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# The WISCONSIN DEFENDER

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## From the Editor...

A lot of attention has been given recently to a major failing of the criminal justice system: innocent people are convicted of crimes they did not commit. While the shortcomings of the system have long been recognized, the advancements in DNA technology have provided conclusive proof of those shortcomings. As a result, various efforts to reform the system are increasing nationwide.

This issue of the *Wisconsin Defender* focuses on the subject of wrongful convictions. An overview of the various reform efforts, such as the new Wisconsin law broadening the preservation requirements of DNA evidence as well as Alaska's and Minnesota's court-imposed requirement that custodial interrogations be recorded, is provided by Keith Findley, Co-Director of the Innocence Project at the UW Law School. ([See page 11.](#))

Information about the Avery Task Force, which is looking at ways to improve the system so that innocent people are not convicted, is also included in this issue. ([See page 10.](#)) The Task Force was created by State Representative Mark Gundrum in response to the exoneration of Steven Avery, a Manitowoc man who spent more than 18 years in prison for crimes he did not commit.

When it comes to your day to day practice, what do you do when your client tells you that he was forced into giving a confession to a crime he did not commit? Nationally known false confession expert Steven Drizin from Northwestern University School of Law summarizes the psychological interrogation techniques used by law enforcement and offers several helpful tips for defense lawyers to use when representing a client who has confessed. ([See page 4.](#))

We hope to continue our focus on wrongful convictions in future issues of the *Wisconsin Defender*, and include information about other topics such as eyewitness identifications.

### 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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## Defending a False or Coerced Confession Case in the Post-DNA Age: What Do You Need to Know to Represent Your Clients Effectively?

By: Steven A. Drizin\*

Confession evidence is among the most potent forms of evidence in a court of law. Judges, jurors, prosecutors, and even defense attorneys, convinced that no innocent person would confess to a crime he did not commit, especially a murder, rape or other serious felony, often consider a confession as dispositive proof of guilt. It's precisely for this reason that police officers work so hard – often too hard — to get a suspect to confess. They know that with a confession, even a false confession, they are almost assured of a conviction.<sup>1</sup>

Defending a client who has confessed is an uphill battle. There's no sense in sugarcoating the difficulty of trying to open people's minds to the reality that some defendants are pressured to confess to crimes they did not commit. The difficulty is compounded by the fact that most interrogations are conducted in secrecy. Because many police departments do not record the entire interrogation of the suspect, the police tactics which are used to obtain confessions largely have escaped public and judicial scrutiny. The historical events of what transpired in the interrogation room have been resolved by swearing contests between the detectives who conducted the interrogations and the suspects who endured them. Not surprisingly, the detectives usually come out as the winners of these credibility contests.

For years, despite complaints by defenders and others about the inherent unfairness of this process, change in this area has been glacial. In the past, in order to learn about police interrogation tactics, defenders have had to consult police interrogation manuals. While these manuals are still a fertile source for information and a must-read for all defenders, today, they should be considered a starting, rather than an ending point, for defenders. As a result of the increased use of electronic recording devices by police departments to tape interrogations, defenders can now get an insider's view of police interrogation practices.

In this article, I will summarize the basic principles of the modern psychological interrogation, focusing in particular, on the Reid Technique, an interrogation technique first developed by Northwestern University School of Law Professor Fred E. Inbau and Chicago Crime Lab Director John E. Reid, in the 1950's, and one which has been refined over the past fifty years in successive editions of Inbau and Reid's classic Criminal Interrogations and Confessions<sup>2</sup> Using examples of these psychological tactics from actual interrogations, I



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Steven is also a leader in efforts to secure greater protections for children at the police station including mandatory videotaping of police interrogations, parental presence and the right to counsel for youth and has sought such relief in an amicus brief co-written with the Wisconsin Innocence Project in the Wisconsin case of *In re C.J.*, 2003 WL 22997996 (Wis. App. 2003).

hope to allow defenders a peek inside the interrogation room, one which should assist them in preparing their cases. Next, I will summarize the relevant research on the relationship between these interrogation techniques and false or coerced confessions. In the final section of this article, I will suggest some ways in which defenders can use this information to represent their clients more effectively.

### **The Modern Psychological Police Interrogation**

Gone are the days when police would shine a bright light on suspects, grill them for days on end, beat them with rubber hoses and telephone books, deprive them of sleep, or use other techniques which became known as the "third degree." While there have been periodic instances of such excessive uses of force in the interrogation room, most notably torture in Chicago's Area Two police headquarters in the 1980's,<sup>3</sup> such heavy-handed interrogation techniques have been replaced with more psychologically oriented techniques. Today, detectives get suspects to confess by using such tactics as feigning friendship, flattery, or false sympathy, lying to suspects about the strength of the evidence against them, and motivating them to make admissions by implying that they will be treated with leniency only if they confess.<sup>4</sup> Privacy, or rather secrecy, is an essential ingredient to the success of the technique,<sup>5</sup> beginning with the setting in which these interrogations take place.

#### **The Set**

Inbau, Reid, et al advise interrogators to dress in civilian clothes and to conduct their interrogations in specially designed rooms at the police station. Think of it as a home-court advantage. The rooms are small, sparsely furnished, cramped, spaces. The fewer the distractions, the better. There are no phones, no pictures, no clocks, and no windows. There may be a table and a few chairs but the table is not to be positioned between the suspect and his interrogators. The detectives need to be able to maneuver their chairs to close in on a suspect and to invade his personal space. The setting is designed to reinforce the suspect's sense of isolation, to increase his anxiety and to show the suspect who is boss.<sup>6</sup>

#### ***Act I: Rapport Building and Behavioral Analysis***

The initial phase of the interrogation involves rapport-building and is the least threatening stage. Getting some personal background information from the suspect, detectives attempt to relate to the suspect, gain his trust, empathize with him. Usually, this is the time in which the *Miranda* warnings are given to the suspect. The warnings are presented as a mere formality, something the interrogator is required to do before the suspect can be free to tell his side of the story, something that people who want to tell the truth need not hide behind. This technique has proven highly successful in getting suspects to waive their *Miranda* rights. Studies have shown that upwards of 80% of adults waive their rights and 90-95% of juveniles agree to speak with the police.<sup>7</sup>

During the rapport building phase,<sup>8</sup> the detectives are trained to observe the suspect's verbal and non-verbal behavior for signs of deception. What is evidence of lying? Detectives are trained that evidence deception includes, for example, slouching, keeping your arms crossed, turning a shoulder to the detective scratching, rubbing one's hands, knuckle popping, drumming fingers on the table, playing with hair, pulling one's ear lobe, start and stop foot-bouncing, and refusing to look an interrogator in the eye. If the interrogator believes the suspect is lying after analyzing his behavior, the interview of the suspect moves into the next, more confrontational phase of the interrogation.<sup>9</sup>

An interrogator's assessment that a suspect is being deceptive is a critical determination which often predisposes the interrogator to believe that the suspect is guilty and causes the interrogator to use the

remainder of the interrogation to confirm this belief.<sup>10</sup> The problem is that studies have shown that people are poor intuitors of truth or deception and that police officials are no exception. Because they have received some training, however, police officers (and other professionals such as psychiatrists, customs inspectors, and polygraphers) tend to be more confident in their abilities to detect deception. This overconfidence can lead interrogators to ask leading or guilt-presumptive questions of suspects, to resort to more coercive techniques like false promises of leniency or the false presentation of evidence, and to be even more aggressive in the way in which they question suspects who are actually innocent.<sup>11</sup> Such techniques are the heart of the second phase of the interrogation – the confrontational or the accusatory phase.

### ***Act II: Shifting a Suspect From Confident to Hopeless***

It is not rational for any suspect, be he guilty or innocent, to confess to his interrogators. To get a suspect to confess, the interrogator, through the use of psychological techniques must convince a suspect that it is in his best interests to confess. As false confession and interrogation experts Richard Ofshe and Richard Leo have noted, this is usually accomplished by tactics which induce a state of hopelessness in the suspect – a sense that the interrogator is convinced of his guilt, does not care that the suspect is saying he is innocent, and will not stop the interrogation unless and until the suspect confesses. Once a suspect reaches this low point, the interrogators then use a variety of tactics to motivate the suspect to confess, typically by suggesting to the suspect, either directly or by implication, that a confession will lead to leniency.<sup>12</sup> Inbau, et al, outline a nine-step process designed to overcome a suspect's resistance to confessing. The interrogator is instructed to:

- ◆ Confront the suspect with his or her guilt (Step 1)
- ◆ Develop the psychological themes that justify or excuse the crime (Step 2)
- ◆ Interrupt all statements of denial (Step 3)
- ◆ Overcome the suspect's factual, moral, and emotional objections to the charges (Step 4)
- ◆ Ensure that the increasingly passive suspect does not tune out (Step 5)
- ◆ Show sympathy and understanding and urge the suspect to tell the truth (Step 6)
- ◆ Offer the suspect a face-saving alternative explanation for his or her guilty action (Step 7);
- ◆ Get the suspect to recount the details of the crime (Step 8); and
- ◆ Convert the statement into a full written confession (Step 9)<sup>13</sup>

#### *Confrontation (Step 1), Cutting Off Denials (Step 3), Overcoming Objections (Step 4)*

A critical turning point in most interrogations is the direct confrontation of the suspect with an accusation that he is guilty. At this stage, interrogators are trained to interrupt a suspect's denials because, according to the Reid technique, the more that a suspect is allowed to deny his guilt, the more psychologically attached he becomes to the idea that he is innocent and the more the more difficult it will be to get him to confess.<sup>14</sup> Below is an example of this tactic from an actual interrogation. The interrogation involved B.M.B., a nine year old black child from Kansas, whom Wichita police suspected of raping his five year old neighbor by touching her in the vaginal area while they were playing in a sandpile. B.M.B. repeatedly denied having touched the girl, but later reluctantly agreed that his finger might have accidentally touched the girl's private area when they were playing in a pile of sand. This admission was the basis for his conviction of rape in juvenile court, a conviction later overturned by the Kansas Supreme Court which ruled that the confession was coerced.<sup>15</sup> This example, while instructive, does not do justice to the power of these technique to induce a state of hopelessness. It is the repetition of these techniques throughout the interrogation, coupled with the practice of cutting off a suspect's denials, that make a suspect feel that he is powerless to control his destiny — that he has no choice but to accede to his interrogator's demand that he confess.

Detective Swanson: Well, let me tell you something, okay? I didn't bring you down here to ask you if you did it. Okay? I brought you down here to tell me why you did it.

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Detective Swanson: Well, let me ask you something, okay? This is, it's not a matter of if, okay? Something happened and I don't think you meant to hurt the girl, but it did happen. So now what we have to do is we have to deal with what happened.

B.M.B.: Yeah, but I didn't....

Detective Swanson: Okay, now listen.

B.M.B.: Touch her.<sup>16</sup>

*Maximization and Minimization: The Use of True and False Evidence Ploys, "Psychological Themes" and "Coercive Motivators" to Elicit the "I did it" Statement (Step 2-Step 7)*

### Maximization in Action

If a suspect persists in his denials, the detectives then use a variety of techniques to motivate the suspect into confessing. In order to overcome a suspect's objections, interrogators must convey to the suspect that the interrogator is absolutely certain of the suspect's guilt. In order to do this, interrogators will sometimes resort to evidence ploys in which they exaggerate the strength of the case against the suspect. Sometimes these ploys are based on real facts ("we have talked to numerous witnesses who place you at the crime scene" or "your co-defendant is laying this on you") but often times interrogators employ false evidence ploys. This practice of intimidating a suspect by overstating the strength of the case against him has been termed "maximization" by Saul Kassin.<sup>17</sup>

The use of false evidence ploys, especially when they involve seemingly irrefutable scientific evidence, has been linked to several false confessions. For example, in the now infamous Central Park Jogger case, in which Manhattan homicide detectives obtained five false confessions from teens to the brutal assault and rape of the jogger, one of the detectives admitted to deceiving 15 year old Yusef Salaam, by telling him that officers had lifted his fingerprints off of the jogger's shorts and that they would be matched to him.<sup>18</sup> In the Michael Crowe case, detectives told Michael that there was a mounting pile of physical and scientific evidence that would prove that he had murdered his younger sister Stephanie. For example, they told him that investigators had found Stephanie's blood in Michael's room.<sup>19</sup> When he asked where the blood was found the detective stated, "I'm sure you know. It's easy to make mistakes in the dark." They also told him that hair had been found in Stephanie's hand and suggested that it would prove to be Michael's hair.<sup>20</sup>

Sometimes, investigators introduce "science" into the interrogation room by subjecting suspects to a polygraph or Computer Voice Stress Analyzer ("CVSA") test, a device which purports to measure deception by detecting tremors in a suspect's voice. The results of these devices are so unreliable that they are inadmissible in court, a fact known to investigators but unknown to most suspects. The use or threatened use of the results, however, is an interrogation tactic that also has been linked to false confessions. In the Michael Crowe case, for example, the detectives skillfully involved Michael in the process of designing the questions for the CVSA. Michael was asked a series of questions altering between general subjects (e.g., "Are we in the state of California?") and specific questions regarding Stephanie's murder (e.g., "Do you know who took Stephanie's life?"). The police then went through the test results and told Michael that the results indicated that he was lying. "This machine doesn't know you," they told Michael, "technology doesn't lie." When presented with the test results that suggested he had killed his sister, Michael began to sob uncontrollably and later confessed.<sup>21</sup> He was later exonerated by DNA evidence which proved that Stephanie's blood was found on the sweatshirt of the true perpetrator.

Anthony Harris was a 12 year-old African-American child whom police suspected of murdering his five year old neighbor because he had been walking near where the girl had last been seen alive. Detectives had lured Harris down to the police station under the pretense that he would be given a voice stress test. Once he arrived at the station, he was separated from his mother, and Thomas Vaughn, the Police Chief from a neighboring town and a Reid-certified interrogator, launched into an interrogation of Anthony. In Anthony's case, Vaughn never had any intention of giving Anthony a voice stress test. His plan was to use the mere threat of administering the CVSA to induce a confession. Passages from Anthony's tape-recorded interrogation, like the one below, led an Ohio appeals court to rule that Anthony's confession was coerced:<sup>22</sup>

Vaughn: Okay, cause like I said before, I can only help you, if you help me. And we're probably going to know ah, and have, or at least have the test results back in a couple of days from the place where they sent your clothes to, and it's going to say whether there was blood in those clothes or not, and that blood would have been our victim's here. Ah, and see that would be the point in time that you're sort of stuck. Ah, now it's not that Anthony was forthcoming. He came in, he talked to me, he didn't want to tell me. I'm not going to deny that, I mean it's probably going to be the toughest thing you ever do is if you tell me that you did this. It's going to be tough for your mom to hear too, but your mom can't help you and I can't help you if you're not honest with me, and ah, you know, I will be able to tell once I give the test if you're telling the truth, I'll know that, and again, I would like to know that before I give the test, so that I don't have to send court or the prosecutor's office or anybody else I listed on there that I did the test and Anthony lied to me on this test. That's the worst thing in the world that could happen here...<sup>23</sup>

### Minimization in Action

The use of maximization techniques are often coupled with what Saul Kassin has labeled as "minimization" techniques<sup>24</sup> and what Inbau, Reid, et al describe as "psychological themes."<sup>25</sup> The purpose of these "psychological themes" is to give the suspect an opportunity to save face – to come clean but at the same time salvage some respect. The suspect is offered two different explanations for the crime; one of which makes the offender out-to be a monster, the other which gives an excuse for the actions and often shifts the blame onto the victim. Sometimes the excuse is a moral excuse ("you stole the money to feed your children"), sometimes it is a legal excuse or a mitigator (you shot the victim in self defense, the sex you had was consensual, the crime was provoked, or impulsive rather than premeditated). The goal here is to limit the suspect's options to two, neither of which involves innocence. Forced to choose between two options, one of which paints the suspect as a monster, the other which sounds almost reasonable by comparison, interrogators know that over time many suspects will latch on to the lesser of two evils, especially if it will bring an end to the interrogation or some other perceived benefit like leniency. Detective Swanson of the Wichita Police Department used minimization techniques in his questioning of nine year old B.M.B:

Detective Swanson: I mean I don't think you're a bad kid. I don't think you meant to hurt the girl.

B.M.B.:No, if I did I'm sorry but I didn't know and C was right there, I don't know why he won't tell the truth for me because I didn't touch that girl. If I did, I'm sorry.

Detective Swanson: Well, see the doctor says it happened, cause she's got, she's got some little cuts down there and it hurt her.

B.M.B.:I didn't go nowhere down there, but on her feet, C was right there with me. He was right there standing right next to me.

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Detective Swanson: Okay, B., we were talking before okay? The fact of the matter is it happened, it was a mistake. You didn't mean to hurt her. Did you? Okay, and I don't think you did. You don't want to hurt that girl. Was it this, you were curious or I mean it's, it's okay. I'm not going to think badly of you. Like I said, the only thing I deal with is the truth. That's the only thing I'm interested in. I mean was it an accident?

B.M.B.: I don't see how I could.

Detective Swanson: Huh?

B.M.B.: I don't see how I could have touched her though cause all I was doing was putting sand on her.

Detective Swanson: But your hand touched her down there, didn't it? You know, it's okay. You know these things really bother us and cause us problems, but if you talk to me and let me know, we can help.

B.M.B.: Could have been an accident, or what I don't know I was putting sand on her and that was it.<sup>26</sup>

Sometimes, police officers suggest that the crime was not even a crime at all — it was an accident. These ploys are highly coercive because of the implication that no punishment will follow from an accident. The accident scenario was used by the Maine State police to coerce a confession from Raymond Wood, whose confession to running over his girlfriend was later tossed out by the trial court judge, after he viewed the tapes of the interrogation:

DET1: [Your] van did hit her last night. Okay? We have evidence, we have proof of that. Now hear me out, Raymond, hear me out—

SUS: [inaudible]

DET1: —just hear me out.

SUS: [inaudible]

DET1: Let me finish, Raymond, let me finish. I feel like I know you, okay? I've dealt with you before. If this is an accident, we don't need the State Police to be here, okay? The State Police don't investigate that. What I'm—

SUS: [inaudible]

DET1: Listen to me, Raymond, listen to me. I know you don't remember. It's very painful. I know that you loved her. What you've got to understand is if you did this intentionally, I have to handle this in an entirely different way.

SUS: I didn't know.

DET1: Do you understand what I'm saying?

SUS: I understand—

DET1: Now an accident is an accident, but by you sitting there and telling me "I don't know what you're talking about," I know that's not true, okay.

SUS: No, sir, I—

DET1: You may be—hey, listen—you may be blocking it up, okay? This may have pained you beyond all belief because I know you love her, but you have to tell me what happened so that I can chalk this up as an accident, if that's what it was.

**See "False Confessions" on Page 18**

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## NEWS BRIEFS

### Task Force to Look at Ways to Reduce Wrongful Convictions

Representative Mark Gundrum (R-New Berlin) has taken a step to help improve the criminal justice system in Wisconsin. Gundrum, who chairs the Assembly's Judiciary Committee, recently formed the Avery Task Force whose charge is to review practices and procedures in Wisconsin's criminal justice system which may need improving to help avoid wrongful convictions of innocent people. The Avery Task Force was created in response to the case of Steven Avery, a Manitowoc man who was recently released from prison after spending 18 years behind bars for a sexual assault and other crimes he did not commit. Avery was finally exonerated after DNA tests confirmed that another man committed the crimes.

Task Force members include: Keith Findley (Wisconsin Innocence Project Co-Director), Bob Donohoo (Milwaukee County Chief Deputy District Attorney), Norm Gahn (Milwaukee County Assistant District Attorney), Scott Horne (LaCrosse County District Attorney), Judy Schwaemle (Dane County Deputy District Attorney), Sandra Bertelle (Kenosha County Victim Witness Coordinator), Tom Reed (Milwaukee County Public Defender), Randy Koschnick (Jefferson County Circuit Court Judge), Fred Fleishauer (Portage County Circuit Court Judge), Louis Butler (Milwaukee County Circuit Court Judge), Ed Stenzel (Retired Milwaukee Assistant Chief of Police), Dan Trawicki (Waukesha County Sheriff), Neil Strobel (Merrill Police Chief), Raymond Dall'Osto (Milwaukee attorney), and Jerome Buting (Brookfield attorney). Legislative members of the Task Force include: Representative Gundrum who will serve as Chair, Representative Tony Staskunas (D-West Allis), Senator Scott Fitzgerald (R-Juneau), Representative Gary Bies (R-Sister Bay), and Representative Pedro Colon (D-Milwaukee).

At its first meeting in December, the Task Force heard from Steven Avery and his lawyers about the specifics of his case. Avery's testimony prompted an ensuing discussion from Task Force members regarding the reliability of the eyewitness identification in his case.

On February 17, the meeting focused on some of the problems related to eyewitness identification evidence. Dr. Gary Wells, professor at Iowa University and one of the nation's leading experts in eyewitness identification evidence, discussed his ongoing research relating to eyewitness identification, providing compelling testimony supporting the need for changes in the state's eyewitness identification procedures. New Jersey Assistant Attorney General Lori Linskey joined the Task Force via teleconference to discuss the cutting-edge improvements New Jersey has made related to eyewitness identifications. The victim in the Avery case talked about the particular problems with eyewitness identification in her case, which led to the wrongful conviction of Mr. Avery.

The Task Force is expected to meet approximately every other month until at least this December. Questions about the Task Force can be directed to Representative Gundrum's office at telephone 608.267.5158. ■

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## Re-Imagining Justice

By: Keith A. Findley\*

It wasn't too long ago that calls for reform in the criminal justice system to reduce the risks of convicting the innocent were greeted with, "If it's not broken, don't fix it."

No longer.

The steady parade of postconviction exonerations, particularly those involving DNA testing (142 DNA exonerations nationwide as of March 2004),<sup>1</sup> has confirmed beyond dispute that the system must be made better. That message was driven home in Wisconsin in September 2003, when postconviction DNA testing exonerated Steven Avery after 18 years in prison for a Manitowoc County sexual assault and attempted murder he did not commit. A few weeks later, another Wisconsin man, Eugene Glenn, was exonerated in Milwaukee (not with DNA evidence, but with other evidence developed by Assistant State Public Defender Rich Martin and Investigator Mary Taylor). Glenn had been wrongly convicted of a robbery on the basis—like Avery—of a mistaken eyewitness identification. These exonerations were only the latest in a growing list of miscarriages of justice in Wisconsin. ([See page 28 for a list of some of Wisconsin's postconviction exonerations.](#))

Improving the fairness and accuracy of the criminal justice system is no longer just an issue for criminal defense attorneys and their presumably guilty clients. It is now a civil rights issue encompassing the rights of the wrongly accused and concerns about public safety and fairness to victims, given that every wrongful conviction means the real perpetrator goes unpunished. Again, Avery's case is representative: while Avery sat in prison for the crime, the actual perpetrator, who was identified by a match in the DNA databank, committed another rape, for which he was subsequently sentenced to 60 years in prison. The opportunity for improving the criminal justice system has rarely been better. Whether much will come of it is yet to be seen, but efforts are at least under way. This article briefly outlines some of those efforts.

### The First Step: Acknowledging Innocence

In 2001, the Wisconsin legislature took the first step in recognizing that the criminal justice system sometimes errs and that we all have a stake in remedying those errors. The legislature passed, with almost no opposition, a law that overrides some of the State's traditional finality objections to postconviction relief by enabling people convicted of crimes an opportunity to prove their innocence through DNA testing.

The new law, passed as part of the 2001 budget, 2001 Wisconsin Act 16, does several things.<sup>2</sup> First, it requires all government agencies or offices that have biological evidence collected in the investigation or prosecution of a case to preserve that evidence as long as anyone remains in custody in connection with that case. Previously,



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no law required preservation of evidence after a conviction became final. Indeed, in over half the cases nationwide where postconviction DNA testing might have been requested to support a claim of innocence, the defendants who wanted DNA testing learned the government had destroyed the evidence. The new law is designed to ensure that, whenever biological evidence might prove innocence, it remains available for testing.

The preservation requirement is broad. It applies to police and sheriff's departments (Wis. Stat. § 968.205), crime laboratories (Wis. Stat. § 165.81(3)), prosecutors' offices (Wis. Stat. § 978.08), and circuit courts (Wis. Stat. § 757.54(2)(b)). And it requires preservation as long as anyone remains in custody—including under a sentence, on probation or parole, under a Chapter 980 sexually violent offender commitment, under a juvenile commitment, or under an "insanity" commitment under § 971.17. During this time, biological evidence can be destroyed only if the state gives notice to all confined individuals, and none objects to the proposed destruction.

The new law also provides a right to postconviction DNA testing in any case in which favorable test results might change the outcome of the case. The law creates a new postconviction procedure for DNA under Wis. Stat. § 974.07 that codifies and amplifies the more general postconviction discovery provisions established in *State v. O'Brien*.<sup>3</sup>

Under § 974.07, a convicted person is entitled, at any time, to DNA testing if it is "reasonably probable" that the person would not have been prosecuted or convicted if "exculpatory [DNA] testing results had been available before the prosecution, conviction, finding of not guilty [by reason of mental disease or defect], or adjudication for the offense."<sup>4</sup> The statute thus makes clear that DNA testing is mandatory if, assuming the test results will be favorable to the defendant, there is a reasonable probability that the results would alter the outcome. When Steven Avery was exonerated in September 2003, he became the first Wisconsin prisoner to be freed by DNA testing ordered under § 974.07.

Until recently, only two states—New York and Illinois—had laws providing a right to postconviction DNA testing. Over the past few years, more than 30 other states, like Wisconsin, have adopted similar provisions.<sup>5</sup> These new laws have contributed significantly to the growing number of prisoners who have been able to prove their innocence through DNA testing.

Federal legislation is also pending that will extend the right to postconviction DNA testing. The Innocence Protection Act of 2003, introduced on October 1, 2003, as part of the Advancing Justice Through DNA Technology Act, will grant any prisoner convicted of a federal crime the right to petition a federal court for DNA testing. Using the power of the federal purse, the Act also encourages states to adopt measures to require preservation of biological evidence and make postconviction DNA testing available to prisoners who claim innocence. The Advancing Justice Through DNA Technology Act (HR 3214) passed the House of Representatives by a vote of 357-67 on November 1, 2003, and is now pending in the Senate.<sup>6</sup>

Wisconsin's new law also recognizes the need to consider new evidence of innocence, regardless of whether the new evidence includes DNA. Prior to 2001, Wisconsin statutes provided that motions for new trial based upon newly discovered evidence could only be brought within one year of verdict.<sup>7</sup> Usually, however, new evidence of innocence does not become available until years after verdict. The Wisconsin courts had previously recognized that this limitation period was too onerous, holding in *State v. Bembenek*<sup>8</sup> that in some cases due process requires courts to consider new evidence of innocence even when it arises more than one year after verdict. When the legislature passed the new DNA provisions in 2001, it also changed the law to codify *Bembenek* by providing that the one-year time limit on newly discovered evidence does not apply to new evidence motions brought under Wis. Stat. § 974.06, Wisconsin's general postconviction motion statute.<sup>9</sup> This new law thereby makes clear that § 974.06 can be used to present new evidence—DNA or otherwise—of innocence and that such a motion can be brought without time limitation.

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**Moving On: Reform Efforts**

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The challenge now remains to seize the learning opportunity presented by DNA exonerations to reduce the risks of future errors before they occur. Toward that end, Wisconsin sent a team to Alexandria, Virginia, in January 2003, to attend the National Conference on Preventing the Conviction of Innocent Persons, sponsored by the American Judicature Society (AJS). The AJS invited teams from eleven jurisdictions to learn about wrongful convictions and to develop specific plans for preventing miscarriages of justice in each individual state. Team members were drawn from all segments of the criminal justice system. Wisconsin's team included the Honorable Frederic Fleishauer, a Circuit Court judge from Stevens Point; Judy Schwaemle, a Dane County Deputy District Attorney; Captain Cheri Maples, Director of Training and Personnel for the Madison Police Department; Jerry Geurts, Director of the State Crime Laboratory in Madison, and me, as Co-Director of the Wisconsin Innocence Project at the University of Wisconsin Law School.

The Wisconsin team identified three goals, which we judged to be both important and attainable. Those goals were:

**1. *Improve eyewitness identification procedures in the state***, by first creating a demonstration project in the Madison Police Department and then using that model to help guide other police departments around the state. The model would implement the latest learning from psychological studies on best practices for conducting lineups and photospreads, such as the use of double-blind testing procedures and sequential, rather than simultaneous, display of suspects or photographs. Captain Maples took the lead in establishing this model project in the Madison Police Department. The Department recently adopted new protocols governing photospread identifications, making it the first police department in this state to implement the reform packages recommended by the latest psychological studies on eyewitness identification errors.

**2. *Raise consciousness among criminal justice system participant—including judges, prosecutors, police and defense attorneys—of the risks and causes of wrongful convictions.*** Wisconsin team members, led by Judge Fleishauer, put together a half-day program on this topic for the May 2003 Judicial Education conference in Green Bay. Plans are still in discussion to present a similar program for the district attorneys' conference.

**3. *Support efforts to create a criminal justice study commission***, whose mission will be to study errors in the criminal justice system and recommend reforms to achieve best practices in the state. This goal recognized the need to continue the work begun at the Alexandria conference.<sup>10</sup>

Models for such a commission exist in other states. A number of states, including Illinois, Indiana, Arizona, Nebraska, and Virginia, have created commissions to study the flaws in the capital punishment system in those states.<sup>11</sup> Most notably, former Illinois Governor George Ryan's Commission on Capital Punishment spent two years exhaustively studying the flaws in a capital punishment system that produced 13 wrongful convictions in the same time that it executed 12 people. That Commission ultimately produced an extensive report with 85 recommendations for reform, some of which have since become law.<sup>12</sup>

Beyond the capital punishment context, the Chief Justice of the North Carolina Supreme Court has appointed a commission—the North Carolina Commission on Actual Innocence—to examine wrongful convictions and recommend reforms, and Connecticut, by statute, has created a commission whose charge is to examine individual cases of wrongful conviction following exonerations.<sup>13</sup> Barry Scheck and Peter Neufeld, directors of the Innocence Project at the Cardozo Law School in New York City, have called for creating a post-exoneration commission or board with investigation and subpoena powers to examine established wrongful conviction cases, much like the National Transportation Safety Board investigates transportation accidents.<sup>14</sup>

Steven Avery's exoneration served as a catalyst for advancing the goal of learning from wrongful convictions in Wisconsin. First, at the request of the Manitowoc County District Attorney, Wisconsin Attorney General Peg Lautenschlager's Office conducted an investigation into the Avery case—an unusual move following an exoneration in this state or elsewhere in this country.<sup>15</sup> Canada has regularly conducted penetrating and exhaustive inquiries following wrongful convictions, resulting in extensive hearings and detailed reports and recommendations for reform.<sup>16</sup> But such has not been the case in the United States. In this country, most exonerations receive little official attention or inquiry into what went wrong. So it was noteworthy that *any* inquiry was made into the Avery case.

Unlike the Canadian inquiries, however, the Wisconsin Attorney General's investigation in the Avery case was solely focused on whether anyone engaged in illegal or unethical conduct. The report found no official wrongdoing, but did not examine broader questions, such as how the identification procedures police employed—whether or not constitutionally adequate—might have been made more reliable; how police and prosecutors might improve the investigation process to avoid the “tunnel vision” that led authorities to focus wrongly on Steven Avery while the true perpetrator was ignored, even though he was known to police and prosecutors and should have been an obvious suspect; or how the Wisconsin postconviction and appellate system twice failed to protect an innocent man (postconviction motions and appeals were denied both on direct appeal and on collateral attack under § 974.06).<sup>17</sup>

Representative Mark Gundrum, Republican chair of the Assembly Judiciary Committee, responded more expansively to these broader questions by creating the Avery Task Force to examine the errors in that case, and to consider reforms to improve the reliability and accuracy of the criminal justice system in general. ([See News Briefs on page 10.](#)) Representative Gundrum appointed 20 task force members representing varied perspectives in the criminal justice system, including legislators, judges, prosecutors, law enforcement officers, defense attorneys and a victim advocate. The Task Force met for the first time in December 2003 when it heard from Steven Avery and his lawyers, and planned topics for Task Force inquiry.

First on the Avery Task Force's agenda is eyewitness identification errors—a logical place to begin given that the primary evidence that led to Avery's wrongful conviction was mistaken eyewitness identification, and that eyewitness error is the most common contributing factor in the DNA exoneration cases (eyewitness error was a contributing factor in over 80% of the wrongful convictions<sup>18</sup>). At a hearing on February 17, 2004, the Task Force heard from the victim in the Avery case, as well as experts including Dr. Gary Wells, the leading proponent of “best practices” identification procedures, along with prosecutors and police who have successfully adopted these procedures. Other topics will be developed as the Task Force proceeds.

At the same time, because the Avery Task Force will have a limited life and will be constrained by practicalities to only a few of the many issues confronting the criminal justice system, the Criminal Law Section of the State Bar, along with the U.W. and Marquette Law Schools, are continuing with plans that have been under development for several years to create an independent Criminal Justice Study Commission to examine these issues in depth. This Commission will pick up where the Avery Task Force leaves off. Like the Avery Task Force, the Study Commission will include respected representatives of various perspectives and players in the criminal justice system, but also respected community leaders from outside the criminal justice system. Efforts are under way to secure the necessary funding for the Commission, and plans are to initiate the Commission's work in the near future.

## The Issues

The proposed Wisconsin Criminal Justice Study Commission will examine cases nationwide with the goal of identifying problems and developing policies for application in Wisconsin. Nine initial topics have been

tentatively identified for the nascent Commission to examine. The list may be revised or expanded as the Commission begins its inquiries. Initially, at least, the list of topics includes:

- ◆ Eyewitness identification procedures
- ◆ False confessions and police interrogation techniques
- ◆ Indigent defense
- ◆ Forensic science
- ◆ Jailhouse informants
- ◆ The role of race & ethnicity
- ◆ Police investigation techniques
- ◆ The role of the prosecutor
- ◆ Appellate review and postconviction remedies

Of these issues, eyewitness identification reform and false confessions have received the most attention nationwide. Other jurisdictions have adopted new procedures designed to reduce the risks of mistaken identifications, like those adopted recently by the Madison Police Department. The United States Department of Justice has studied the problem extensively and published recommendations for improving identification procedures.<sup>19</sup> In New Jersey, the Attorney General—who, unlike most attorneys general in the United States, has direct supervisory authority over all law enforcement in that state—has mandated that all law enforcement agencies employ the new procedures, including double-blind lineups and photospreads and sequential presentations of photos and suspects.<sup>20</sup> At the same time, while many courts remain resistant to permitting expert testimony on eyewitness identification, courts are beginning to recognize the need to educate jurors on the fallibility and counter-intuitive aspects of the psychology underlying identification processes.<sup>21</sup>

False confessions also present a pressing, albeit counter-intuitive, problem. Even for criminal defense attorneys, when a client has given police a confession, it is typical to assume the person must be guilty—for who would confess to a crime he didn't commit? As it turns out, 35 of the first 142 DNA exonerations, or 25%, have involved false confessions or admissions.<sup>22</sup> Police are trained in psychological interrogation techniques that work remarkably well; unfortunately, they appear to work well even when the defendant is innocent. ([See article by Steven A. Drizin on page 4.](#))

The recent spate of proven false confessions has led many to call for mandatory videotaping of all custodial interrogations. Videotaping serves as a deterrent to the most blatant forms of coercion, creates an objective record of what happened during the interrogation, and protects police officers against spurious claims of misconduct.

To date, both the Alaska and Minnesota Supreme Courts have required that custodial interrogations be electronically recorded. The Alaska Supreme Court did so in *Stephan v. State*<sup>23</sup> in 1985 to protect “the accused’s right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.”<sup>24</sup> The Minnesota Supreme Court did so in *State v. Scales*<sup>25</sup> in 1994 pursuant to its supervisory powers. Concerns about false and coerced confessions are leading other jurisdictions to take a new look at videotaping interrogations as well. In Illinois, for example, numerous false and coerced confessions, including several from children and teenagers, led Illinois lawmakers to pass a bill by an overwhelming margin mandating that custodial interrogations in homicide cases be recorded.<sup>26</sup> The New Jersey Supreme Court is also currently considering imposing a recording requirement.<sup>27</sup> In addition, on February 9, 2004, the ABA House of Delegates unanimously passed a resolution urging law enforcement agencies, legislatures, and courts to require that the entirety of all custodial interrogations be videotaped.<sup>28</sup>

In Wisconsin, the Supreme Court is presently deciding whether to review a case in which the Wisconsin Innocence Project of the U.W. Law School, and the Children and Family Justice Center of the Northwestern University School of Law, as *amici*, have joined counsel for a juvenile in asking the Court to impose an electronic recording requirement, at least when police interrogate juveniles.<sup>29</sup> In that case, *In the Interest of Jerrell C.J.*, the Wisconsin Court of Appeals, District I, expressed “grave concern” over false confessions and recognized the need “for Wisconsin to tackle the false confession issue.”<sup>30</sup> Although the court took no position on electronic recording, it did express that the time has come for Wisconsin to find “safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent.”<sup>31</sup> In Milwaukee, the false confession case of Katrina French less than two years ago led Milwaukee District Attorney E. Michael McCann to suggest that Milwaukee police should start taping interrogations.<sup>32</sup>

Each of the issues identified for Study Commission inquiry addresses similarly important matters and holds the promise for improving the criminal justice system. For example, adequacy of defense counsel is a growing concern in Wisconsin, as public defender private bar rates become increasingly inadequate, and as eligibility standards for appointment of counsel become more outdated, making counsel unavailable to all but the most destitute.

At stake are fairness and justice, but also public safety—for each time the system misfires, not only is an innocent person convicted, but a guilty person avoids apprehension. The Steven Avery and Eugene Glen cases are but two of the many recent reminders of these facts. In the end, the question really isn’t how frequently the system fails, but simply whether the system can be made better; it’s about adopting “best practices.” Now that the window of opportunity has been opened by the DNA exonerations, we must do what we can to seize that opportunity.

## Endnotes

<sup>1</sup>See Benjamin N. Cardozo School of Law Innocence Project at <http://www.innocenceproject.org>.

<sup>2</sup>For a full description of the new DNA law, see Keith Findley, *New Laws Reflect the Power and Potential of DNA*, WISCONSIN LAWYER 20 (May 2002).

<sup>3</sup>223 Wis. 2d 303, 588 N.W.2d 8 (1999).

<sup>4</sup>Wis. Stats. § 974.07(7)(a)2.

<sup>5</sup>See Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL W. L. REV. 355 (2002).

<sup>6</sup>See Benjamin N. Cardozo School of Law Innocence Project at <http://www.innocenceproject.org/legislation/index.php>.

<sup>7</sup>Wis. Stat. § 801.16(4).

<sup>8</sup>140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1987).

<sup>9</sup>Wis. Stat. § 805.16(5).

<sup>10</sup>For a fuller explanation of, and rationale for, such a Commission, see Keith Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. WESTERN L. REV. 333 (2002).

<sup>11</sup>*Id.* at 349-50.

<sup>12</sup>See Report of the Governor’s Commission on Capital Punishment, George H. Ryan, Governor, (April 2002), available at <http://justice.policy.net/cjreform/studies/ilryancom/indexilrpt.vtml>.

<sup>13</sup>See Conn. Gen. Stat. 2003 CT H.B. 5022.

<sup>14</sup>Barry C. Scheck & Peter J. Neufeld, *Toward the formation of “Innocence Commissions” in America*, 86 JUDICATURE 98 (Sept-Oct. 2002).

<sup>15</sup>The Attorney General’s Report on the Avery case is available online at [http://www.doj.state.wi.us/news/rep121803\\_DCI.asp](http://www.doj.state.wi.us/news/rep121803_DCI.asp).

<sup>16</sup>See, e.g., Ministry of the Attorney General, Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin available at <http://www.attorneygeneral.jus.gov.on.ca:80/english/about/pubs/morin/>

<sup>17</sup>See *State v. Avery*, Case No. 86-1831-CR, available at 1987 WL 267394; *State v. Avery*, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997).

<sup>18</sup>Barry Scheck, Peter Neufeld, and Jim Dwyer, ACTUAL INNOCENCE 246 (2000).

<sup>19</sup>U.S. Dep't of Justice, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>. For an analysis of the DOJ guidelines and how they might be applied in Wisconsin, see Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L. Rev. 529.

<sup>20</sup>New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, available at <http://www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf>.

<sup>21</sup>See John Gibeaut, "Yes, I'm Sure That's Him," *Eyewitness reliability under question by experts, courts*, ABA JOURNAL 26 (October 1999); *United States v. Hall*, 165 F.3d 1095 (7<sup>th</sup> Cir. 1999).

<sup>22</sup>See Benjamin N. Cardozo School of Law Innocence Project at: <http://www.innocenceproject.org/causes/falseconfessions.php>.

<sup>23</sup>711 P.2d 1156 (Alaska 1985).

<sup>24</sup>*Id.* at 1159.

<sup>25</sup>518 N.W.2d 587, 592 (Minn. 1994).

<sup>26</sup>Steve Mills, *Law mandates taping of interrogations; Blagojevich signs race profiling bill*, Chicago Tribune, July 18, 2003, Metro, at 1 available at 2003 WL 59284811.

<sup>27</sup>Michael Booth, *Court to Police: Go to Videotape*, The Legal Intelligencer, November 13, 2004 at 4.

<sup>28</sup>Susan Saulny, *National law group endorses videotaping of interrogations*, New York Times, February 10, 2004.

<sup>29</sup>*In the Interest of Jerrell C.J.*, *State v. Jerrell C. J.*, Wisconsin Supreme Court Case No. 02-3423.

<sup>30</sup>*In the Interest of Jerrell C.J.*, *State v. Jerrell C.J.*, Wis. Ct. App. No. 02-3423 (Dec. 23, 2003) at ¶25, ¶32, available at 2003 WL 22997996.

<sup>31</sup>*Id.* at ¶32.

<sup>32</sup>Doerge, *Prosecutor backs taping interrogations*, Milwaukee Journal-Sentinel, May 6, 2002, at: <http://www.jsonline.com/news/metro/-may02/41209.asp>. ■

## WEBSITE OF THE MONTH

<http://www.wiscat.net/>

If you are interested in locating a book or video and wish to determine if it is available from a Wisconsin library, you'll want to use this issue's featured website, [www.wiscat.net](http://www.wiscat.net). This site allows you to search for a book or other material in library catalogs throughout the state. The site's advanced search option allows you to search by title, author, subject, or publisher number and allows you to narrow your search by media choice including books, non-musical sound recordings, or visual materials.



For example, if searching for *Criminal Interrogation and Confessions* by Inbau, Reid, et al., the site indicates that this book is part of the collections at Beloit College, Gateway Technical College, Mid-State Tech College, and UW-Oshkosh.

If the book or other material you wish to check out is not available locally, you can utilize the interlibrary loan process through your library.

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"False Confessions" continued from Page 9

SUS: I've told you—

DET1: No, you haven't Raymond. You're holding back on me, I know you are.

SUS: Then like I said I don't remember anything.

DET1: No, listen to me Raymond. Tell me what happened. Give it to me straight.

SUS: [inaudible]

DET1: If this is an accident we can rule it as such, okay, but if you're gonna play with me and look like you're hiding something, you have no idea how much evidence I have. Ray, you can hear me?

SUS: I know what I don't remember.<sup>27</sup>

### *A Spectrum of Coercive Motivators*

In addition to the use of maximization and minimization, Ofshe and Leo describe the use of other tactics called "motivators" which are often used to persuade a suspect to confess. Ofshe and Leo have identified three groups of motivators: low-end coercive motivators, systemic inducements, and high-end coercive motivators.

#### Low-end Motivators

Classic low-end inducements involve appeals to a suspect's sense of decency and morality. For example, interrogators may appeal to a suspect's conscience ("do the right thing"), extol the cathartic benefits of telling the truth ("the truth will set you free"), suggest that religious absolution will follow from confessing ("it's the Christian thing to do"), or try to get the suspect to feel for the pain of the victim's family members. These techniques are perfectly legal and when questioned about them, most detectives readily admit to using such tactics. These tactics are not likely to cause an innocent person to confess because the benefits offered from confessing are of no use to someone who is not guilty. But when these techniques are coupled with more coercive techniques like minimization, maximization and implied or express promises of leniency, they can become much more powerful motivators.<sup>28</sup>

For example, here's a variation of the "truth will set you free" pitch in Inbau, Reid et al:

"I'll bet ever since that day 20 years ago, that old man stands as a ghost at the end of your bed, which prevents you from sleeping and scares you to death so that you don't even want to go to bed. You're feeling miserable, Jim, because you are living with that man's death on your conscience. If it wasn't for that old reprobate who got you into this, your hair wouldn't be gray at your age and you would not be feeling as you do all the time. Your life has been ruined by that old S.O.B.. He got lots of guys into trouble Everyone out there knows that, but you got the unlucky break of being with him when he shot that fellow. Jim, you won't get any rest until you get that off your conscience by telling the truth about it."<sup>29</sup>

#### Middle-end motivators: Systemic Inducements

These are tactics are designed to get a suspect to reason that he will be treated with leniency if he admits to the crime. Generally, no specific promises, other than vague promises of help ("I can work things out," "I can try to get you some help", "I'll go to the judge and prosecutors and tell them of your cooperation") are ever actually made. The suspect is asked to think about how his confession will be received by those in the court system who hold his fate in their hands. Interrogators suggest that confessions will be seen as evidence of remorse by judges and prosecutors, while the refusal to come clean will be weighed heavily against the suspect.<sup>30</sup>

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Below is an example of a systemic inducement used by Chief Thomas Vaughn of the Millersville, Ohio Police Department on 12 year old Anthony Harris of New Philadelphia, Ohio. It is the tail-end of the same monologue previously discussed in which Vaughn threatened to use the CVSA.

Vaughn: ...Because put yourself in the judge's shoes or the prosecutor's shoes. He reads this report, here's Anthony who took this test and didn't do good on the test. He didn't say that he did it. He lied about it, so if you were in the judge's shoes, does that put you on looking for some kind of counseling and help that way or just hey, this guy needs to put away until he's twenty-one cause he's not remorseful, and he didn't care that he did that. Two different kind of people, isn't it? Now if you were the judge which would you want to see, the truthful person or the person that didn't care?

Systemic inducements were also used to coerce the false confession of Michael Crowe. As the following example from the Crowe case demonstrates, there is a fine line between systemic inducements and implied or even express promises of leniency. At one point a detective explained to Michael, "You're a child. You're 14 years old. Nobody's going to hold you to the same standards that they would some criminal on the street, okay. You're going to need some help through this."<sup>31</sup> At another point when Michael expressed concern that he would be "locked up," the following exchange occurred:

Detective Claytor: I think we have ways of helping this situation. You know what?

Mr. Crowe: What?

Detective Claytor: I'm not really sure that locking you up is the answer. You know what else?

Mr. Crowe: What?

Detective Claytor: We don't do that to 14 year olds.

Mr. Crowe: What do you do to them?

Detective Claytor: We look for understanding, and we try to help. But you know what? It's a two-way street. We put out that effort, we need that effort.

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Detective Claytor: "You know, I'm not real sure how familiar you are with this system, but kind of the way it works is if the system has to prove it, yeah, it's jail. If they don't, then its help. What that kind of puts us — or where that kind of puts us is in a position of you have these two roads to go here. Which one are we going to go down?"<sup>32</sup>

### Threats of Harm

Although police infliction of physical harm on suspects and other third-degree tactics is rare and is largely in the past, there have been some police torture scandals in the past twenty years, most notably the systematic torture of suspects by police officers in Chicago's Area Two police district.<sup>33</sup> More common are threats of physical harm such as threatening the suspect with the death penalty or with the fact that he will be sexually assaulted while in prison. For example, in the case of Michael Rettenberger, the Utah Supreme Court tossed out his confession because detectives were captured on tape threatening Rettenberger with the death penalty.<sup>34</sup>

### *Using the Post-Admission Narrative to Distinguish True From False Confessions*

Getting an innocent suspect to say "I did it" is the easy part; getting him to tell you how he or she committed a crime takes some work. By comparing the post-admission narrative with the objectively knowable facts of the crime, one can separate true confessions from false confessions. The true confession can be easily distinguished from the false confession by studying what Ofshe and Leo call the post-confession narrative.

True confessors will provide details large and small which only the real criminal would have known. Their confessions will also often lead police to corroborative evidence — the spoils, the weapon, or co-defendants. False confessors struggle for details; their confessions are often laced with “I might have done this” or “I might have done that” and many “I don’t recall.” Although the analysis of the fit between the suspect’s confession and the known facts of the crime is often a reliable way of determining the reliability of the confession, it is not without flaws. Many confessions are filled with some correct facts and some which are incorrect. Without a tape of the interrogation process, it is impossible to know whether these facts were suggested to the suspect by his interrogator or whether they originated from the mind of the suspect.

Even if the interrogation is taped, the fact that the suspect hits the mark with regard to some of the crime facts, does not guarantee that the suspect is guilty. Sometimes suspects learn these facts from reading media accounts, from the neighborhood rumor mill, or from some other source. Suspects are also often shown crime scene photos or even taken to the crime scene during the interrogation, events which are rarely captured on tape. Crime scene photos and crime scenes are rich in precisely the kind of detail that makes confessions seem truthful and these sources can contaminate the suspect’s post-admission narrative.

### *Jogging A Suspect’s Memory*

As discussed above, a suspect who falsely confesses will have great difficulty coming up with an account of the crime which fits with the crime facts. After his denials are overcome, these suspects will often begin to doubt their own memories and say things like “I must have done these awful things, but why can’t I remember it.” Detectives have an answer at the ready for the suspect who can’t remember committing the crime. They suggest that the suspect may have “blacked out” or been in a “dream state” of some sort and that these states “happen all the time.”

Suspects who have a history of mental illness or drug or alcohol addiction, are particularly vulnerable to these tactics. The “blackout” suggestion was critical in inducing a false confession from Raymond Wood, who had a history of heavy drinking:

DET1: If this is an accident we can rule it as such, okay, but if you’re gonna play with me and look like you’re hiding something, you have no idea how much evidence I have. Ray, you can hear me?

SUS: I know what I don’t remember.

DET2: Raymond, Raymond, listen to me. You know what we pulled off that bumper? Some hair, okay. Some hair came off that bumper, all right? Right now that hair—

DET1: Did you black out now at all during that night?

DET2: —right now.

DET1: Do you remember— that’s what I was getting at with the drinking. Do you think you had too much to drink last night and maybe you were blacking out?

SUS: I don’t think I had that much.<sup>35</sup>

Another tactic used by police to jog the memory of the suspect who can’t remember committing the crime, is to ask the suspect if he has ever dreamed about the crime or to give the investigator a hypothetical account of how the crime might have occurred. When the suspect tries to please the interrogator by recounting a dream or giving a hypothetical, the interrogator will often cite the suspect’s account as evidence that he is guilty. The dream statement or the hypothetical becomes the truth and the suspect may be charged or convicted on the basis of such statements. Detectives from the DuPage County Sheriff’s Department claimed that Rolando Cruz made “dream statements” which contained details of the crime unknown to the public. These statements, which were later shown to be fabrications, were used to convict Cruz and sentence him to death for the murder of 9-year-old Jeanine Nicarico. McHenry County Police officers induced Gary Gauger to

construct a hypothetical account of the murders of his two parents and then used his hypothetical to convict him and sentence him to death. Like Cruz, Gauger was exonerated off of Illinois' death row.<sup>36</sup>

### **The Relationship Between Psychological Interrogation Tactics and False Confessions**

Inbau, Reid et al, continue to maintain that the use of these methods are not "apt to cause an innocent person to confess."<sup>37</sup> For decades, courts have accepted this claim at face value and allowed police officers great latitude when evaluating confessions obtained through the use of these techniques. The growing numbers of documented false confessions in the age of psychological interrogation, however, belies Inbau and Reid's claim and has punctured what false confession expert Richard Leo has called the "myth of the psychological interrogation."<sup>38</sup> These techniques can and have contributed to false confessions and defenders need to be able to demonstrate this fact in order to get courts to more closely scrutinize these practices and legislatures to take seriously the reforms such as mandatory recording of custodial interrogations.

DNA technology has revealed that our criminal justice wrongfully arrests and convicts innocent suspects with alarming frequency. A 1995 study of forensic laboratories that conduct DNA testing found that in roughly 23 percent of the cases, DNA test results excluded the primary suspects. In the cases reported by the FBI as part of this study, DNA test results excluded 20 percent of the suspects, and only 60 percent matched the primary suspect.<sup>39</sup> To date, according to data from the Benjamin N. Cardozo School of Law Innocence Project, DNA evidence has exonerated 142 wrongfully convicted individuals. Of these 142, 35 or 25% have involved false confessions. A soon to be released study of 125 "proven false confessions" by Richard Leo and I, reveals that the problem is not just confined to wrongfully convicted persons. Because DNA technology is now widely used in criminal investigations, many false confessions are identified before a defendant is convicted. The fact that DNA evidence is only available in a fraction of all cases, suggests that the DNA exonerations are only the tip of the iceberg of the false confession problem.<sup>40</sup>

Because very few police departments record the entire interrogation of suspects, researchers have been frustrated in their efforts to identify which tactics, in particular, increase the risk of false confessions. Nevertheless, laboratory studies and analysis of documented false confession cases, suggests that certain tactics, especially when used upon vulnerable suspects like the mentally retarded,<sup>41</sup> children and juveniles,<sup>42</sup> the mentally ill, and others who are highly suggestible. For example, in laboratory experiments, under circumstances which are far less coercive than interrogations, Saul Kassin has been able to generate large numbers of false confessions from college students by confronting them with false evidence of their guilt.<sup>43</sup>

A similar experiment involving teenagers led to even higher false confession rates.<sup>44</sup> By analyzing the documented false confession cases, experts have raised concerns about excessively long interrogations, the use of false evidence ploys which involved scientific or pseudo-scientific testing, minimization techniques like the accident scenario which ask suspects to adopt scenarios in which police officers change the crime scene facts, and tactics which provide to suspects an explanation for why they are unable to remember details or ask a suspect to provide hypothetical accounts of the crimes.<sup>45</sup>

### **Conclusion**

It is now beyond dispute that the psychological interrogation techniques contribute to false and coerced confessions. This undeniable fact necessitates that defenders familiarize themselves with these techniques both by reading the manuals and studying actual tapes and transcripts. But after spending the past five years reviewing hundreds of hours of interrogation tapes and transcripts and documenting hundreds of proven false confessions and confessions which are probably false, I still have many questions to answer about the prevalence of false confessions and the reasons why innocents falsely confess. The good news is that there

are some answers to these questions on the horizon. New psychological research is being conducted and contemplated in the laboratories and more and more jurisdictions are requiring law enforcement to record custodial interrogations of suspects. Even more promising is the fact that an increasing number of police departments and prosecutor's officers are adopting taping policies on their own. As more and more jurisdictions record interrogations, judges will be able to define the acceptable barriers of police practices without relying on swearing contests, prosecutors will be able to assess the voluntariness and reliability of confession evidence earlier in the process instead of taking a police officer's word in blind faith, and defenders will be able to effectively challenge confessions before, during, and after trial. Until these changes take hold, however, below are some of my suggestions for how defenders can prepare confession cases, which are in outline form below.

### **Pre-Trial Preparation: Some Helpful Hints**

- ◆ Educate yourself about police interrogation practices and false confessions. Obtain a copy of Inbau, Reid, Buckley and Jayne's Criminal Interrogations and Confessions (4<sup>th</sup> Ed. 2001) or other widely used police training manuals. Another such manual is David E. Zulawski and Douglas E. Wicklander, Practical Aspects of Interview and Interrogation, (2d ed. 2002).
- ◆ Seek police training materials through discovery or consult with retired detectives (you may wish to hire them as private investigators to learn about the training in your area; this material is available and can be obtained through the subpoena power). If you obtain these materials, freely share with them with other defenders.
- ◆ Debrief your client as soon as possible about the details of his interrogation. Once he informs you that he has confessed, do not waste time. It is important that you interview him as soon as possible after the interrogation before his memory fades or is contaminated by other evidence in the case. Getting a timeline will be crucial.
- ◆ Some defenders recommend that the interview take place before you receive a copy of the confession.<sup>46</sup> This is a good idea. The more information you have about the case, the greater the risk will be that you will enter the interview with a prejudgment about your client's guilt or that you will contaminate your client's memory of the events by providing the client with details of the crime. At a later point, you may want to ask your client about specific statements he is alleged to have made and what police tactics led him to make those statements but these inquiries should be reserved for later interviews. Refrain from asking leading question and be careful not to interrupt your client – the last thing you want is to have your client relive the trauma of the interrogation with you, his lawyer, acting just as his interrogators did.
- ◆ Because the totality of the circumstances test governs the question of whether the confession is voluntary, it is absolutely critical that you get as much detail from your client about the physical environment of the of the interview – the room , the furniture, the lighting, whether there was a phone or a clock, the lighting (artificial or natural), a lock on the door, the arrangement of the chairs, descriptions of the officers, etc. Have your client draw you a diagram of the interview room and place himself and the officers in their assigned seats.
- ◆ You may want to do some role playing with your client. Have your client play the role of the interrogator and get him to act out what the interrogator was saying, how close he was to the suspect, whether he touched the suspect, etc. Defendants often give very generic descriptions (“he screamed at me”) and role playing can get your client to open up. Look to see if the client can articulate some of the tactics

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described above – check for signs of minimization, the accident scenario, the use or threatened use of a polygraph test, maximization, promises of leniency, inducements, memory jogging.

- ◆ After this initial interview, you'll want to go back to your client to go over with him the discovery related to the interrogation. Confront him with the police accounts of the interrogation and ask him if they are accurate. If your client has signed a written statement, go over each line, establish who wrote the line and whether it is accurate.
- ◆ If the confession contains details of the crime that only the true perpetrator would know, ask your client how he came to know these details. Find out the extent of his knowledge about the crime before he was arrested (news accounts, conversations, rumors, presence at the crime scene). Also ask your client what if any information was shown to him during the interrogation (photos, fingerprints, lie detector results, etc.)
- ◆ Use experts. Because certain suspects are more vulnerable to coercion than others and more likely to confess when pressured, you may wish to have your client evaluated by a mental health professional to see if he or she is particularly suggestible. The Gudjonsson Suggestibility Scale is a validated psychological test that can measure "interrogative suggestibility." Such testing, along with IQ testing, is recommended for mentally ill, mentally retarded, and juvenile suspects. Gisli H. Gudjonsson is a former detective from Iceland who is a prodigious researcher and one of the foremost experts on the psychology of false confessions. His new book is The Psychology of Interrogations and Confessions, A Handbook (Wiley 2003). You should also consider hiring an expert in false confessions to assist you at the voluntariness hearing or at trial. Many courts will allow these experts to testify about the psychology of police interrogations, how these techniques can produce false confessions, the wrongful conviction literature on false confessions, and other subjects relating generally to the topic. Most courts, however, do not allow experts to give an opinion on the ultimate issue of voluntariness and reliability.
- ◆ File motions to suppress. These motions give you a trial run at the detectives and allow you to lock them into a story. Use your cross-examination skills to take the factfinder inside the interrogation room, to give them a sense of the total domination and control of the interrogators and the utter helplessness of suspects ("If my client wanted to go to the bathroom, he had to ask your permission, correct? When he did go, you followed him there, waited outside the room, and escorted him back, correct? If he needed a drink, you had to provide it to him, correct? He wasn't allowed to get up and go to the coke machine or the water fountain? He couldn't get up and use the pay phone, right? If he wanted the phone, you would have had to grant him permission, correct?"). These facts may not sway some judges, but jurors who are taken inside such interrogation rooms may be more concerned.
- ◆ Establish that the detective reviewed case files and spoke to arresting officers about the case before the interrogation. In other words, he had knowledge of the objectively knowable facts of the case before he entered the room (this gives him the knowledge needed to feed them to the suspect either on purpose or inadvertently through his questions) and also get the detective to admit that he suspected the defendant based in part on his behavior analysis.
- ◆ In juvenile cases, parents are often present when their children confess. Even though the parents failed to protect their children (and in many cases, encouraged them to waive their rights), their mere presence often is convincing evidence to courts that the confession was voluntary. As an attorney, you need to thoroughly debrief parents to see if police officers actively discouraged them from helping their kids. This is common. In fact, Reid, et al trains detectives to neutralize parents. For example, Reid, et al. suggest that to enlist the cooperation of parents, interrogators should use some of the very same

minimization tactics they use during interrogations: “[i]n dealing with an overprotective attitude towards his or her child, an investigator should emphasize three primary points: 1) no one blames the parents or views them as negligent in their upbringing of their child, 2) all children at one time or another have done things to disappoint their parents, and 3) everyone – the investigator as well as the parents – has done things as a youth that should not have been done.”<sup>47</sup> These tactics are designed to make it easier to interrogate the child, especially if the parent is in the room during the interrogation. Once the interrogation starts, Inbau instructs interrogators to tell the parents to refrain from talking, relegating the parent to the status of a mere observer, and then to proceed to interrogate the juvenile suspect as if the parent were not there.<sup>48</sup>

- ◆ Know your interrogators. Build a file thru LEXIS, newspaper searches and case searches. Try to obtain personnel files relating to problematic interrogations in their backgrounds. Ask your colleagues about the interrogator’s reputation.
- ◆ Move to suppress any statement that is not recorded in its entirety as inherently unreliable. During the hearing establish that equipment, whether audio and video, is available in the police station. The officer could have chosen to tape the interrogation but decided not to. If you have a strong case for a false confession, you will want to preserve issues relating to the failure of the police to record interrogations. Appellate courts, in the post-DNA age, seem to be more willing to consider a court-imposed taping requirement. In a case handled by Assistant State Public Defender Eileen Hirsch, the Wisconsin Appeals Court in *In re Jerrell J.*, recently refused to require videotaping of police interrogations but expressed “grave concern[s]” over juveniles’ false confessions and recognized the need “for Wisconsin to tackle the false confession issue.” Although the Court took no position on the electronic recording issue, it did express that the time has come for Wisconsin to find “safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent.” This case is being appealed to the Wisconsin Supreme Court. To view, the amicus brief of the Center on Wrongful Convictions and the Wisconsin Innocence Project, see <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessionsindex.htm>. To date, both Alaska and Minnesota require that custodial interrogations be recorded. See *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985) (“the recording of custodial interrogations is now a reasonable and necessary safeguard, essential to the adequate protection of the accused’s right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (requiring electronic recording of all custodial interrogations under Supreme Court’s supervisory powers). The New Jersey Supreme Court is currently considering the issue.

### Some Useful Sources of Information on Police Interrogation Tactics and False Confessions

There are a number of easily accessible articles, websites, and other materials that should be read, including:

- ◆ Richard Ofshe and Richard Leo (1997), *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. Univ. L. Rev. 979
- ◆ Saul M. Kassin and Katherine Keichel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation*, 7 Psychol. Sci. 125 (1996)
- ◆ More of Saul Kassin’s articles can be found on the web at his homepage: <http://www.williams.edu/Psychology/Faculty/Kassin/default.htm>

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- ◆ Reid, Inbau, Buckley & Jayne, Criminal Interrogations and Confessions (4<sup>th</sup> Ed.)
  - ◆ The website of John Reid and Associates is <http://www.reid.com>
  - ◆ Gisli H. Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook (2003)
  - ◆ Steven A. Drizin & Beth Colgan: *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois= Problem of False Confessions*, 32 Loy. L. J. 337, (Winter 2001)
  - ◆ Steven A. Drizin, *The Problem of False Confessions in Illinois*, <http://www.law.nwu.edu/depts/clinic/cfjc/programs/falseconfessions.htm>
  - ◆ Website of Northwestern University School of Law's Center on Wrongful Convictions: <http://www.law.nwu.edu/depts/clinic/wrongful/FalseConfessions.htm>
  - ◆ Website of the Benjamin N. Cardozo School of Law Innocence Project: <http://www.innocenceproject.org>
  - ◆ Here are several cases in which courts (with the benefits of transcripts) have found some of the techniques described above to be so coercive as to render a defendant's subsequent confessions involuntary; *State v. Rettenberger*, 984 P.2d 1009 (1999) (18 year old who functioned at the level of a 15 year old); *In re Anthony Harris*, 2000 WL 748087 (Ohio App. 2000) (interrogation of 12 year old boy in murder case); *In the Matter of B.M.B.*, 955 P.2d 1302 (Kan. 1998) (interrogation of 10 year old boy in rape case.; *In re D.B.X.*, 638 N.W.2d 449 (Minn App. 2002) (suppressing 14 year old's confession as involuntary where detective: "(1) ordered D.B.X. to remove his clothing; (2) told D.B.X. that he would have to 'make a recommendation' to the prosecutor about the case; (3) admonished D.B.X. to tell the truth; (4) challenged D.B.X.'s propensity for truthfulness; (5) told D.B.X. that if he did not 'come clean' on small matters, Chambers would not be able to 'help'; and (6) encouraged D.B.X. to join, among two kinds of people, the people who 'make a mistake' and confess rather than the people who are non-remorseful criminals.")

There are also some excellent tapes of television news shows worth purchasing or viewing online:

- ◆ For an excellent source of information on false confessions, visit the website of the Canadian Broadcasting Corp's show Disclosure and view the show "Inside the Interrogation Room" online at: [http://www.cbc.ca/disclosure/archives/030128\\_confess/main.html](http://www.cbc.ca/disclosure/archives/030128_confess/main.html) and [http://www.cbc.ca/disclosure/archives/030128\\_confess/resources.html](http://www.cbc.ca/disclosure/archives/030128_confess/resources.html)
  - ◆ "A Child's Confession", ABC NEWS 20-20, (The Story of Anthony Harris), June 18, 1999 (Correspondent Robert Campos)
  - ◆ "The Interrogation of Michael Crowe," Court TV's award winning documentary, aired September 10, 2000. <http://www.courtvtv.com/onair/shows/thesystem/gpepisodes/interrogationofcrowe.html>
  - ◆ "Murder on a Sunday Morning", 2001 Academy Award Winning Documentary, HBO America Undercover Special aired March 31, 2001 (False confession story of Brenton Butler) (excellent cross-exam of interrogating officers) <http://www.hbo.com/americaundercover/murder/>
  - ◆ ABC 20-20's "False Confessions" piece featuring three cases Gary Gauger (Ill.), Allen Chesnet (Md.), Raymond Wood (Me.), aired March 15, 2002 (Producer Sarah Koch)
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**Endnotes**

<sup>1</sup>Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminal 429, 440 (Winter 1998) (finding that 73% of false confessors who took their cases to trial were convicted).

<sup>2</sup>Now in its Fourth edition, and with two new authors, the Inbau and Reid manual is still considered to be the bible of training manuals. Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogations and Confessions* (4<sup>th</sup> Ed. 2001).

The website of John Reid and Associates is at: <http://www.reid.com>

<sup>3</sup>JOHN CONROY, UNSPEAKABLE ACTS; ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 231 (2000).

<sup>4</sup>See Richard Ofshe and Richard Leo (1997), *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. Univ. L. Rev. 979.

<sup>5</sup>See Inbau, et al, *supra* note 2, at 51, 70-72.

<sup>6</sup>*Id.* at 51-64.

<sup>7</sup>Over 90% of juveniles waive their right to remain silent. This figure is 95% for juveniles under age 15. Thomas Grisso and Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 Law & Human Behavior 321, 339 (1977).

<sup>8</sup>Inbau, et al, *supra* note 2, at 93-94.

<sup>9</sup>Inbau et al, *supra* note 2, at 171-191.

<sup>10</sup>Saul M. Kassin, Christine C. Goldstein, and Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room*, 27 Law and Human Behavior 187 (April 2003).

<sup>11</sup>*Id.*

<sup>12</sup>See Ofshe and Leo, *supra* note 4, at 981-1122; See also, Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL., & SOC'Y 189 (1997).

<sup>13</sup>Inbau, et al., *supra* note 2, at 209-397.

<sup>14</sup>*Id.* at 304.

<sup>15</sup>*In the Matter of B.M.B.*, 955 P.2d 1302 (Kan. 1998).

<sup>16</sup>Transcript of Interrogation of B.M.B (May 30, 1996), Case # 96C43540 (on file with author).

<sup>17</sup>Saul Kassin, & Kathryn Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*.7 Psychological Science 125-128 (1996).

<sup>18</sup>THOMAS MCKENNA, MANHATTAN NORTH HOMICIDE, at 11. (1991).

<sup>19</sup>See Transcript of Interrogation of Michael Crowe, January 22, 1998 (1/22), Volume II, at 80 (on file with author). Crowe Transcripts 1/22, Vol. I at.20-25, 29, 40, 43, Vol. I at. 10-11, 34,72.

<sup>20</sup>See Crowe Transcripts, 1/22 Vol. II at 20-25, 29, 40, 43, Vol. II at 10-11, 34,72).

<sup>21</sup>See Crowe Transcripts, Vol. II pp.40, 52-61.

<sup>22</sup>*In re Harris*, 2000 WL 748087 (Ohio App. 2000).

<sup>23</sup>Transcript of Interrogation of Anthony Harris (January 15, 1998) (on file with author).

<sup>24</sup>Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW AND HUM. BEH. 233, 234-35 (1991).

<sup>25</sup>Inbau, et al, *supra* note 2, at 232-303.

<sup>26</sup>*Transcript of B.M.B.*

<sup>27</sup>Interrogation of Raymond Wood, available at <http://www.mtcforensics.com/transcript.html>.

<sup>28</sup>Richard J. Ofshe & Richard A. Leo *The Decision to Confess Falsely: Rational Choice and Irrational Action* 74 Denver U L. Rev. 979-1119.

<sup>29</sup>Inbau, Reid et al, *supra* note 2, at 262.

<sup>30</sup>Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW AND HUM. BEH. 233-251 (1991). See also Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminal 429-496 (1998).

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<sup>31</sup>See Crowe Transcripts, Vol. III at p. 73.

<sup>32</sup>See Crowe Transcripts, Vol. III p. 80.

<sup>33</sup>See generally CONROY, *supra* note 3.

<sup>34</sup> *State v. Rettenberger*, 984 P.2d 1009 (1999) (18-year-old who functioned at the level of a 15-year-old).

<sup>35</sup>See Raymond Wood Interrogation, *supra* note 27.

<sup>36</sup>The Cruz and Gauger cases and many other Illinois false confessions are described in greater detail at: <http://www.law.northwestern.edu/depts/clinic/cfjc/programs/falseconfessions.htm#adultsproven>

<sup>37</sup>Inbau, Reid et al, *supra* note 2 at 212.

<sup>38</sup>Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. \_\_ (due out March 2004).

<sup>39</sup>*Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* Nat'l Instit. Just, Research Report, (June 1996) at xxviii.

<sup>40</sup>*Id.*

<sup>41</sup>For an excellent article on false confessions and the mentally retarded, see Morgan Cloud, et al, *Words Without Meanings: The Constitution, Confession, and the Mentally Retarded Suspects* 69 U.Chi.L.Rev. 495, 573 (2002).

<sup>42</sup>Drizin, S, and Colgan, B. "Tales From The Juvenile Confession Front: A Guide To How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects", a chapter in *Interrogations, Confessions, and Entrapment* (edited by G. Daniel Lassiter), a volume in the Perspectives in Law and Psychology Series, edited by Ron Roesch (Kluwer Academic/Plenum Publishers, due out Summer 2004).

<sup>43</sup>Saul M. Kassin and Katherine Keichel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation* 7 Psychol. Sci. 125 (1996).

<sup>44</sup>Redlich, A.D., & Goodman, G.S. (2003). Taking responsibility for an act not committed: The influence of age and suggestibility. *Law and Human Behavior*, 27 141-156. Redlich and Goodman found extremely high false confession rates among teenagers in a laboratory experiment in which only mild coercion was used. For a summary of the Redlich and Goodman study, see Drizin, S.A. *False Confessions: Some Developmental And Forensic Considerations*, available on the website of Cornell Institute on Research for Children at <http://www.human.cornell.edu/units/circ/>.

<sup>45</sup>See e.g., Welsh White, *What is an Involuntary Confession Now?*, 50 Rutgers U. L. Rev. 2001, 2042-2056 (Summer 1998), George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TX L. Rev. 1091 (March 2003).

<sup>46</sup>See Tobey C. Hockett, How to Identify and Expose a False Confession, training materials available on the web at : <http://www.nettally.com/fpda/False%20Confession%20Outline.doc>.

<sup>47</sup>See Inbau, et al., *supra* note 2, at 301.

<sup>48</sup>*Id.* ■

## REVIEW GRANTED IN THE WISCONSIN SUPREME COURT

For the list of cases the Wisconsin Supreme Court has accepted for review, please visit the Table of Pending Cases on the Wisconsin Court System's website at:

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

The Table of Pending Cases is updated regularly and includes the case number, abbreviated case caption, a brief statement of the issues in the case, background information on how the case got to the Supreme Court, the date of oral argument, the Supreme Court mandate, and the citations to the Court of Appeals opinion, if applicable.



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## Wrongful Convictions in Wisconsin

**W**isconsin has three of the nation's 142 DNA exonerations. The state also has exonerations based upon other types of evidence. Wisconsin's known wrongful convictions include:

- **Eugene Glenn** was convicted in Milwaukee County and sentenced to 20 years in prison for a robbery that occurred in 2001. He was convicted primarily on the basis of an identification made by a single eyewitness, the victim of the robbery. Glenn was exonerated in October 2003 after his public defender tracked down leads never followed by the police, and found the true perpetrator, who confessed.
- **Steven Avery** was convicted of sexual assault, attempted murder, and false imprisonment in Manitowoc County in 1985. The convictions were based almost entirely upon the testimony of a single eyewitness, supported to a much lesser degree by microscopic hair examination evidence and purportedly incriminating statements made by Mr. Avery. Eighteen years later, in 2003, DNA evidence proved that Mr. Avery was not the perpetrator. The DNA profile also matched another man who was by then serving a 60-year sentence for sexual assaults convicted after the assault in this case.
- **Michael Piaskowski** was convicted of first-degree intentional homicide for a 1992 murder in Brown County. His conviction was affirmed on appeal in state court. The federal district court, however, granted habeas corpus relief, and the Seventh Circuit Court of Appeals affirmed in 2001, holding that the evidence against Piaskowski was legally insufficient to sustain the conviction.
- **Thomas Murphy** was convicted in a 1998 trial in Portage County of two counts of both first and second-degree sexual assault. The trial court granted a new trial based on evidentiary errors—including erroneous reliance at trial on inconclusive hair examination testing to suggest that the hairs came from the defendant. The defendant was acquitted at the retrial, after approximately 2 ½ years in prison.
- **Samuel Hogan** was convicted in Milwaukee County of second-degree sexual assault arising from an incident in April 1995. Hogan's conviction was reversed on appeal in 1997 based on a finding of ineffective assistance of counsel because counsel failed to investigate and present exculpatory evidence. The district attorney's office chose not to retry the defendant.
- **Anthony Hicks** was convicted of sexual assault in Dane County in 1991. The conviction was obtained largely by eyewitness testimony and microscopic hair examination. DNA subsequently proved that the hairs—which had been attributed to Hicks—could not have been his. The Supreme Court reversed the conviction, and the prosecution dismissed the case, after Hicks had served approximately five years in prison.
- **Cornelius Reed** was convicted of first-degree intentional homicide in Milwaukee County for a 1992 drive-by shooting. In 1996 the court of appeals reversed the conviction and granted a new trial based

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on newly discovered evidence. The new evidence more reliably pointed to another individual as the murderer. Reed was retried but acquitted at the new trial, after approximately three years in prison.

- ***Fredric Saecker*** was convicted in 1989 in Buffalo County of second-degree sexual assault, burglary, and kidnapping. His conviction rested on circumstantial evidence—he was seen walking on the highway near the crime with blood on his hands—and incriminating statements he allegedly made while in jail, even though he did not fit the victim’s description, and she and her husband could not identify him. His conviction was affirmed on appeal. Six years later, in 1995, DNA testing established that the semen collected from the victim could not have come from him, and his conviction was set aside.
- ***Albert Luster*** was convicted in Milwaukee County of first-degree sexual assault of a child for an incident that allegedly occurred in 1990. The trial court granted a new trial based on newly discovered evidence and ineffective assistance of trial counsel. The case was subsequently dismissed.
- ***Francis Phillip Hemauer*** was convicted of a 1968 abduction, rape, and attempted murder in Milwaukee County, and sentenced to 60 years in prison. The primary evidence against him was eyewitness testimony of the victim and incriminatory statements he allegedly made during custodial questioning. His conviction was affirmed by the supreme court. The conviction was subsequently set aside, however, with the agreement of the Milwaukee County District Attorney’s Office, when serological tests (non-DNA) proved that he was not the source of the seminal deposits in the victim’s underwear. He was released in 1981, after eight years in prison.
- In ***In re DSC***, a juvenile was adjudicated delinquent in Rock County upon a finding that he committed first-degree intentional homicide in 1985. The adjudication rested on the eyewitness testimony of a five-year-old child. The adjudication was reversed on newly discovered evidence: an older boy confessed that he alone committed the crime.
- In ***In re Curtis S.***, a juvenile was adjudicated delinquent in Milwaukee County upon a finding that he committed first-degree sexual assault in 1995. The trial court reversed the adjudication upon a finding of ineffective assistance of counsel. Counsel had failed to present evidence from the alleged victim’s family and school that the child was a pathological liar, and had repeatedly made false abuse allegations against teachers at school. After the trial court granted a new trial, the district attorney’s office dismissed the case.

If you know of other wrongful convictions in Wisconsin—defined as cases in which the conviction was vacated and charges were then dropped or the defendant was acquitted, for reasons other than bars to use of evidence or to retrial unrelated to innocence (such as Fourth Amendment or double jeopardy bars)—please send them to Keith Findley, Wisconsin Innocence Project, University of Wisconsin Law School, 975 Bascom Mall, Madison, WI 53706. ■

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## LEGISLATIVE UPDATE

### 2003 Wisconsin Act 110 <http://www.legis.state.wi.us/2003/data/acts/03Act110.pdf>

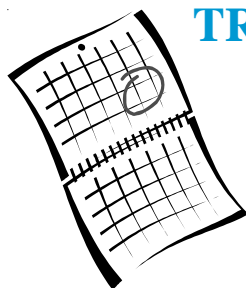
This act defines “live birth” and “born alive” for application to all of the statutes. The act also contains the following two new rules of statutory construction: (1) an individual who undergoes a live birth is born alive; and (2) if a statute or rule refers to a live birth or to the circumstance of being born alive, the statute or rule must be construed such that whoever undergoes a live birth as the result of an abortion has the same legal status and legal rights as a human being who undergoes a live birth as the result of natural or induced labor or a cesarean section.

The act went into effect on January 8, 2004.

### 2003 Wisconsin Act 122 <http://www.legis.state.wi.us/2003/data/acts/03Act122.pdf>

This act allows, upon request, a sheriff or jailer access to a competency report of a criminal defendant being held in the jail pending or during a trial or sentencing hearing. The sheriff or jailer may also provide a copy of the report to the person who maintains the jail’s medical records as well as the defendant’s doctor or nurse or person who provides health care services to inmates at the jail.

The act went into effect on February 21, 2004.



## 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)**

### **I Object: Evidence for the Criminal Defense Lawyer**

Office of the Wisconsin State Public Defender

March 4, 2004-Madison

March 11, 2004-Milwaukee

March 12, 2004-Appleton

March 25, 2004-Wausau

March 26, 2004-Eau Claire

April 20, 2004-LaCrosse

### **12th Annual Trial Skills Academy**

Office of the Wisconsin State Public Defender

May 17-21, 2004

Delavan, Wisconsin

### **Annual Criminal Defense Conference**

Office of the Wisconsin State Public Defender

October 7 & 8, 2004

Milwaukee, Wisconsin

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## PRACTICE POINTER

*The following Practice Pointer was submitted by Michael Yovovich, Assistant State Public Defender in the Madison Appellate Office.*

### **MAKING TIS-II WORK FOR YOU IN TIS-I CASES: ALWAYS BE AWARE OF THE DATE THE OFFENSE WAS COMMITTED**

Now that truth-in-sentencing Part II (2001 Act 109, effective for crimes committed on or after February 1, 2003) has been in effect for approximately one year, two recurrent problems have surfaced.

The first truth-in-sentencing package (1997 Act 283, effective for crimes committed on or after December 31, 1999), lasted only three years. The interplay between these two massive changes in such a short period of time has led to problems in advocacy.

The first problem is that some defense attorneys fail to argue at sentencing that their TIS-I clients are being sentenced in a TIS-II world. The legislature has chosen to reduce the maximum sentence for most offenses by approximately a third (**see charts which follow**). That reduction bears directly on how society and the legislature view the seriousness of the offense. One of the main considerations for a sentencing judge is the seriousness of the offense. While the judge is not bound to follow the legislative lowering of the classification and penalty, the change bears directly on the seriousness of the offense.

Moreover, only trial counsel has the opportunity to make this argument at sentencing. On appeal, a change in the penalty is not a new factor.

There are some offenses which have had a dramatic change in the maximum sentence. For example, if your client was involved in an OWI homicide between December 31, 1999 and January 31, 2003, he or she faced a maximum sentence of 60 years. If that same client was a first time drunk driver and charged with OWI homicide occurring on February 1, 2003, he or she would only face a maximum sentence of 25 years. There is no conceivable reason to not bring such a disparity to the court's attention.

There are numerous offenses which were committed during the three years of the TIS-I regime where the defendant has not yet been sentenced. In addition, there will be even more defendants whose probations will be revoked in the future. While it is an open question whether counsel would be legally "ineffective" for failing to argue how less serious the offense is currently, counsel would surely be a more effective advocate for his or her client by doing so. The closer the date of the offense comes to the effective date of TIS-II, the more compelling the argument.

The second problem, which is not as prevalent, is that at times TIS-II defendants slip through the cracks and are sentenced as though they committed the offense before February 1, 2003. From the appellate office's experience, this can occur in three separate ways. First, the district attorney makes a mistake in charging the wrong felony classification. It is then taken for granted that the classification is correct. Second, the district attorney charges the correct current felony classification, but uses the TIS-I maximum for that classification. Once again, the charging document is not double-checked. A third way that the mistake might occur is that the presentence report (often in sentencing after revocation cases) cites the wrong maximum and makes a corresponding recommendation. This has also slipped through the system.

While such mistakes may be caught in the appellate process, not every defendant appeals. In addition, appellate counsel may make the same mistake trial counsel made

The following chart was prepared by Assistant State Public Defender Jefren Olsen of the Madison Appellate Office. It is meant to aid you in avoiding the mistakes described above. Please note that the chart is **not** all inclusive. There are some offenses with significant substantive changes which are not included, and some unclassified offenses which later became classified are also not included.

In addition, because changes are frequently made to the statutes related to criminal penalties, counsel should always check the statutory provisions..

***Statutes in the Criminal Code (Chs. 940 to 951) in which penalties were reduced by 2001 Wis. Act 109 (TIS II)***

The penalties for each class of felony are expressed as maximum confinement in prison + maximum extended supervision = maximum term of imprisonment.

| Statute               | Classification (and penalty)       |  |
|-----------------------|------------------------------------|--|
|                       | <u>TIS I</u> (12/31/99 to 1/31/03) | <u>TIS II</u> (eff. 2/1/03)                    |
| 940.02                | B (40 + 20 = 60)                   | C (25 + 15 = 40)                               |
| 940.07                | C (10 + 5 = 15)                    | G (5 + 5 = 10)                                 |
| 940.09                | B (40 + 20 = 60)                   | C (25 + 15 = 40) <i>or</i><br>D (15 + 10 = 25) |
| 940.11(1)             | C (10 + 5 = 15)                    | F (7.5 + 5 = 12.5)                             |
| 940.12                | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.15(2), (5) & (6)  | E (2 + 3 = 5)                      | I (1.5 + 2 = 3.5)                              |
| 940.19(2)             | E (2 + 3 = 5)                      | I (1.5 + 2 = 3.5)                              |
| 940.19(4) & (6)       | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.195(2)            | E (2 + 3 = 5)                      | I (1.5 + 2 = 3.5)                              |
| 940.195(4)            | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.20(1)             | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.20(1m)            | E (2 + 3 = 5)                      | I (1.5 + 2 = 3.5)                              |
| 940.20(2), (2m) & (3) | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.20(4), (5) & (6)  | E (2 + 3 = 5)                      | I (1.5 + 2 = 3.5)                              |
| 940.20(7)             | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.201(2)            | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |
| 940.203(2)            | D (5 + 5 = 10)                     | H (3 + 3 = 6)                                  |

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| 940.205(2)            | D (5 + 5 = 10)        | H (3 + 3 = 6)                                      |
| 940.207(2)            | D (5 + 5 = 10)        | H (3 + 3 = 6)                                      |
| 940.21                | B (40 + 20 = 60)      | C (25 + 15 = 40)                                   |
| 940.22(2)             | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                                 |
| 940.24(1) & (2)       | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                                  |
| 940.285(2)(b)1g.      | B (40 + 20 = 60)      | C (25 + 15 = 40) <i>or</i><br>D (15 + 10 = 25)     |
| 940.285(2)(b)1m.      | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                                 |
| 940.285(2)(b)1r. & 2. | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)<br>(under certain circumstances) |
| 940.29                | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                                  |
| 940.295(3)(b)1g.      | B (40 + 20 = 60)      | C (25 + 15 = 40) <i>or</i><br>D (15 + 10 = 25)     |
| 940.295(3)(b)2.& 3.   | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)<br>(under certain circumstances) |
| 940.305(1)            | A (life imprisonment) | B (40 + 20 = 60)                                   |
| 940.305(2)            | B (40 + 20 = 60)      | C (25 + 15 = 40)                                   |
| 940.31(1)             | B (40 + 20 = 60)      | C (25 + 15 = 40)                                   |
| 940.31(2)(a)          | A (life imprisonment) | B (40 + 20 = 60)                                   |
| 940.31(2)(b)          | B (40 + 20 = 60)      | C (25 + 15 = 40)                                   |
| 941.11                | D (5 + 5 = 10)        | H (3 + 3 = 6)                                      |
| 941.12(1)             | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                                  |
| 941.20(3)(a)          | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                                 |
| 941.26(2)(b)          | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                                 |
| 941.26(2)(f)          | D (5 + 5 = 10)        | H (3 + 3 = 6)                                      |
| 941.26(4)(d)          | D (5 + 5 = 10)        | H (3 + 3 = 6)                                      |
| 941.31(1)             | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                                 |

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| 941.315(3)        | D (5 + 5 = 10)        | H (3 + 3 = 6)                             |
| 941.32            | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                        |
| 941.325           | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 941.327(2)(b)1.   | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 941.327(2)(b)2.   | D (5 + 5 = 10)        | H (3 + 3 = 6)                             |
| 941.327(2)(b)3.   | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                        |
| 941.327(2)(b)4.   | A (life imprisonment) | C (25 + 15 = 40)                          |
| 941.327(3)        | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 941.37(3)         | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 941.38(2)         | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 942.09(2)         | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 943.01(2)         | D (5 + 5 = 10)        | I (1.5 + 2 = 3.5)                         |
| 943.01(2d) & (2g) | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 943.011(2)        | D (5 + 5 = 10)        | I (1.5 + 2 = 3.5)                         |
| 943.012           | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 943.013(2)        | D (5 + 5 = 10)        | I (1.5 + 2 = 3.5)                         |
| 943.015(2)        | D (5 + 5 = 10)        | I (1.5 + 2 = 3.5)                         |
| 943.017(2) & (2m) | D (5 + 5 = 10)        | I (1.5 + 2 = 3.5)                         |
| 943.02(1)         | B (40 + 20 = 60)      | C (25 + 15 = 40)                          |
| 943.03            | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 943.04            | D (5 + 5 = 10)        | H (3 + 3 = 6)                             |
| 943.10(1)         | C (10 + 5 = 15)       | F (7.5 + 5 = 12.5)                        |
| 943.10(2)         | B (40 + 20 = 60)      | E (10 + 5 = 15)                           |
| 943.12            | E (2 + 3 = 5)         | I (1.5 + 2 = 3.5)                         |
| 943.20(3)(c)      | C (10 + 5 = 15)       | G (5 + 5 = 10) <i>or</i><br>H (3 + 3 = 6) |

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| 943.20(3)(d)          | D (5 + 5 = 10)   | H (3 + 3 = 6)      |
| 943.201(2)            | D (5 + 5 = 10)   | H (3 + 3 = 6)      |
| 943.205(3)            | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.207(3m)(b)        | D (5 + 5 = 10)   | I (1.5 + 2 = 3.5)  |
| 943.207(3m)(c)        | C (10 + 5 = 15)  | H (3 + 3 = 6)      |
| 943.208(2)(b)         | D (5 + 5 = 10)   | I (1.5 + 2 = 3.5)  |
| 943.208(2)(c)         | C (10 + 5 = 15)  | H (3 + 3 = 6)      |
| 943.209(2)(b)         | D (5 + 5 = 10)   | I (1.5 + 2 = 3.5)  |
| 943.209(2)(c)         | C (10 + 5 = 15)  | H (3 + 3 = 6)      |
| 943.21(3)(b)          | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.23(1g)            | B (40 + 20 = 60) | C (25 + 15 = 40)   |
| 943.23(2)             | D (5 + 5 = 10)   | H (3 + 3 = 6)      |
| 943.23(3) & (5)       | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.24(2)             | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.25(1) & (2)       | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.27                | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.28(2), (3) & (4)  | C (10 + 5 = 15)  | F (7.5 + 5 = 12.5) |
| 943.30(1) through (5) | D (5 + 5 = 10)   | H (3 + 3 = 6)      |
| 943.31                | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.32(2)             | B (40 + 20 = 60) | C (25 + 15 = 40)   |
| 943.34(1)(c)          | C (10 + 5 = 15)  | G (5 + 5 = 10)     |
| 943.38(1) & (2)       | C (10 + 5 = 15)  | H (3 + 3 = 6)      |
| 943.39                | D (5 + 5 = 10)   | H (3 + 3 = 6)      |
| 943.395(2)(b)         | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |
| 943.40                | D (5 + 5 = 10)   | H (3 + 3 = 6)      |
| 943.41(8)(b)          | E (2 + 3 = 5)    | I (1.5 + 2 = 3.5)  |

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| 943.41(8)(c)              | C (10 + 5 = 15) | G (5 + 5 = 10),<br>H (3 + 3 = 6) <i>or</i><br>I (1.5 + 2 = 3.5) |
| 943.45(3)(c)              | E (2 + 3 = 5)   | A misdemeanor<br>(9 months)                                     |
| 943.45(3)(d)              | D (5 + 5 = 10)  | I (1.5 + 2 = 3.5)   |
| 943.455(4)(c)             | E (2 + 3 = 5)   | A misdemeanor<br>(9 months)                                     |
| 943.455(4)(d)             | D (5 + 5 = 10)  | I (1.5 + 2 = 3.5)   |
| 943.46(4)(c)              | E (2 + 3 = 5)   | A misdemeanor<br>(9 months)                                     |
| 943.46(4)(d)              | D (5 + 5 = 10)  | I (1.5 + 2 = 3.5)   |
| 946.47(3)(c)              | E (2 + 3 = 5)   | A misdemeanor<br>(9 months)                                     |
| 943.47(3)(d)              | D (5 + 5 = 10)  | I (1.5 + 2 = 3.5)   |
| 943.49(2)(b)2.            | D (5 + 5 = 10)  | I (1.5 + 2 = 3.5)   |
| 943.50(4)(c)              | C (10 + 5 = 15) | G (5 + 5 = 10)  |
| 943.60(1)                 | D (5 + 5 = 10)  | H (3 + 3 = 6)   |
| 943.61(5)(c)              | C (10 + 5 = 15) | H (3 + 3 = 6)   |
| 943.62(4)(c)              | C (10 + 5 = 15) | F (7.5 + 5 = 12.5)  |
| 943.70(2)(b)2.            | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)   |
| 943.70(2)(b)3g., 3r. & 4. | C (10 + 5 = 15) | F (7.5 + 5 = 12.5)  |
| 943.70(3)(b)2.            | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)   |
| 943.70(3)(b)3.            | D (5 + 5 = 10)  | H (3 + 3 = 6)   |
| 943.70(3)(b)4.            | C (10 + 5 = 15) | F (7.5 + 5 = 12.5)  |
| 943.75(2)                 | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)   |
| 943.75(2m)                | C (10 + 5 = 15) | H (3 + 3 = 6)   |
| 943.76(2)(a) & (b)        | C (10 + 5 = 15) | F (7.5 + 5 = 12.5)  |

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| 943.76(4)(a) & (b) | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 944.05(1)          | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 944.06             | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 944.16             | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 944.21(5)(c) & (e) | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 944.32             | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 944.33(2)          | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 944.34             | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 945.03             | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 945.05(1)          | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 945.08(1)          | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.02(1)          | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 946.03(1)          | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 946.03(2)          | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.05(1)          | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.10             | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.11(1)          | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.12             | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.13(1)          | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.14             | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.15(1) & (3)    | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.31(1)          | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.32(1)          | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.41(2m)         | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.415(2)         | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.42(3)          | D (5 + 5 = 10)  | H (3 + 3 = 6)      |

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| 946.425(1), (1m)(b) & (1r)(b) | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.43                        | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 946.44(1)                     | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.44(1g) & (1m)             | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 946.47(1)                     | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.48(1)                     | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.49(1)(b)                  | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.49(2)                     | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.60(1) & (2)               | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.61(1)                     | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.64                        | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.65(1)                     | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.68(1r)(a)                 | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.68(1r)(b) & (c)           | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.69(2)                     | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 946.70(2)                     | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.72(1)                     | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.74(2)                     | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 946.76                        | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 947.013(1t)                   | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 947.013(1v) & (1x)            | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 947.015                       | E (2 + 3 = 5)   | I (1.5 + 2 = 3.5)  |
| 948.02(3)                     | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |
| 948.03(2)(b)                  | D (5 + 5 = 10)  | H (3 + 3 = 6)      |
| 948.03(2)(c)                  | C (10 + 5 = 15) | F (7.5 + 5 = 12.5) |

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| 948.03(3)(b)          | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.03(3)(c)          | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.03(4)(a)          | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.03(4)(b)          | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.04(1) & (2)       | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.05(1), (1m) & (2) | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.055(2)(a)         | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.055(2)(b)         | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.07                | BC (20 + 10 = 30) | D (15 + 10 = 25)   |
| 948.075(1)            | BC (20 + 10 = 30) | D (15 + 10 = 25)   |
| 948.08                | BC (20 + 10 = 30) | D (15 + 10 = 25)   |
| 948.095(2)            | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.11(2)(a) & (am)   | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.12 (1m) & (2m)    | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.13(2)             | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.22(2)             | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.23                | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.24(1)             | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.30(2)             | B (40 + 20 = 60)  | C (25 + 15 = 40)   |
| 948.31(1)(b)          | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.31(2)             | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.31(3)             | C (10 + 5 = 15)   | F (7.5 + 5 = 12.5) |
| 948.40(4)(b)          | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.60(2)(b)          | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |
| 948.60(2)(c)          | D (5 + 5 = 10)    | H (3 + 3 = 6)      |
| 948.61(2)(b)          | E (2 + 3 = 5)     | I (1.5 + 2 = 3.5)  |

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|              |                                 |                                     |
|--------------|---------------------------------|-------------------------------------|
| 948.62(1)(a) | E (2 + 3 = 5)                   | A misdemeanor<br>(9 months)         |
| 948.62(1)(b) | D (5 + 5 = 10)                  | I (1.5 + 2 = 3.5)                   |
| 948.62(1)(c) | C (10 + 5 = 15)                 | G (5 + 5 = 10)                      |
| 951.18(1)    | E (2 + 3 = 5)                   | I (1.5 + 2 = 3.5)                   |
| 951.18(2)    | D (5 + 5 = 10)<br>E (2 + 3 = 5) | H (3 + 3 = 6);<br>I (1.5 + 2 = 3.5) |
| 951.18(2m)   | D (5 + 5 = 10)<br>E (2 + 3 = 5) | H (3 + 3 = 6);<br>I (1.5 + 2 = 3.5) |

***Statutes in Chs. 961 for which penalties were reduced by 2001 Wis. Act 109 (TIS II)***

The penalties for the crime under TIS I are expressed as the maximum term of imprisonment only. The penalties for TIS II are expressed as maximum confinement in prison + maximum extended supervision = maximum term of imprisonment.

| Statute   | Classification (and penalty) |                    |
|---|------------------------------|--------------------|
|   | <u>TIS I</u>                 | <u>TIS II</u>      |
| 961.41(1)(a) & (1m)(a)  | 22.5 years                   | E (10 + 5 = 15)    |
| 961.41(1)(b) & (1m)(b)  | 7.5 years                    | H (3 + 3 = 6)      |
| 961.41(1)(cm)1g. & (1m)(cm)g.<br>(one gram or less)                                     | 15 years                     | G (5 + 5 = 10)     |
| 961.41(1)(cm)1r. & (1m)(cm)1r.<br>(more than one but less than five grams) <sup>1</sup> | 15 years                     | F (7.5 + 5 = 12.5) |
| 961.41(1)(cm)2. & (1m)(cm)2.  | 22.5 years                   | E (10 + 5 = 15)    |
| 961.41(1)(cm)3. & (1m)(cm)3.  | 3 to 30 years                | D (15 + 10 = 25)   |
| 961.41(1)(cm)4. & (1m)(cm)4.  | 5 to 45 years                | C (25 + 15 = 40)   |
| 961.41(1)(cm)5. & (1m)(cm)5.<br>(more than 100 grams) <sup>2</sup>                      | 10 to 45 years               | C (25 + 15 = 40)   |
| 961.41(1)(d)1.  | 22.5 years                   | F (7.5 + 5 = 12.5) |
| 961.41(1)(d)2.  | 6 months to 22.5 years       | E (10 + 5 = 15)    |
| 961.41(1)(f)3.  | 1 to 22.5 years              | E (10 + 5 = 15)    |

|                |                 |                    |
|----------------|-----------------|--------------------|
| 961.41(1)(g)3. | 1 to 22.5 years | E (10 + 5 = 15)    |
| 961.41(1n)     | 15 years        | F (7.5 + 5 = 12.5) |
| 961.41(2)(a)   | 22.5 years      | E (10 + 5 = 15)    |
| 961.41(2)(b)   | 7.5 years       | H (3 + 3 = 6)      |
| 961.455(1)     | 15 years        | F (7.5 + 5 = 12.5) |

Finally, Act 109 changed both penalties and offense thresholds for delivery or manufacture of THC (961.41(1)(h)) and possession of THC with intent to deliver or manufacture (961.41(1m)(h)). Thus, depending on the amount of THC or number of plants, the penalty may be reduced (*e.g.*, delivery of 100 grams was reduced from a 4.5 year maximum to a Class I felony) or increased (*e.g.*, delivery of 300 grams goes from a 4.5 maximum to a Class H felony).

|                            |  |   |
|----------------------------|--|---|
| 961.41(1)(h)1. & (1m)(h)1. | 4.5 years<br>(up to 500 grams<br>or 10 plants)         | I (1.5 + 2 = 3.5)<br>(up to 200 grams<br>or 4 plants)         |
| 961.41(1)(h)2. & (1m)(h)2. | 7.5 years<br>(500 to 2500 grams<br>or 11 to 50 plants) | H (3 + 3 = 6)<br>(200 to 1000 grams<br>or 5 to 20 plants)     |
| 961.41(1)(h)3. & (1m)(h)3. | 15 years<br>(more than 2500 grams<br>or 50 plants)     | G (5 + 5 = 10)<br>(1000-2500 grams<br>or 21 to 50 plants)     |
| 961.41(1)(h)4. & (1m)(h)4. | 15 years<br>(more than 2500 grams<br>or 50 plants)     | F (7.5 + 5 = 12.5)<br>(2500-10,000 grams<br>or 51-200 plants) |
| 961.41(1)(h)5. & (1m)(h)5. | 15 years<br>(more than 2500 grams<br>or 50 plants)     | E (10 + 5 = 15)<br>(more than 10,000<br>grams or 200 plants)  |

### Endnotes

<sup>1</sup>Before Act 109, delivery of less than 5 grams of cocaine was punishable by up to 15 years' imprisonment. Act 109 split that category into two—delivery of less than one gram and delivery of more than one gram but less than five grams.

<sup>2</sup>Act 109 repealed 961.41(1)(cm)5 and amended 961.41(1)(cm)4 to punish anyone with more than 40 grams. Accordingly, possession of more than 100 grams is now charged under 961.41(1)(cm)4. ■

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## CRIMINAL JURY INSTRUCTION COMMITTEE REPORT

By: Chuck Vetzner\*

*\*Chuck Vetzner is an Assistant State Public Defender in the Madison Appellate Office. He attends the Criminal Jury Instruction Committee meetings on behalf of the State Public Defender.*

Despite several inquiries, the Committee concluded that it could not draft an instruction for the crime of storage and handling of anhydrous ammonia, Wis. Stat. § 101.10. (Section 101.10 pertains to manufacture of methamphetamine.) The problem is Wis. Stat. § 101.10(3)(a), which requires use of containers meeting the requirements of departmental rules. The rules have not yet been promulgated. Hence, no instruction, and, at least in theory, no successful prosecutions either.

The Committee gave final approval to an instruction for carrying a concealed weapon, Wis. Stat. §941.23, in light of the “constitutional defense” concerning the right to bear arms recognized in *State v. Hamdan*, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785. Although the decision apparently anticipated the issue being presented as a special question preceding consideration of the elements, the new instruction, Wis. J.I.—No. 1335A, treats the defense as an additional element requiring the prosecution to prove beyond a reasonable doubt that the defendant went armed with a concealed weapon for an unlawful purpose. The Committee concluded that this was the better approach because preliminary consideration of the defense would require an assumption that the prosecution had met the standard elements of the offense, *i.e.*, that the defendant went armed with a concealed weapon.

New instructions were drafted for the well-publicized crime prohibiting a correctional staff member to have sexual contact or intercourse with a prisoner. J.I.—No. 1216. However, the Committee encountered difficulty with the following language in Wis. Stat §940.225(2)(h):

*This paragraph does not apply if the individual with whom the actor has sexual contact or intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.*

This sentence was an apparent attempt to preclude prosecution of staff members who were sexually assaulted by prisoners. However, in light of the wording, the Committee was unable to determine whether the exemption presented an issue for the jury or for the court.

The Committee agreed to review at a future meeting the adequacy of the current pattern instruction on eyewitness identification—No. 141. SPD staff attorneys were previously encouraged to forward to me their thoughts and suggestions about this instruction. The same offer is hereby extended to the private defense bar. ■

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## CASE DIGEST

By: Bill Tyroler\*

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

*This Case Digest includes United States Supreme Court and Wisconsin appellate decisions released/published July 12, 2003, to January 29, 2004.*

### UNITED STATES SUPREME COURT OPINIONS

#### HABEAS CORPUS

HABEAS—PROCEDURE—COURT MAY NOT RE-CHARACTERIZE PRO SE LITIGANT'S PLEADING AS HABEAS WITHOUT FIRST GIVING NOTICE.

*Castro v. U.S.*, <http://www.supremecourtus.gov/opinions/03pdf/02-6683.pdf> 02-6683

HABEAS—REVIEW HIGHLY DEFERENTIAL—INEFFECTIVE ASSISTANCE OF COUNSEL: WIDE LATITUDE AFFORDED CHOICE OF APPROACH IN CLOSING ARGUMENT—"JUDICIOUS SELECTION OF ARGUMENTS FOR SUMMATION IS A CORE EXERCISE OF DEFENSE COUNSEL'S DISCRETION."

*Yarborough v. Gentry*, <http://www.supremecourtus.gov/opinions/02pdf/02-1597.pdf> 02-1597, 540 U.S. \_\_\_, *per curiam*

HABEAS—REVIEW—JURY INSTRUCTIONS—FAILURE TO CHARGE THAT DEFENDANT A "PRINCIPAL OFFENDER" AT MOST HARMLESS ERROR: DEFENDANT ONLY PERSON CHARGED, AND NO EVIDENCE ANYONE ELSE COMMITTED THE KILLING, SO "JURY VERDICT WOULD SURELY HAVE BEEN THE SAME HAD IT BEEN INSTRUCTED TO FIND AS WELL THAT THE RESPONDENT WAS A 'PRINCIPAL.'"

*Mitchell v. Esparza*, <http://www.supremecourtus.gov/opinions/02pdf/02-1369.pdf> 02-1369, 540 U.S. \_\_\_, *per curiam*

#### SEARCH & SEIZURE

SEARCH AND SEIZURE—ENTRY UNDER WARRANT—15-20 SECONDS BETWEEN ANNOUNCEMENT AND FORCIBLE ENTRY REASONABLE, GIVEN POSSIBILITY THAT TARGET OF SEARCH (COCAINE) COULD BE DESTROYED.

*U.S. v. Banks*, <http://www.supremecourtus.gov/opinions/03pdf/02-473.pdf> 02-473

SEARCH AND SEIZURE—FINDING CONTRABAND IN CAR IN PLACES JOINTLY ACCESSIBLE TO ALL OCCUPANTS PROVIDED PROBABLE CAUSE TO ARREST ALL OCCUPANTS FOR POSSESSION.

*Maryland v. Pringle*, <http://www.supremecourtus.gov/opinions/03pdf/02-809.pdf> 02-809

SEARCH AND SEIZURE—ROADBLOCK FOR PURPOSE OF GATHERING INFORMATION ABOUT CRIME UNDER INVESTIGATION, AS OPPOSED TO SEEING IF CARS' OCCUPANTS WERE THEN COMMITTING CRIME, PERMISSIBLE.

*Illinois v. Lidster*, <http://www.supremecourtus.gov/opinions/03pdf/02-1060.pdf> 02-1060

**SIXTH AMENDMENT**

RIGHT TO COUNSEL—ATTACHMENT WHEN FORMAL CHARGE ISSUES—TEST FOR TAKING STATEMENT FROM ARRESTEE IN VIOLATION OF 6<sup>TH</sup>-AMENDMENT RIGHT TO COUNSEL DIFFERENT FROM 5<sup>TH</sup> AMENDMENT TEST: VIOLATION OCCURS WHEN POLICE DELIBERATELY ELICIT INCRIMINATING STATEMENT, REGARDLESS OF “INTERROGATION”—FACT THAT SUBSEQUENT STATEMENT COULD NOT BE SUPPRESSED AS FRUIT OF MIRANDA VIOLATION DOESN’T PRECLUDE SUPPRESSION AS FRUIT OF 6<sup>TH</sup> AMENDMENT VIOLATION.

*Fellers v. U.S.*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=02-6320> 02-6320

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

MANDATE WHERE GUILTY-PLEA BASED SUPPRESSION HEARING IS DEEMED DEFECTIVE AND REMANDED FOR NEW HEARING: REMEDY IS TO VACATE GUILTY PLEA NOTWITHSTANDING AFFIRMANCE OF REFUSAL TO SUPPRESS, ¶¶26-28.

*State v. Lucian Agnello II*, <http://www.courts.state.wi.us/html/ca/00/00-2599.htm> 2004 WI App 2, (AG’s) PFR filed 1/8/04, on appeal after remand, 2003 WI 44 <http://www.courts.state.wi.us/html/sc/00/00-2599.htm>; prior history: *State v. Agnello I*, <http://www.courts.state.wi.us/sc/opinions/96/PDF/96-3406.PDF> 226 Wis.2d 164, 593 N.W.2d 427 (1999)

For Agnello: Jerome F. Buting, Pamela Moorshead

POSTCONVICTION MOTIONS—DISCOVERY—DEFENSE NOT ENTITLED TO DISCLOSURE OF “THE MEANS BY WHICH [A PROSECUTION WITNESS’S] APPEARANCE AT TRIAL WAS ACCOMPLISHED, WHETHER SHE WAS EITHER HOUSED OR HELD IN CUSTODY BY THE [S]TATE PENDING HER TESTIMONY, AND THE CIRCUMSTANCES OF ANY SUCH HOUSING OR INCARCERATION,” ¶¶30-34.

*State v. Timothy M. Ziebart*, <http://www.courts.state.wi.us/html/ca/03/03-0795.htm> 2003 WI App 258, PFR filed 12/18/03

For Ziebart: Robert R. Henak

STANDARD OF REVIEW—BINDING PRECEDENT—CONFLICTING STATE AND U.S. SUPREME COURT CASE LAW.

*State v. James F. Brienzo*, <http://www.courts.state.wi.us/ca/opinions/01/pdf/01-1362.pdf> 2003 WI App 203, 671 N.W.2d 700, PFR denied 11/17/03

For Brienzo: Jerome F. Buting

Though the court of appeals isn’t bound by state court precedent when it conflicts with *subsequent* U.S. Supreme Court pronouncement, the court of appeals *is* required to follow state precedent that the litigant argues conflicts with prior Supreme Court cases, ¶14.

**WAIVER—JUDICIAL ESTOPPEL**

*State v. John S. Cooper*, <http://www.courts.state.wi.us/html/ca/02/02-2248.htm> 2003 WI App 227, 672 N.W.2d 118, PFR filed 11/14/03

For Cooper: John A. Birdsall

¶14 ... Because Cooper directly contributed to the error, he cannot benefit from the error. See *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). The doctrine of judicial estoppel prevents a defendant from benefitting (*sic*) from a manipulation of the judicial system and would present an alternative basis for affirming here. See *Salveson v. Douglas County*, 2001 WI 100, ¶37, 245 Wis. 2d 497, 630 N.W.2d 182 (a party cannot be allowed to play “fast and loose with the judicial system”).

#### WAIVER—SUFFICIENCY OF OBJECTION, PLEA BARGAIN BREACH

*State v. Leonard C. Matson*, <http://www.courts.state.wi.us/html/ca/03/03-0251.htm> 2003 WI App 253  
For Matson: Michael Yovovich, SPD, Madison Appellate

¶32. Matson sufficiently preserved his objections to the letter for appeal. His counsel made numerous unsuccessful objections to the circuit court’s decision to consider the letter. Counsel need not object when the point at issue is one on which the court has just ruled adversely. *Schueler v. Madison*, 49 Wis. 2d 695, 707, 183 N.W.2d 116 (1971). Matson had already objected to the circuit court’s use of the police officer’s letter and his objections were unequivocally denied. Further objections would most certainly have proved futile. Submitting the sentencing memorandum was merely a tactical way to contend with the circuit court’s decision and cannot be considered waiver of the issue.

#### CIVIL COMMITMENTS

##### CH. 51—TIME LIMITS: HEARING TO REVIEW TRANSFER TO INPATIENT STATUS

*Fond du Lac County v. Elizabeth M.P.*, <http://www.courts.state.wi.us/html/ca/02/02-3221.htm> 2003 WI App 232, 672 N.W.2d 88

For Elizabeth M.P.: Thomas K. Voss

¶28. Wisconsin Stat. § 51.35(1)(e) mandates that a patient transferred to a more restrictive environment receive a hearing within ten days of said transfer. Elizabeth was not provided with a hearing within ten days in violation of § 51.35(1)(e)3. The circuit court was without jurisdiction to effectuate a transfer to inpatient status. We therefore reverse the orders of the circuit court. Elizabeth shall be returned to outpatient status.

##### SVP—PETITION FOR DISCHARGE—PROBABLE CAUSE ESTABLISHED FOR DISCHARGE HEARING, WHERE THE PSYCHOLOGIST CONDUCTING THE REEVALUATION AND USING ACTUARIAL TABLES UNAVAILABLE AT THE TIME OF ORIGINAL COMMITMENT FOUND NO SUBSTANTIALLY PROBABILITY OF REOFFENDING.

*State v. Henry Pocan*, <http://www.courts.state.wi.us/html/ca/02/02-3342.htm> 2003 WI App 233, 671 N.W.2d 860

For Pocan: Margaret A. Maroney, SPD, Madison Appellate

#### CONFESSIONS

##### VOLUNTARINESS—VARIOUS FACTORS, INCLUDING FOLLOWING, INSUFFICIENT TO SHOW COERCION: HANDCUFFED TO RING IN INTERROGATION ROOM, LACK OF SLEEP, LENGTH OF INTERROGATION (9)+ HOURS), ¶¶13-22.

*State v. Lucian Agnello II*, 2004 WI App 2, (AG’s) PFR filed 1/8/04, on appeal after remand, 2003 WI 44; prior history: *State v. Agnello I*, 226 Wis.2d 164, 593 N.W.2d 427 (1999)

For Agnello: Jerome F. Buting, Pamela Moorshead

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VOLUNTARINESS—VARIOUS FACTORS, INCLUDING FOLLOWING, INSUFFICIENT TO SHOW COERCION: HANDCUFFED IN INTERROGATION ROOM, YOUTHFULNESS (AGE 14), DENIAL OF REQUEST TO SEE PARENTS, ¶¶12-29.

*State v. Jerrell C.J.*, <http://www.courts.state.wi.us/html/ca/02/02-3423.htm> 2004 WI App 9, *PFR* filed 1/22/04

For Jerrell: Eileen A. Hirsch

VOLUNTARINESS—PRIVATE CITIZEN’S COERCION—COERCIVE POLICE CONDUCT IS REQUIRED TO RENDER STATEMENT INVOLUNTARY, THEREFORE COERCION FROM A PRIVATE CITIZEN CAN’T SUPPORT VOLUNTARINESS SUPPRESSION.

*State v. Marvin J. Moss*, <http://www.courts.state.wi.us/html/ca/03/03-0436.htm> 2003 WI App 239, 672 N.W.2d 125, *PFR* denied 12/16/03

For Moss: F.M. Van Hecke

## CONFRONTATION

FORMER TESTIMONY (AT CO-DEFENDANT’S TRIAL), ADMISSIBLE AT DEFENDANT’S TRIAL: § 908.045(1), FORMER TESTIMONY RULE, IS “FIRMLY ROOTED” HEARSAY EXCEPTION, ¶¶18-31; FURTHER, THERE WERE PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS: WITNESS WOULD HAVE LOST USE IMMUNITY HAD HE TESTIFIED FALSELY; CODEFENDANT’S INTEREST IN IMPEACHING WITNESS WAS SIMILAR TO DEFENDANT’S; WITNESS’S TESTIMONY CONCERNED MATTER THAT “IS STRAIGHTFORWARD AND RELATES TO AN EVENT THAT OCCURRED BEFORE THE MURDER,” SO THAT “(L)ITTLE COULD BE GAINED BY FURTHER CROSS-EXAMINATION,” ¶31.

*State v. Glenn H. Hale*, <http://www.courts.state.wi.us/html/ca/03/03-0417.htm> 2003 WI App 238, 672 N.W.2d 130, *PFR* filed 11/16/03

For Hale: Steven D. Phillips, SPD, Madison Appellate

## COUNSEL

INEFFECTIVE ASSISTANCE—FAILURE TO INVESTIGATE: NO DEFICIENT PERFORMANCE FOR FAILING TO INVESTIGATE THEORY OF 3<sup>RD</sup>-PARTY GUILT, IN ABSENCE OF ANY EVIDENCE LINKING THAT PARTY TO THE CRIME, ¶¶31-32.

*State v. David Arredondo*, <http://www.courts.state.wi.us/html/ca/02/02-2361.htm> 2004 WI App 7, *PFR* filed 1/22/04

For Arredondo: James A. Rebholz

INEFFECTIVE ASSISTANCE—CLOSING ARGUMENT—PROSECUTOR’S CLOSING ARGUMENT CHARACTERIZING THE THEORY OF DEFENSE AS “THE POLICE ARE LYING” WAS IMPROPER AND, GIVEN THE CLOSENESS OF THE CASE, PREJUDICIAL; BECAUSE TRIAL COURT DIDN’T CONDUCT *MACHNER* HEARING, MATTER REMANDED FOR DETERMINATION OF WHETHER FAILURE TO OBJECT WAS DEFICIENT PERFORMANCE.

*State v. Steven T. Smith*, <http://www.courts.state.wi.us/html/ca/02/02-3404.htm> 2003 WI App 234, 671 N.W.2d 854

For Smith: Mark S. Rosen

INEFFECTIVE ASSISTANCE—FAILURE TO OBTAIN PRETRIAL RULING ON ADMISSIBILITY OF EXPECTED TESTIMONY NOT DEFICIENT PERFORMANCE, ¶¶38-40.

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*State v. Robert Jamont Wright*, <http://www.courts.state.wi.us/html/ca/03/03-0238.htm> 2003 WI App 252, PFR filed 12/26/03

For Wright: Ann Auberry

**SANCTIONS—VIOLATION OF BAN ON CITING UNPUBLISHED OPINION FOR PRECEDENTIAL EFFECT, § 809.23(3)—\$50 PENALTY IMPOSED FOR EACH SUCH CITE**

*State v. John S. Cooper*, <http://www.courts.state.wi.us/html/ca/02/02-2248.htm> 2003 WI App 227, 672 N.W.2d 118, PFR filed 11/14/03

For Cooper: John A. Birdsall

(Note that the ban is rife with exceptions; you *can* cite non-precedential *trial court* decisions, *Brandt v. LIRC*, 160 Wis. 2d 353, 466 N.W.2d 673 (Ct. App. 1991); unpublished cases from *other states*, *Predick v.*

*O'Connor*, <http://www.courts.state.wi.us/html/ca/02/02-0503.htm> 2003 WI App 46, ¶12 n. 7, 260 Wis. 2d 323; and unpublished *federal* decisions, *State ex rel. Gendrich v. Litscher*, <http://www.courts.state.wi.us/html/ca/00/00-3527.htm> 2001 WI App 163, ¶7 n. 6, 246 Wis.2d 826, 632 N.W.2d 878.)

### **CRIMES: § 364.63, OWI**

**OWI, § 346.63(1)(B)—CERTIFIED DOT DRIVING TRANSCRIPT ADMISSIBLE TO PROVE REPEATER STATUS.**

*State v. Kevin J. Van Riper*, <http://www.courts.state.wi.us/html/ca/03/03-0385.htm> 2003 WI App 237, 672 N.W.2d 156

For Van Riper: Anthony L. O'Malley

### **CRIMES: § 946.42, ESCAPE**

**ESCAPE—“ACTUAL CUSTODY”—PROBATIONER WHOSE JAIL CONFINEMENT CONDITION HAS BEEN STAYED FOR PERIOD OF HOSPITALIZATION NOT IN CUSTODY FOR § 946.42 PURPOSES AND THEREFORE MAY NOT BE CHARGED WITH ESCAPE FOR LEAVING HOSPITAL AND FAILING TO RETURN TO JAIL, ¶21.**

*State v. Rick L. Edwards*, 2003 WI App 221, 671 N.W.2d 371, PFR filed 10/24/03

For Edwards: Margaret A. Maroney, SPD, Madison Appellate

### **CRIMES: § 948.02, SEXUAL ASSAULT OF CHILD**

**ATTEMPTED SEXUAL ASSAULT (INTERCOURSE) OF CHILD IS CRIME KNOWN TO LAW, DESPITE LACK OF “FORMAL” INTENT ELEMENT OF COMPLETED CRIME OF INTERCOURSE, BECAUSE CONTACT FORMALLY REQUIRES INTENT AND INTERCOURSE NECESSARILY INVOLVES CONTACT, ¶¶18-21.**

*State v. James F. Brienzo*, 2003 WI App 203, 671 N.W.2d 700, PFR denied 11/17/03

For Brienzo: Jerome F. Buting

**COMPLAINT ESTABLISHED PROBABLE CAUSE FOR ATTEMPTED SEXUAL ASSAULT OF CHILD, AND ATTEMPTED CHILD ENTICEMENT, INITIATED OVER INTERNET, ¶¶17, 25.**

*State v. James F. Brienzo*, 2003 WI App 203, 671 N.W.2d 700, PFR denied 11/17/03

For Brienzo: Jerome F. Buting

**2<sup>nd</sup>-DEGREE SEXUAL ASSAULT (BY CONTACT), § 948.02(2)—ELEMENTS: STATE MUST PROVE MORE THAN THAT THE DEFENDANT “KNOWINGLY” TOUCHED SOMEONE (OR EVENT THAT THE TOUCHING WAS PURPOSEFUL IN A GENERAL SENSE), ¶13; INSTEAD, THE STATE MUST**

PROVE THAT THE TOUCHING WAS FOR THE SPECIFICALLY PROHIBITED PURPOSE OF SEXUAL DEGRADATION, HUMILIATION, AROUSAL OR GRATIFICATION, ¶14.

*State v. John A. Jipson*, <http://www.courts.state.wi.us/html/ca/03/03-0866.htm> 2003 WI App 222, 671 N.W.2d 18

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

### **CRIMES: § 948.025, REPEATED SEXUAL ASSAULT**

#### **REMEDY FOR VIOLATION OF MULTIPLE CHARGING PROSCRIPTION**

*State v. John S. Cooper*, 2003 WI App 227, 672 N.W.2d 118, *PFR* filed 11/14/03

For Cooper: John A. Birdsall

¶15. We hold that a court may reverse a conviction on the repeated acts charge under Wis. Stat. § 948.025(1) when the proscription against multiple charges in § 948.025(3) is violated. This remedy is proper even where the repeated acts charge was filed prior to an action for specific acts of sexual assault under Wis. Stat. § 948.02(1). Prosecutors should engage in charging practices that avoid violations of § 948.025(3). When necessary, the trial court should address such violations at the time of consolidation rather than during or after trial. If a violation of § 948.025(3) does arise, the State should choose which charge or charges it will pursue.

### **DEFENSES**

COERCION, § 939.46(1)—LIMITED TO “MOST SEVERE FORM OF INDUCEMENT,” AND NOT AVAILABLE TO DEFENDANT WHO OFFERED NO EXPLANATION AS TO WHY HE DIDN’T CALL POLICE OR RUN AWAY DESPITE OPPORTUNITY, ¶¶5-15.

*State v. Jeffrey A. Keeran*, <http://www.courts.state.wi.us/html/ca/01/01-1892.htm> 2004 WI App 4, *PFR* filed 1/5/04

For Keeran: Joseph L. Sommers

### **EVIDENCE**

OTHER CRIMES—PRIOR ACQUITTAL OF DIFFERENT INCIDENT DIDN’T PRECLUDE ADMISSIBILITY AS EXTRANEIOUS MISCONDUCT—TEST IS WHETHER REASONABLE JURY COULD FIND BY PREPONDERANCE OF EVIDENCE THAT DEFENDANT COMMITTED THE MISCONDUCT, ¶48.

*State v. David Arredondo*, 2004 WI App 7, *PFR* filed 1/22/04

For Arredondo: James A. Rebholz

EXPERT—BECAUSE THE STATE’S “JENSEN” TESTIMONY WAS LIMITED TO THE COMPLAINANT’S DELAY IN REPORTING, AND BECAUSE RIZZO’S EXPERT CONCEDED THAT HE COULD ASSESS THAT ASPECT WITHOUT A PERSONAL EXAMINATION, “MADAY” EXAMINATION OF COMPLAINANT WASN’T NECESSARY.

*State v. Joseph F. Rizzo II*, <http://www.courts.state.wi.us/html/ca/03/03-0163.htm> 2003 WI App 236, 672 N.W.2d 162, *PFR* denied 12/16/03, on appeal after remand of *State v. Rizzo I*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93

For Rizzo: Kathryn A. Keppel, Raymond M. Dall’osto

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**OBJECTION/OFFER OF PROOF, § 901.03—PRETRIAL: DEFINITIVE RULING PROPERLY PRESERVES OBJECTION; CONDITIONAL RULING DOESN'T, ¶¶29-31.**

*State v. Daniel H. Kutz*, <http://www.courts.state.wi.us/html/ca/02/02-1670.htm> 2003 WI App 205, 671 N.W.2d 660, *PFR filed 10/27/03*

For Kutz: T. Christopher Kelly

**CHARACTER, § 904.04—(NON-)CONSENT & STATE v. ALSTEEN**

*State v. Timothy M. Ziebart*, 2003 WI App 258, *PFR filed 12/18/03*

For Ziebart: Robert R. Henak

¶24.... Where, as here, a defense of consent is inextricably connected to a defendant's conduct surrounding and including sexual contact, and where other-acts evidence is probative of a *modus operandi* rebutting that defense, *Alsteen* does not preclude an instruction advising the jury that it may consider the evidence on the issue of whether an alleged victim consented to the defendant's conduct.

**PRIVILEGES—§ 905.13, COMMENT ON SILENCE**

*State v. John S. Cooper*, 2003 WI App 227, 672 N.W.2d 118, *PFR filed 11/14/03*

For Cooper: John A. Birdsall

Cooper's choice not to talk to investigating officer at some point after previously talking not manifestly intended to imply invocation of right to silence, but instead explained why the investigation terminated at that point. ¶19. And, Cooper remaining silent at one point during postarrest interrogation in which he was otherwise responsive similarly not intended to be comment on invocation of right to silence. ¶20

**RELEVANCE, § 904.01—WITNESS'S FAILURE TO IDENTIFY DEFENDANT AS BEARING ON SUGGESTIVENESS OF LINEUP: "WITHOUT MORE, LOMACK'S INABILITY TO IDENTIFY WRIGHT AT A PRELIMINARY HEARING SOME EIGHT MONTHS AFTER HE IDENTIFIED WRIGHT AT A LINEUP DOES NOT RENDER THE IDENTIFICATIONS OF THE OTHER EYEWITNESSES SUSPECT.," ¶43.**

*State v. Robert Jamont Wright*, 2003 WI App 252, *PFR filed 12/26/03*

For Wright: Ann Auberry

**REVERSE" MISCONDUCT—INABILITY OF WITNESS TO IDENTIFY DEFENDANT OF SIMILAR UNCHARGED CRIME: "WITHOUT MORE, WE HOLD THAT THE MERE INABILITY OF A VICTIM TO IDENTIFY THE DEFENDANT AS THE PERPETRATOR OF A SIMILAR UNCHARGED CRIME PERFORCE TAKES THE JURY INTO THE REALM OF CONJECTURE OR SPECULATION," ¶44.**

*State v. Robert Jamont Wright*, 2003 WI App 252, *PFR filed 12/26/03*

For Wright: Ann Auberry

**HEARSAY, DEFINITIONS—"STATEMENT," § 908.01(1)—TRUTH OF MATTER ASSERTED.**

*State v. Daniel H. Kutz*, 2003 WI App 205, 671 N.W.2d 660, *PFR filed 10/27/03*

For Kutz: T. Christopher Kelly

¶36. There is no dispute that an out-of-court instruction to do something is not hearsay when offered to prove that the instruction was given and, accordingly, to explain the effect on the person to whom the instruction was given.... Therefore, the trial court correctly ruled that the instruction was not hearsay when used to show why her mother began looking for her at 3:45 p.m. However, we do agree with Daniel that the State sought to offer and did offer Elizabeth's mother's testimony for purposes in addition to establishing why she went looking for her daughter when she did....

¶37. Our examination of the record at trial shows the State did in fact use Elizabeth's instruction for a purpose other than to explain why her mother went looking for her when she did. Her instruction to her mother was mentioned three times in the State's closing argument, and one of those references was clearly used to convey that Elizabeth feared Daniel might do something to harm her and that he did. We therefore address Daniel's contention that Elizabeth's instruction to her mother was hearsay when used in this way.

HEARSAY, DEFINITIONS—"STATEMENT," § 908.01(1): HOMICIDE VICTIM'S STATEMENT ("IF I AM NOT HOME IN HALF AN HOUR COME LOOKING FOR ME") NOT AN "ASSERTION," § 908.01(1), AND THEREFORE NOT HEARSAY, BECAUSE IT WAS AN "INSTRUCTION" WHICH DID "NOT NECESSARILY IMPLY ANY ASSERTION ABOUT THE REASON FOR HER REQUEST," SUCH AS AN OPINION THAT THE DEFENDANT WAS DANGEROUS, ¶¶46-48.

*State v. Daniel H. Kutz*, 2003 WI App 205, 671 N.W.2d 660, PFR filed 10/27/03

For Kutz: T. Christopher Kelly

HEARSAY—§ 908.03(2), EXCITED UTTERANCE.

*State v. Daniel H. Kutz*, 2003 WI App 205, 671 N.W.2d 660, PFR filed 10/27/03

For Kutz: T. Christopher Kelly

Declarant's statement relating threat made by defendant morning after threat was inadmissible as excited utterance, where there was no showing that the stress caused by the incident was continuous, and without opportunity for reflection, ¶65.

HEARSAY—FORMER TESTIMONY, § 908.045(1)—TESTIMONY OF WITNESS FROM CO-DEFENDANT'S EARLIER, SEPARATE TRIAL ADMISSIBLE WHEN WITNESS BECAME UNAVAILABLE AT TIME OF DEFENDANT'S TRIAL: BECAUSE BOTH DEFENDANT'S WERE CHARGED PTAC, IT WAS IN CO-DEFENDANT'S INTEREST TO DISCREDIT LINKAGE WITNESS SOUGHT TO ESTABLISH BETWEEN CRIME AND DEFENDANT, ¶¶15-17.

*State v. Glenn H. Hale*, 2003 WI App 238, 672 N.W.2d 130, PFR filed 11/16/03

For Hale: Steven D. Phillips, SPD, Madison Appellate

HEARSAY—§ 908.045(2), STATE-OF-MIND.

*State v. Daniel H. Kutz*, 2003 WI App 205, 671 N.W.2d 660, PFR filed 10/27/03

For Kutz: T. Christopher Kelly

Statements made by declarant to describing various threats made by defendant inadmissible under state-of-mind rule: the rule permits "a declarant's statement of his or her feelings to prove only how the declarant feels and not to admit a declarant's statements of the cause of those feelings to prove certain events occurred," ¶60.

HEARSAY—§ 908.045(2), RECENT PERCEPTION.

*State v. Daniel H. Kutz*, 2003 WI App 205, 671 N.W.2d 660, PFR filed 10/27/03

For Kutz: T. Christopher Kelly

Various statements upheld as recent perceptions, where it was reasonable to infer that the declarant was relating conduct that had occurred within the prior day or two, and there was no indication she lacked clear recall. ¶52. The possibility of the declarant's lack of "good faith" was factored into the trial court's ruling. ¶53. And, "the existence of corroboration is not a general requirement under Wis. Stat. § 908.045(2)." ¶54. However, the recent perception rule "does *not* apply to the aural perception of an oral statement privately told to a person," ¶63 (emphasis supplied).

## GUILTY PLEAS

DEFERRED PROSECUTION AGREEMENT, § 971.39, NOT SAME AS AGREEMENT TO DEFER ENTRY OF JUDGMENT, AND PROCEDURAL FORMALITIES THAT APPLY TO THE FORMER DON'T APPLY TO THE LATTER.

*State v. Rex E. Wollenberg*, <http://www.courts.state.wi.us/html/ca/03/03-1706.htm> 2004 WI App 20, PFR filed 1/8/04

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

KNOWLEDGE OF REQUIRED ELEMENTS—SEXUAL ASSAULT, § 948.02(2)—"KNOWING CONTACT" INSUFFICIENT: DEFENDANT MUST SPECIFICALLY KNOW THAT PURPOSE WAS FOR SEXUAL DEGRADATION, HUMILIATION, AROUSAL, OR GRATIFICATION, ¶¶10-17

*State v. John A. Jipson*, 2003 WI App 222, 671 N.W.2d 18

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

PLEA BARGAINS—BREACH, BY PROSECUTOR: SENTENCING RECOMMENDATION MADE BY POLICE OFFICER, EXCEEDING BARGAINED LENGTH

*State v. Leonard C. Matson*, 2003 WI App 253

For Matson: Michael Yovovich, SPD, Madison Appellate

¶13. Matson argues his due process rights were violated when Alstadt, the investigating detective in this case, gave a sentencing recommendation that undermined the State's recommendation, in effect, breaching the plea agreement. The State counters that Alstadt was not a party to the plea agreement and thus his letter did not violate Matson's due process rights. We agree with Matson that Alstadt's letter constituted a breach of the plea agreement.

PLEA BARGAINS—BREACH, BY PROSECUTOR, REMEDY: "THE LESS EXTREME REMEDY OF SPECIFIC PERFORMANCE IS ALWAYS PREFERRED" (I.E., NEW SENTENCING BY DIFFERENT JUDGE), ¶¶33-34.

*State v. Leonard C. Matson*, 2003 WI App 253

For Matson: Michael Yovovich, SPD, Madison Appellate

## JURY

WAIVER OF JURY—TRIAL COURT'S REJECTION OF WAIVER, NOTWITHSTANDING BOTH PARTIES' ASSENT TO WAIVE, NOT REVIEWABLE.

*State v. Virgil L. Burks*, <http://www.courts.state.wi.us/html/ca/03/03-0472.htm> 2004 WI App 14, PFR filed 1/2/04

For Burks: James Lucius

## SEARCH & SEIZURE

EXIGENCY – BLOOD ALCOHOL "ONCE AN INDIVIDUAL ARRESTED ON PROBABLE CAUSE FOR OWI HAS PROVIDED A SATISFACTORY AND USEABLE CHEMICAL TEST, THE EXIGENT CIRCUMSTANCES JUSTIFYING A WARRANTLESS AND NONCONSENSUAL BLOOD DRAW NO LONGER EXIST," ¶1.

*State v. Jacob J. Faust*, <http://www.courts.state.wi.us/html/ca/03/03-0952.htm> 2003 WI App 243, 672 N.W.2d 97, PFR granted 12/16/03

For Faust: Stephen M. Seymour

EXPECTATION OF PRIVACY—WARRANTLESS GARBAGE SEARCH: DEFENDANT DID NOT HAVE ACTUAL EXPECTATION OF PRIVACY IN GARBAGE PLACED IN DUMPSTER LOCATED AT REAR OF APARTMENT BUILDING, ¶21; NOR WOULD SOCIETY “RECOGNIZE A REASONABLE EXPECTATION OF PRIVACY WHEN GARBAGE IS THROWN INTO A DUMPSTER WITH THE KNOWLEDGE AND EXPECTATION THAT CONTROL OF THE GARBAGE WOULD BE TURNED OVER TO THIRD PARTIES,” ¶22.

*State v. Sylvester Sigarroa*, <http://www.courts.state.wi.us/html/ca/03/03-0703.htm> 2004 WI App 16, *PFR* filed 1/2/04

For Sigarroa: John Pray, UW Law School

WARRANTLESS ENTRY—POLICE HAD PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES, BASED ON TENANT’S REPORT OF BURGLARY IN PROGRESS OF NEIGHBOR’S APARTMENT WITHIN HOUSING COMPLEX, ALONG WITH SUSPECT’S SUSPICIOUS BEHAVIOR, TO ENTER SUSPECT’S APARTMENT AND INVESTIGATE FURTHER.

*State v. Scott Michael Harwood*, <http://www.courts.state.wi.us/html/ca/03/03-0049.htm> 2003 WI App 215, 671 N.W.2d 325

For Harwood: Pat J. Schott, Margaret G. Zickuhr

## SENTENCING

EXTENDED SUPERVISION—CONDITIONS—”§ 973.01(2) DOES NOT AUTHORIZE CONFINEMENT IN ANY FACILITY AS A CONDITION OF EXTENDED SUPERVISION,” ¶4.

*State v. Jeremy John Larson*, <http://www.courts.state.wi.us/html/ca/03/03-0019.htm> 2003 WI App 235, 672 N.W.2d 322

For Larson: David Cook

(Note: remedy mandated is simply to vacate the illicit condition, ¶10.)

FACTORS—PRIOR ACQUITTAL—SENTENCING JUDGE PERMITTED TO CONSIDERED COMPLAINANT’S TESTIMONY AT TRIAL RESULTING IN DEFENDANT’S ACQUITTAL, ¶¶54-55.

*State v. David Arredondo*, 2004 WI App 7, *PFR* filed 1/22/04

For Arredondo: James A. Rebholz

FINES—LOCAL GUIDELINES APPROPRIATE IN OWI CASE—BUT COURT MUST DETERMINE ABILITY TO PAY, WHEN RAISED BY DEFENDANT.

*State v. Bruce J. Kuechler*, <http://www.courts.state.wi.us/html/ca/02/02-1205.htm> 2003 WI App 245

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

PROBATION—CONDITIONS—MODIFICATION FOR “CAUSE.”

*State v. Rick L. Edwards*, <http://www.courts.state.wi.us/html/ca/03/03-0790.htm> 2003 WI App 221, 671 N.W.2d 371, *PFR* filed 10/24/03

For Edwards: Margaret A. Maroney, SPD, Madison Appellate

¶14 ... While the trial court may only modify the conditions of probation for “cause,” *see State v. O’Connor*, 77 Wis. 2d 261, 295, 252 N.W.2d 671 (1977), the law places no limitation on what the trial court may consider as cause when making that determination, *see State v. Gerard*, 57 Wis. 2d 611, 625, 205 N.W.2d 374 (1973) (the “cause” contemplated by the statute includes impossibility, undue hardship and probably other causes).

PROBATION—CONDITIONS—JAIL: STAY, FOR PERIOD OF INMATE’S HOSPITALIZATION PERMISSIBLE EXERCISE OF DISCRETION; NO ENTITLEMENT TO CONFINEMENT CREDIT DURING HOSPITALIZATION, ¶¶15-21.

*State v. Rick L. Edwards*, 2003 WI App 221, 671 N.W.2d 371, PFR filed 10/24/03

For Edwards: Margaret A. Maroney, SPD, Madison Appellate

### TRIAL (AND PRE-TRIAL) PROCEDURE

DEFENDANT’S RIGHT TO TESTIFY, WAIVER OF: DEFENDANT HELD TO PRIOR, EXPLICIT “IRREVOCABLE DECISION NOT TO TESTIFY IN THIS CASE” WHEN HE ATTEMPTED TO RETRACT WAIVER, AFTER CLOSE OF TESTIMONY AND STATE’S DISMISSAL OF REBUTTAL WITNESSES, ¶¶14-21.

*State v. David Arredondo*, 2004 WI App 7, PFR filed 1/22/04

For Arredondo: James A. Rebholz

### DUPLICITY—REMEDY

*State v. James F. Brienzo*, 2003 WI App 203, 671 N.W.2d 700, PFR denied 11/17/03

For Brienzo: Jerome F. Buting

The remedy for a duplicitous charge (disjunctively charging distinct offenses in the same count) is election by the state of the single alternative, rather than dismissal of the charge. This election may occur on pretrial appeal as well as at the trial level, ¶15.

MOTION IN LIMINE ORDERS—ENFORCEMENT: COURT OF APPEALS DECRIES “INCREASING PATTERN OF WITNESS AND/OR ATTORNEY VIOLATION OF IN LIMINE ORDERS, AND SUGGESTS METHODS OF AVOIDING VIOLATIONS, ¶¶28-31.

*State v. Sylvester Sigarrao*, 2004 WI App 16, PFR filed 1/2/04

For Sigarrao: John Pray, UW Law School

### MOTION IN LIMINE—PURPOSE

*State v. Robert Jamont Wright*, 2003 WI App 252, PFR filed 12/26/03

For Wright: Ann Auberry

¶40. While the following list is not exhaustive, we view a motion in limine as proper where (1) the trial court has directed that the evidentiary issue be resolved before trial; (2) the evidentiary material is highly prejudicial or inflammatory and would risk a mistrial if not previously addressed by the trial court, *id.*; (3) the evidentiary issue is significant and unresolved under existing law; (4) the evidentiary issue involves a significant number of witnesses or a substantial volume of material making it more economical to have the issue resolved in advance of trial so as to save the time and resources of all concerned; or (5) a party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine, *see State v. Bergeron*, 162 Wis. 2d 521, 528-29, 470 N.W.2d 322 (Ct. App. 1991)....

ADJOURNMENT, TO ALLOW STATE TO PREPARE FOR DEFENSE EXPERT, NOTWITHSTANDING DEFENSE COMPLIANCE WITH DISCOVERY REQUIREMENTS—WITHIN BROAD GRANT OF TRIAL COURT’S DISCRETIONARY AUTHORITY, ¶50.

*State v. Robert Jamont Wright*, 2003 WI App 252, PFR filed 12/26/03

For Wright: Ann Auberry ■

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