuit court indicated in its colloquy, “repeater” and “habitual offender” are legal, not factual terms, and a defendant may not be aware of what he or she is admitting. *Cf. State v. Collins*, <http://www.courts.state.wi.us/html/ca/01/01-2185.htm> 2002 WI App 177, ¶¶12-13, No. 01-2185-CR (holding that admission the defendant is a repeater is insufficient to show that convictions are “comparable” to a Wisconsin “serious felony” under WIS. STAT. § 939.62(2m)). *See also State v. Farr*, 119 Wis. 2d 651, 659, 350 N.W.2d 640 (1984) (stating that defendant’s admission “may not by statute be inferred”); *State v. Zimmerman*, 185 Wis. 2d 549, 557, 518 N.W.2d 303 (Ct. App. 1994) (holding that admission by defendant must make reference to the date of conviction and periods of incarceration if conviction is more than five years old).

¶6 However, *State v. Liebnitz*, <http://www.courts.state.wi.us/sc/opinions/98/PDF/98->

**2182.PDF** 231 Wis. 2d 272, 288, 603 N.W.2d 208 (1999), directs us to consider “the totality of the record.” The complaint against Watson alleges that he is a repeater and that he “plead guilty on May 9, 1997, to felon in possession of a firearm in case no. 96-CF-713 before Judge Montabon.” This allegation includes both the nature and the date of the prior conviction and put Watson on notice that the State was seeking a repeater charge and that this charge was based, at least in part, on the felon in possession allegation. We therefore conclude that the plea hearing colloquy, in which the circuit court explained the effect of Watson’s admission, together with the complaint, which alleged the nature and date of Watson’s previous conviction, establish that Watson “fully understood the nature of the repeater charge.” *Liebnitz*, 231 Wis. 2d at 275.

#### ENHANCERS— JUDGMENT ON PRIOR ENTERED AFTER COMMISSION OF CURRENT OFFENSE

*State v. Razzie Watson, Sr.*, 2002 WI App 247

For Watson: Dennis Schertz

A guilty plea suffices to establish a qualifying repeater-enhancement, even though the judgment of conviction on that plea isn’t entered until after commission of the offense being enhanced. ¶¶9-14.

#### ENHANCERS—TRUTH-IN-SENTENCING – ONLY ACTUAL CONFINEMENT, AND NOT EXTENDED SUPERVISION, SUBJECT TO § 939.62(1)(b) ENHANCEMENT, ¶¶36-42

*State v. Joseph F. Volk*, 2002 WI App 274

For Volk: Charles B. Vetzner, SPD, Madison App

The remedy for unsupported enhancement is resentencing (rather than commuting the ES excess under §

**973.13** <http://folio.legis.state.wi.us/cgi-bin/>

**om isapi.dll?clientID=100515&infobase=stats.nfo&j1=973.13&jump=973.13&softpage=Browse Frame Pg**

: “When a crucial component of such a sentence is overturned, it is proper and necessary for the sentencing court to revisit the entire question.” ¶¶46-49.

#### EXTENDED SUPERVISION — CONDITIONS — VAGUENESS CHALLENGE — NOTIFYING AGENT OF “DATING RELATIONSHIP”: “WE CONCLUDE THAT THE STATUTORY DEFINITION OF “DATING RELATIONSHIP” AS SET OUT IN WIS. STAT. § 813.12(1)(ag) [http://](http://folio.legis.state.wi.us/cgi-bin/)

[folio.legis.state.wi.us/cgi-bin/](http://folio.legis.state.wi.us/cgi-bin/)

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PROVIDES AN OBJECTIVE STANDARD FOR ENFORCEMENT AND FURTHER PROVIDES KOENIG WITH ADEQUATE NOTICE OF WHEN SHE MUST INTRODUCE SOMEONE TO HER AGENT,” ¶1

*State v. Cheryl A. Koenig*, <http://www.courts.state.wi.us/html/ca/02/02-1076.htm> 2003 WI App 12

For Koenig: Patrick Flanagan

#### FACTORS — VICTIM’S GOOD CHARACTER MAY BE CONSIDERED, ¶¶21-24

*State v. Curtis E. Gallion*, 2002 WI App 265, *PFR granted 2/19/03*

For Gallion: Howard B. Eisenberg; Randall E. Paulson, SPD, Milwaukee App

#### FACTORS — JAIL CREDIT — SENTENCING COURT MAY TAKE INTO ACCOUNT THE AMOUNT OF JAIL CREDIT TO BE AWARDED, IN THE NARROW INSTANCE WHERE THE COURT WANTS TO ASSURE A TERM OF IMPRISONMENT SUFFICIENTLY LENGTHY TO ALLOW EXPOSURE TO A TREATMENT PROGRAM

*State v. Eric S. Fenz*, <http://www.courts.state.wi.us/html/ca/01/01-1436.htm> 2002 WI App 244

For Fenz: Jacob W. Gobel

FACTORS — REFUSAL TO NAME AN ACCOMPLICE, OR OTHERWISE COOPERATE WITH LAW ENFORCEMENT, IS (ABSENT A VALID ASSERTION OF SELF-INCRIMINATION) A LEGITIMATE SENTENCING FACTOR, ¶9

*State v. Christopher Kaczynski*, <http://www.courts.state.wi.us/html/ca/02/02-0025.htm> 2002 WI App 276, PFR filed 11/20/02

For Kaczynski: Eugene Kaluzny

#### HARSHNESS

*State v. Christopher Kaczynski*, 2002 WI App 276, PFR filed 11/20/02

For Kaczynski: Eugene Kaluzny

Sentence of 10 years, where the conduct would have supported charges carrying 45 years, isn't harsh. ¶13.

RESTITUTION — SPECIAL DAMAGES: INCLUDES LOSS OF SICK LEAVE AND IS THEREFORE PERMISSIBLE UNDER § 973.20(5)(a) <http://folio.legis.state.wi.us/cgi-bin/>

[om\\_isapi.dll?clientID=100527&infobase=stats99.nfo&j1=973.20\(5\)\(a\)&jump=973.20\(5\)\(a\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100527&infobase=stats99.nfo&j1=973.20(5)(a)&jump=973.20(5)(a)) ¶12

*State v. Mark M. Loutsch*, <http://www.courts.state.wi.us/html/ca/02/02-1755.htm> 2003 WI App 18, PFR filed 1/17/03; X-PFR filed 1/31/03

For Loutsch: Charles B. Vetzner

RESTITUTION — DETERMINATION OF ABILITY TO PAY MAY NOT BE DEFERRED, ¶25

*State v. Mark M. Loutsch*, 2003 WI App 18, PFR filed 1/17/03; X-PFR filed 1/31/03

For Loutsch: Charles B. Vetzner

#### RESTITUTION – CAUSATION

*State v. Oscar A. Rash*, 2003 WI App 32, PFR filed 2/25/03

For Rash: Peter Koneazny, Diana Felsmann, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/020841.pdf>

The restitution order for damage to the victim's car was supported by sufficient causation, where the defendant abducted the victim for 20-30 minutes, during which time the unattended and unlocked car was broken into by unknown actor(s). ¶¶6-8.

¶8. The word "crime" as used in Wis. Stat. § 973.20(2) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=112602&infobase=statsnfo&j1=973.20\(2\)&jump=973.20\(2\)&softpage=Browse Frame Pg](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=112602&infobase=statsnfo&j1=973.20(2)&jump=973.20(2)&softpage=Browse Frame Pg) "encompass[es] all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge of which the defendant was convicted." *State v. Madlock*, <http://www.courts.state.wi.us/html/ca/98/98-2718.htm> 230 Wis. 2d 324, 333, 602 N.W.2d 104, 109 (Ct. App. 1999) (quoted source omitted, emphasis in quoted source). Thus, in ordering restitution, the sentencing court must "take[] a defendant's entire course of conduct into consideration" and not "break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." *Ibid.* (quoted source omitted). Additionally, a criminal cannot escape responsibility for restitution simply because he or she was not aware of the damage. *Id.*, 230 Wis. 2d at 336-337, 602 N.W.2d at 110; *cf. Butzow*, 51 Wis. 2d at 287, 187 N.W.2d at 352 ("foreseeability" is element of negligence not of "causation"). Given the legislative concern that victims be made whole insofar as that is possible, a victim's burden of proof to show causation is certainly not higher than would be a plaintiff's comparable burden in a civil case, and, although we do not have to decide it here, may be substantially lower. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground"). Here, it was reasonable for the postconviction court to conclude that but for Rash's

crime, Ivory's car would not have been taken and damaged and that Ivory's property in the car would not have been stolen.

(Note that "Wisconsin does not follow the majority view in *Palsgraf v. Long Island Railroad Co.*, 248 NY 339, 162 N.E. 99, 99-101 (NY 1928), under which the existence of a duty of care depends upon whether injury to the particular victim was foreseeable." *Gritzner v. Michael R.*, <http://www.courts.state.wi.us/html/sc/98/98-0327.htm> 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906 ¶20 n. 3. For a learned discussion, see Judge Dykman's dissent in *Hicks v. Nunnery* <http://www.courts.state.wi.us/html/ca/01/01-0751.htm> 2002 WI App 87, ¶¶77 et seq.)

#### RESTITUTION — CAUSAL CONNECTION — RACKETEERING

*State v. Bernell Ross*, 2003 WI App 27, PFR filed 2/21/03

For Ross: Andrew Mishlove

Ross was convicted of a pattern of racketeering involving securities fraud contrary to Wis. Stat. §§ [551.41\(2\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=111376&infobase=stats97.nfo&j1=%20551.41&jump=%20551.41) [946.82\(2\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=111376&infobase=stats97.nfo&j1=946.82&jump=946.82), (3), (4) [946.83](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=111376&infobase=stats97.nfo&j1=946.83&jump=946.83) [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=161455&infobase=stats97.nfo&j1=946.83&jump=946.83](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=161455&infobase=stats97.nfo&j1=946.83&jump=946.83) (WOCCA). This pattern of racketeering, based in fraudulent activities occurring in Wisconsin and contrary to the securities law, also affected investors in other parts of the country. By claiming at various times that the securities he was selling were registered in Wisconsin (which implied disclosure) when they were not, and then continuing to sell these securities after a stop order had been issued, Ross aided in creating victims in other states. Thus, it is clear that the fraudulent activities perpetrated in Wisconsin were a substantial factor in attracting investors in other states, which provides the proper nexus between the crimes and the losses to out-of-state victims. ¶¶55-57.

#### REVIEW — HARSHNESS

*State v. Curtis E. Gallion*, 2002 WI App 265, PFR granted 2/19/03

For Gallion: Howard B. Eisenberg; Randall E. Paulson, SPD, Milwaukee App

Sentence of 30 years (21 years confinement, 9 years ES) for homicide by intoxicated use of motor vehicle — "in the middle range of that authorized by the legislature," and committed by a defendant with a criminal history whose "situation presents something in the middle ground" — isn't too harsh. ¶¶30-41.

#### MODIFICATION — NEW FACTOR — TRUTH-IN-SENTENCING — EARLY COMPLETION OF ALL AVAILABLE REHABILITATION PROGRAMS IS A NEW FACTOR JUSTIFYING REDUCTION OF THE CONFINEMENT PORTION OF HER SENTENCE, ¶¶13-17

*State v. Dawn M. Champion*, <http://www.courts.state.wi.us/html/ca/01/01-1894.htm> 2002 WI App 267, PFR filed 12/2/02

For Champion: Patricia L. Arreazola

#### RESENTENCING — INCREASE IN ORIGINAL SENTENCE AFTER GRANT OF RELIEF

*State v. Victor Naydihor*, 2002 WI App 272, PFR filed 11/25/02

For Naydihor: Philip J. Brehm

An increased sentence on resentencing is barred unless the court expressly relies on events occurring, or coming to the court's attention, after original sentencing. But the court is not limited to consideration of the defendant's conduct. Here, the resentencing court properly relied on new and more current information pertaining to the victim's worsened financial and physical condition to justify the increase. ¶¶27-29. This information was "new," not merely something known to the original-sentencing court. ¶¶30-35.)

(Note: "Although the new and additional information operated to the detriment of Naydihor, such information

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might well benefit a defendant in another case.” ¶29.)

MODIFICATION – TIMELINESS — NEW-FACTOR BASED MOTION TO MODIFY SENTENCE IS BASED ON COURT’S INHERENT AUTHORITY AND ISN’T CONSTRAINED BY ANY TIME LIMIT, ¶¶11-12

*State v. Robert L. Noll*, <http://www.courts.state.wi.us/html/ca/01/01-3341.htm> 2002 WI App 273

HARSHNESS — SEXUAL ASSAULT

*State v. Richard G.B.*, 2003 WI App 12, PFR filed 1/13/03

For Richard G.B.: Bridget E. Boyle

Sentence of 18 years for sexual assault of a child (mouth-vagina intercourse with 15 year-old niece) wasn’t harsh and excessive, measured against a maximum possible sentence of 20 years. Trial court also “articulated its reasoning for the sentence and considered the appropriate factors” (namely, primary sentencing factors, weighed against Richard’s character). ¶¶18-21.

INACCURATE INFORMATION — PROCEDURE FOR CHALLENGING

*State v. Jeffrey R. Groth*, 2002 WI App 299, PFR filed 12/11/02

For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

¶22. A defendant who asks for resentencing because the court relied on inaccurate information must show both that the information was inaccurate and that the court relied on it. *Id.* The defendant carries the burden of proving both prongs-inaccuracy of the information and prejudicial reliance by the sentencing court-by clear and convincing evidence. *Id.* See also *State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Once a defendant does so, the burden shifts to the State to show that the error was harmless. *State v. Anderson*, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). An error is harmless if there is no reasonable probability that it contributed to the outcome. *Id.* at 411.

INACCURATE INFORMATION — RESENTENCING

*State v. Jeffrey R. Groth*, 2002 WI App 299, PFR filed 12/11/02

For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

The trial court’s disclaimer (on postconviction ruling) of reliance on information challenged as inaccurate isn’t binding on reviewing court; rather, appellate court “may independently review the record to determine the existence of any such reliance.” ¶¶27-28. Here, the record shows that this disclaimer “was, at least in part, factually inaccurate” (the sentencing court seemed to adopt a remark by the prosecutor that itself embodied the inaccuracy); and the information — that defendant beat pregnant women “is so heinous that it would be difficult (if not impossible or improper) for any sentencing court to ignore.” ¶¶29-31.

RE-SENTENCING – MULTIPLE COUNTS

*State v. Jeffrey R. Groth*, 2002 WI App 299, PFR filed 12/11/02

For Groth: Peter Koneazny, Randall E. Paulson, SPD, Milwaukee Appellate

On-Line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/013000.pdf>

Groth was sentenced on all three counts at the same hearing and, therefore, the court’s determination of his sentence on any of the counts may well have affected its determination and structuring of his sentences on all three. Neither party on appeal has suggested otherwise. Therefore, although Groth has not challenged his convictions for aiding a felon and carrying a concealed weapon, his resentencing should encompass those counts as well as the homicide. See *State v. Anderson*, 222 Wis. 2d 403, 409-12, 588 N.W.2d 75 (Ct. App. 1998).

¶39 n. 1.

**STATUTES****CONSTRUCTION — IN PARI MATERIA**

*State v. Jeremiah C.*; *State v. Katie H.*, 2003 WI App 40

For Juveniles: Susan E. Alesia, SPD, Madison Appellate

¶17. All the statutes cited above deal with the same subject matter and assist in implementing the goals and policies of the Juvenile Justice Code. No matter which version of Wis. Stat. § [938.355\(4\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=115939&infobase=stats99.nfo&j1=938.355(4)&jump=938.355(4)) is utilized, we must read it and Wis. Stat. §§ [118.15](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=160586&infobase=stats99.nfo&j1=118.15&jump=118.15) [118.16](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=115939&infobase=stats99.nfo&j1=118.16&jump=118.16) and [938.13](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=115939&infobase=stats99.nfo&j1=938.13&jump=938.13) in pari materia. See *Aaron D.*, 214 Wis. 2d at 66. In pari materia refers to statutes and regulations relating to the same subject matter or having a common purpose. *Perra v. Menomonee Mut. Ins. Co.*, <http://www.courts.state.wi.us/html/ca/00/00-0184.htm> 2000 WI App 215, ¶9, 239 Wis. 2d 26, 619 N.W.2d 123. The statutory construction doctrine of in pari materia requires a court to read, apply and construe statutes relating to the same subject matter together. Id. It is our duty to construe statutes on the same subject matter in a manner that harmonizes them in order to give each full force and effect. *Aaron D.*, 214 Wis. 2d at 66.

**CONSTRUCTION – LENITY APPLIES ONLY WHERE STATUTORY LANGUAGE IS AMBIGUOUS, ¶24 n. 5**

*State v. Richard W. Delaney*, <http://www.courts.state.wi.us/html/sc/01/01-1051.htm> 2003 WI 9, affirming unpublished decision <http://www.courts.state.wi.us/html/ca/01/01-1051.htm>

For Delaney: Joseph R. Cincotta

**CONSTRUCTION – RULE THAT SPECIFIC CONTROLS GENERAL DOESN'T APPLY WHERE STATUTORY LANGUAGE CLEAR, ¶24 n. 5**

*State v. Richard W. Delaney*, 2003 WI 9, affirming unpublished decision

For Delaney: Joseph R. Cincotta

**CONSTRUCTION — “SHALL” – TIME LIMITS**

*State v. George Schertz*, 2002 WI App 289

For Schertz: Barbara A. Cadwell

¶7 ... (S)tatutory time limits are often held to be directory despite the word “shall.” *Eby v. Kozarek*, 153 Wis. 2d 75, 79-80, 450 N.W.2d 249 (1990). In deciding whether a statute’s use of the word “shall” is mandatory or directory, we consider the objectives sought to be accomplished by the statute, the statute’s history, the consequences that would flow from the alternative interpretations, and whether a penalty is imposed by its violation. *State v. Perry*, 181 Wis. 2d 43, 53-54, 510 N.W.2d 722 (Ct. App. 1993).

**TPR****NOTICE – INDIAN CHILD WELFARE ACT, 25 U.S.C. §§ 1901-1963**

*Sheboygan Co. DHS v. Neal J.G.*, <http://www.courts.state.wi.us/html/sc/02/02-0575.htm> 2003 WI 11, on bypass

For parent: Timothy A. Provis

¶2. We conclude that the information before the circuit court was too vague for the court to have reason to know that each of Neal's children met the definition of "Indian child" under the **ICWA** <http://www4.law.cornell.edu/uscode/25/ch21.html>. Because the information was insufficient to show that the ICWA applied in this case, no notice was required...

Non-binding **Guidelines** [http://www.nicwa.org/policy/regulations/icwa/ICWA\\_guidelines.pdf](http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf) are helpful in resolving the reason-to-know issue, and describe relevant circumstances ¶¶18-20. The rub in this case is that the information was too vague: that the children have "Indian heritage" "stem(ming) from the Ojibwa tribe in Marinette."

#### EVIDENCE — PARENT'S CRIMINAL OFFENSES AND SENTENCES

*State v. Quinsanna D.*, <http://www.courts.state.wi.us/html/ca/02/02-1920.htm> 2002 WI App 318, *PFR* filed 12/19/02

For Quinsanna D.: Carl W. Chessir

Evidence of the mother's criminal history wasn't restricted by **§ 906.09** [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100542&infobase=stats.nfo&j1=906.09&jump=906.09](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100542&infobase=stats.nfo&j1=906.09&jump=906.09) because her prior convictions weren't used to attack her credibility; rather, they were relevant to show why the children were removed from her home, and also whether she had assumed parental responsibility. ¶20. Nor was admissibility governed by **§ 904.04** [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100542&infobase=stats.nfo&j1=904.04&jump=904.04&softpage=Browse\\_Frame\\_Pg](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100542&infobase=stats.nfo&j1=904.04&jump=904.04&softpage=Browse_Frame_Pg) because this evidence didn't go to character: "Instead, evidence of all the offenses and sentences was introduced to prove that she had failed to assume parental responsibility for Keyon and Teyon. ¶22.

#### "PERVERSE VERDICT"

*State v. Quinsanna D.*, <http://www.courts.state.wi.us/html/ca/02/02-1920.htm> 2002 WI App 318, *PFR* filed 12/19/02

For Quinsanna D.: Carl W. Chessir

To be perverse, a verdict must be based on considerations ulterior to a reasonably fair application of judgment to evidence. In this case, the jury could have inferred that Quinsanna's daily exposure of the children to drugs showed a failure to exercise significant responsibility for protection and care, hence a failure to establish a substantial parental relationship. Moreover, Quinsanna doesn't point to ulterior considerations of any kind. ¶¶31-33.

#### COMPETENCY OF COURT – DISPOSITION

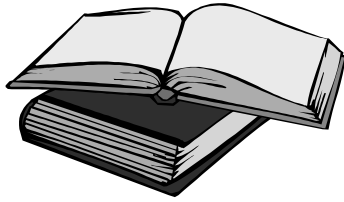
*State v. Quinsanna D.*, 2002 WI App 318, *PFR* filed 12/19/02

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Despite the trial court's failure to make an explicit finding of good cause for adjourning disposition beyond the 45 days set by **§ 48.424(4)(a)** [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100547&infobase=stats99.nfo&j1=48.424\(4\)\(a\)&jump=48.424\(4\)\(a\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100547&infobase=stats99.nfo&j1=48.424(4)(a)&jump=48.424(4)(a)), the record contains ample evidence of such cause — scheduling difficulties, along with universal agreement on the date. ¶¶38-39. Moreover, the GAL's consent excludes from the computation the period covered by the consent, **§ 48.315(1)(b)** [http://folio.legis.state.wi.us/cgi-bin/om\\_isapi.dll?clientID=100547&infobase=stats99.nfo&j1=48.315\(1\)\(b\)&jump=48.315\(1\)\(b\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=100547&infobase=stats99.nfo&j1=48.315(1)(b)&jump=48.315(1)(b)), so that the 45-day limit wasn't exceeded in any event. ¶¶40-41. ■

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