Prepared by Robert D. Donohoo
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# POSSIBLE CHALLENGES TO THE ADMISSIBILITY OP ALL OR PART OF A DEFENDANT'S STATEMENT

## THIS IS VERSION 2 OF THIS OUTLINE

### INTRODUCTION

This outline sets forth some of the possible constitutional, statutory, and evidentiary challenges (and applicable cases and case law in some situations) that a defendant or the prosecution (in some limited cases) may bring in an attempt to prevent the admission into evidence of all or part of a defendant's out-of-court and/or court-related statements. I have included (in the interests of completeness) numerous challenges which, by their very nature, should not be successful.

This outline is intended for use by prosecutors, judges, and defense attorneys alike. It is an objective summary/listing of possible challenges to the use of a defendant's statement intended to be used by all parties in their mutual goal of searching for the truth and assuring that justice is served.

Many areas of the criminal law, including the admissibility into evidence of a defendant's statement, are consistently evolving and changing. Thus, the probability that one or more items in this outline will be outdated increases in proportion to the greater the length of time between the date of this outline and when it is used. Therefore, persons who use this outline should consider the information in this outline as a legal research starting point, especially as the time between the date of the outline and its use increases.

I have divided statements of a defendant into two categories: out-of-court statements (pages 4-28) and court related statements (pages 29-32).

One or more Wisconsin Court of Appeals cases in this outline may contain an incomplete Wisconsin citation such as 2010 WI App ___. Such a citation indicates that, on the date of this outline, the case had been recommended for publication in the official reports but it had not yet been ordered published.

Wisconsin Supreme Court Order 08-02, effective July 1, 2009, allows some unpublished opinions to be cited for their persuasive value. This was done by amending sec. 809.23. Most of the opinions that can be cited under this Supreme Court Order are not included in this outline. However, when I have included one of these opinions, I refer to it as "*a RULE 809"* case.

My outline entitled **THE INTRODUCTION INTO EVIDENCE, AT THE DEFENDANT'S TRIAL OR SENTENCING, OF THE DEFENDANT'S TESTIMONY AT A PRIOR COURT HEARING, TRIAL, OR OTHER PROCEEDING** discusses items related to the items addressed in this outline.

I would appreciate any comments or suggestions concerning the format of this outline and its contents (including any incorrect citation numbers, misspellings, and the citation to a case that does not appear to be related to the topic under which it appears). My work e-mail is robert.donohoo@da.wi.gov and my home e-mail is diane.bob@att.net.

## MISCELLANEOUS

The United States Supreme Court has stated that confessions, if properly obtained, are reliable evidence.

(1) "Second, it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

> Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law"'. *McNeil*, 501 U.S., at 181, 111 S.Ct. 2204 [quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)].

*See also Moulton, supra*, at 180, 106 S.Ct. 477 ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities")." *Texas v. Cobb*, 532 U.S. 162, 171-72, 121 S.Ct. 1335, 1343 (2001).

(2) "In *Miranda*, again in *Innis*, the Court emphasized:

> Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence . . . *Miranda v. Arizona*, 384 U.S. at 478, 86 S.Ct. at 1630 . . ." *Arizona v. Mauro*, 481 U.S. 520, 529, 107 S.Ct. 1931, 1936 (1987).

(3) "The 'ready ability to obtain uncoerced confessions is not an evil but an unmitigated good' . . . Without these confessions, crimes go unsolved and criminals unpunished." *Montejo v. Louisiana*, 556 U.S. ____, ____, 129 S.Ct. 2079, 2091 (2009).

(4) "Voluntary confessions are not merely 'a proper element in law enforcement,' *Miranda*, *supra*, at 478, they are an 'unmitigated good,' *McNeil*, 501 U.S. at 181, 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law,' *idid.* (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986))." *Maryland v. Shatzer*, 559 U.S. ____, ____, 130 S.Ct. 1213, 1222.

Section 974.05(1)(d)3. provides that the State may appeal from an order the substantive effect of which results in suppressing a confession or admission of the defendant—if a trial court suppresses a statement of the defendant, the State can file an interlocutory appeal pursuant to sec. 974.05(1)(d)2. and 3. *State v. Jennings*, 2002 WI 44, ¶¶ 7-11, 252 Wis.2d 228, 234-35, 647 N.W.2d 142. Under sec. 974.05(1)(d), the State may appeal as a matter of right "any pretrial order that bars the admission of evidence which might 'normally' determine the successful outcome of the prosecution." *State v. Eichman*, 155 Wis.2d 552, 559-67, 455 N.W.2d 143 (1990). Thus, not all orders excluding evidence are appealable as of right. However, the determination of when excluded evidence "might 'normally' determine" the outcome is solely up to the prosecutor because he or she is in the best position to assess the evidence. *Id.* at 564. The Supreme Court has expressed confidence that prosecutors will not abuse this power. *Id.* at 564 n.1.

In *State v. Samuel*, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423, *cert. denied*, 537 U.S. 1018 (2002), the Court set forth the law and procedure that is to be used when the defendant seeks to suppress an allegedly involuntary statement of a witness.

## OUT-OF-COURT STATEMENTS

### *Introduction*

The following possible challenges that a defendant or the prosecution might make in an attempt to block the admission into evidence of the out of court statement of a defendant, including the page number(s) where each challenge is addressed in this outline, are addressed in this part of this outline:

1. A direct *Miranda* violation: 6.

2. An indirect *Miranda* violation—a statement given after a prior statement is obtained in violation of *Miranda*: 7.

3. A direct voluntariness (*Goodchild*) violation—police conduct: 7.

4. An indirect (*Goodchild*) voluntariness violation (police conduct)—a statement given after a prior statement is obtained in violation of the voluntariness requirement: 7.

5. A voluntariness violation—no police conduct: 7.

6. A statement given after a Fourth Amendment violation—general law: 8.

7. A statement given after a *Payton* Fourth Amendment violation: 8, 9.

8. A Sixth Amendment right to counsel violation—a general challenge: 9-12.

9. A Sixth Amendment Right to counsel violation—ineffective assistance of counsel: 12.

10. A Sixth Amendment right to confrontation violation: 12.

11. A statement obtained in violation of the due process clause of the Fourteenth Amendment: 12.

12. An unreasonably long detention violation—a “sew-up” confession: 12.

13. A *Riverside* 48-hour rule challenge: 13.

14. A “prompt/reasonable time appearance" challenge: 13.

15. A statement given by the defendant pursuant to the reporting requirement of Wisconsin’s hit-and-run statute: 13, 14.

16. The juvenile status of the defendant: 14.

17. Compelled admissions about particular instances of criminal activities by a probationer or parolee given in response to questions by a probation or parole agent or at a probation or parole revocation hearing: 15.

18. Questioning by a law enforcement agent of a person who is on probation, parole, or extended supervision: 15.

19. The defendant as a condition of probation is ordered into sex offender treatment and he is required to admit to the offense: 15, 16.

20. A *Garrity* immunity statement: 16, 17.

21. The requirement that some statements be electronically recorded: 17, 18.

22. A statement obtained in violation of sec. 968.135: 18.

23. A statement was obtained in connection with a deferred prosecution: 19.

24. Rules of Evidence—An offer and related statements to the prosecuting attorney to plead guilty or no contest: 19.

25. Rules of Evidence—A statement is protected by one of the Chapter 905 privileges: 20.

26. Rules of Evidence—Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time: 20.

27. Rules of Evidence—An objection by the defendant that his/her statement is hearsay when it is introduced by the prosecution: 20.

28. Rules of Evidence—The introduction of all or part of the defendant's statement by the <u>defense</u>: 20, 21.

29. An honesty-testing machine related statement: 21-23.

30. A statement obtained in violation of sec. 967.06: 23..

31. A statement obtained in violation of Wisconsin's Electronic Surveillance Control Law (WESCL): 23, 24.

32. A statement obtained in violation of an ethical rule: 24, 25.

33. A violation of the defendant's right to consular notification under Article 36 of the Vienna Convention on Consular Relations: 26, 27.

34. The admissibility of "credibility" statements made by an officer during an interrogation especially a recorded interrogation: 27.

35. The corroboration rule: 27.

36. Denial of the right to make a telephone call after a person is arrested: 27, 28.

37. The *McNabb-Mallory* rule: 28.

38. A person was held incommunicado: 28.

39. A statement obtained pursuant to a grant of immunity. *See* the discussion under **COURT RELATED STATEMENTS.**

I have divided challenges to an out-of-court statement of the defendant into six categories based on the foundation for each challenge: **(1)** United States and Wisconsin Constitutions-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15, 16, 17, 18, 19, 20, 38; **(2)** United States Constitution-11; **(3)** Wisconsin Constitution-12; **(4)** Wisconsin Statutes-14, 16, 21, 22, 23, 29, 30; 31; **(5)** Rules of Evidence-24, 25, 26, 27, 28; 34; **(6)** Miscellaneous-21, 32, 33, 35, 36, 37.

***Specific Challenges***

1. A direct *Miranda* violation.

   a. The Fifth Amendment to the United States Constitution right against self-incrimination made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.

   b. Numerous *Miranda* issues are discussed in my outlines entitled **MIRANDA-PART 1, MIRANDA-PART 2, MIRANDA-PART 3, MIRANDA-CUSTODY,** and **MIRANDA-QUESTIONING.**

   c. A summary of numerous recent *Miranda* cases is set forth at the end of this outline in Attachment B at pages 34-38.

   d. Presently pending before the United State's Supreme Court is the case of *Berghuis v. Thompkins*, 08-1470. The issue is "Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them."

2. An indirect *Miranda* violation—a statement given after a prior statement is obtained in violation of *Miranda*.

   a. *See* the discussion in my outline **MIRANDA-PART 3.**

3. A direct voluntariness (*Goodchild*) violation—police conduct.

   a. The Fifth Amendment to the United States Constitution right to due process made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.

   b. *See* my outline entitled **THE VOLUNTARINESS OF A DEFENDANT'S STATEMENT**.

   c. Wisconsin cases include *State v. Reynolds*, 2010 WI App 56, ____ Wis.2d ____, ____ N.W.2d ____; *State v. Ward*, 2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 236; *State v. Davis*, 2008 WI 71, 310 Wis.2d 583, 751 N.W.2d 332; *State v. Markwardt*, 2007 WI App 242, 306 Wis.2d 420, 742 N.W.2d 546; *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110; *State v. Agnello*, 2004 WI App 2, 269 Wis.2d 260, 674 N.W.2d 594; *State v. Knapp*, 2003 WI 121, 265 Wis.2d 278, 666 N.W.2d 881, *vacated and remanded on other grounds*, 542 U.S. 952 (2004), *reinstated by* 2005 WI 127, ¶ 2 n.3, 285 Wis.2d 86, 700 N.W.2d 899; *State v. Triggs*, 2004 WI App 91, 264 Wis.2d 861, 663 N.W.2d 396; *State v. Hoppe*, 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407; *State v. Turner*, 136 Wis.2d 333, 401 N.W.2d 827 (1987); *State v. Clappes*, 136 Wis.2d 222, 401 N.W.2d 759 (1987).

4. An indirect (*Goodchild*) voluntariness violation (police conduct)—a statement given after a prior statement is obtained in violation of the voluntariness requirement.

   a. *State v. Mark*, 2008 WI App 44, 308 Wis.2d 191, 747 N.W.2d 727.

5. A direct voluntariness violation—no police conduct.

   a. The Fifth Amendment to the United States Constitution right to due process made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.

   b. *State v. Moss*, 2003 WI App 239, 267 Wis.2d 772, 672 N.W.2d 125.

6. A statement given after a Fourth Amendment violation—general law.

   a. Cases include *State v. Farias-Mendoza*, 2006 WI App 134, 294 Wis.2d 726, 720 N.W.2d 489 (the statement obtained from the defendant after his illegal arrest—no probable cause to arrest—was insufficiently attenuated from his illegal seizure and therefore it should have been suppressed); *State v. Wilson*, 229 Wis.2d 256, 600 N.W.2d 14 (Ct. App. 1999) (the statement was obtained from the defendant after the police unlawfully penetrated the curtilage of the defendant's home and the search of the defendant was unlawful because the defendant was arrested without probable cause; the Court concluded that the statement must be suppressed after the State did not argue that the statement was sufficiently attenuated); *State v. Kiekhefer*, 212 Wis.2d 460, 569 N.W.2d 316 (Ct. App. 1997); *State v. Anderson*, 165 Wis.2d 441, 477 N.W.2d 277 (1991); *State v. Guzy*, 134 Wis.2d 399, 397 N.W.2d 144 (Ct. App. 1986), *rev'd on other grounds*, 139 Wis.2d 663, 407 N.W.2d 548, *cert. denied*, 484 U.S. 979 (1987); *State v. Smith*, 131 Wis.2d 220, 388 N.W.2d 601 (1986); *State v. Verhagen*, 86 Wis.2d 262, 272 N.W.2d 105 (Ct. App. 1978); *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843 (2003); *United States v. Reed*, 349 F.3d 457 (7th Cir. 2003).

7. A statement given after a *Payton* Fourth Amendment violation.

   a. A statement obtained <u>inside</u> a residence after a *Payton* rule violation is <u>not</u> admissible in the state's case-in-chief. *New York v. Harris*, 495 U.S. 14, 20, 110 S.Ct. 1640, 1646 (1990).

   b. In *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640 (1990), the United States Supreme Court held that where the police have probable cause to arrest a defendant (developed apart from the illegal entry), the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of the *Payton* rule. In *State v. Mariano*, 114 Hawai'i 271, 160 P.3d 1258 (2007), the Court, using the Hawai state constitution, refused to adopt the holding of the Court in *Harris*.

   c. In *State v. Cash*, 2004 WI App 63, ¶ 27, 271 Wis.2d 451, 465, 677 N.W.2d 709, the Court in footnote 10 stated:

> While we have already determined that his warrantless arrest was supported by probable cause, we note that Cash's statements were made outside of his residence and therefore, even if the arrest were deemed illegal, his statements would not have been suppressed as the result

of a constitutional violation. *See New York v. Harris*, 495 U.S. 14, 21 (1990) (the exclusionary rule does not bar statements made outside the home even though statement was taken after an arrest made in the home in violation of *Payton v. New York*, 445 U.S. 573 (1980)).

d. Chief Justice Abrahamson, in her dissent in *State v. Roberson*, 2006 WI 80, ¶ 81, 292 Wis.2d 280, 323, 717 N.W.2d 111, noted that the Wisconsin Supreme Court has never adopted the *Harris* exception to the exclusionary rule.

e. In *State v. Ferguson*, 2009 WI 50, ¶¶ 35-45, 317 Wis.2d 586, 611-16, 767 N.W.2d 187, the Court, in the context of addressing the sufficiency of the lawful authority element part of an obstructing an officer jury instruction where the police entered the defendant's home to arrest her and she continued to struggle with the police outside of the home, used the reasoning and conclusions of *Harris* in finding that the police were acting with lawful authority when the defendant struggled with them after being removed from her home by the police. Justice Bradley in her concurring opinion joined by Chief Justice Abrahamson and Justice Crooks, would not have used the *Harris* decision as the basis for the decision that the jury was properly instructed as to the defendant's activities outside of her home. 2009 WI at ¶¶ 59-61, 317 Wis.2d at 620-21.

8. A Sixth Amendment right to counsel violation—a general challenge.

a. The Sixth Amendment to the United States Constitution right to counsel made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the right to counsel found in Article I, Section 7, of the Wisconsin Constitution.

b. Relevant Wisconsin cases include: *State v. Forbush*, 2010 WI App 11, ____ Wis.2d _____, 779 N.W.2d 476, *petition for review granted by the Wisconsin Supreme Court; State v. Ward*, 2009 WI 60, ¶¶ 43 n.5,69, 86-101, 318 Wis.2d 301, 333-35, 355, 364-73, 767 N.W.2d 236; *State v. Anson*, 2002 WI App 270, 258 Wis.2d 433, 654 N.W.2d 48; *State v. Badker*, 2001 WI App 27, 240 N.W.2d 460, 623 N.W.2d 142; *State v. Dagnall*, 2000 WI 82, 236 Wis.2d 339, 612 N.W.2d 680; *State v. Semrau*, 2000 WI App 54, 233 Wis.2d 508, 608 N.W.2d 376; *State v. Hornung*, 229 Wis.2d 469, 600 N.W.2d 264 (Ct. App.1999); *State v. Harris*, 199 Wis.2d 227, 544 N.W.2d 545 (1996); *State v. Coerper*, 199 Wis.2d 216, 544 N.W.2d 423 (1996); *State v. Pischke*, 198 Wis.2d 257, 542 N.W.2d 202 (Ct. App. 1995).

c. Relevant United States Supreme Court cases include: *Montejo v. Louisiana*, 556 U.S. ____, 129 S.Ct. 2079 (2009); *Kansas v. Ventris*, 556 U.S. ____, 129 S.Ct. 1841 (2009); *Rothgery v. Gillespie County, Texas*, ____ U.S. ____, 128 S.Ct. 2578 (2008) (a discussion of when the Sixth Amendment right to counsel attaches); *Fellers v. United States*, 540 U.S. 519, 124 S.Ct. 1019 (2004); *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335 (2001); *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404 (1986).

d. In *Ventris*, the Court directly addressed, in the context of the defendant's statement to a jailhouse informant that was introduced at the defendant's jury trial (by having the informant testify) to impeach the defendant's testimony, the issue of whether a statement obtained in violation of the defendant's Sixth Amendment right to counsel is admissible at a defendant's trial to impeach the defendant's testimony/conflicting statement. The Court answered the question in the affirmative—a statement obtained from the defendant in violation of his or her Sixth Amendment right to counsel can be introduced to impeach/challenge the defendant's inconsistent testimony at the defendant's trial. In so finding, the Court: (1) stated that they were accepting, but not affirming, the State's concession that the statement was obtained in violation of the Sixth Amendment; (2) held that when a statement is obtained in violation of the Sixth Amendment, the constitutional violation occurs when the uncounseled interrogation is conducted and not when it is introduced at the defendant's trial; therefore the issue in the case was the scope of the remedy for a violation that has already occurred rather than the prevention of a constitutional violation.

e. In *Montejo*, the Court overruled its prior decision in *Michigan v. Jackson*. In *Jackson*, the Court had held that the police were forbidden, under the Sixth Amendment right to counsel, to initiate interrogation of a criminal defendant once he or she had requested counsel at an arraignment or similar proceeding. I think it is a fair statement that the answer to numerous Sixth Amendment right to counsel issues, in the context of police interrogations, are "up in the air" because of both the holding of the Court in *Montejo* and the language that was used in the various opinions in the case.

f. The Wisconsin courts, prior to *Rothgery*, have stated/held that in Wisconsin the Sixth Amendment right to counsel attaches by the filing of a criminal complaint or the issuance of an arrest warrant. It is my opinion, based on the type of proceeding at issue in *Rothgery* and some of the language in the opinions in *Rothgery*, that an argument could now be made that in Wisconsin in certain situations a person's Sixth Amendment right to counsel can attach before a criminal

complaint is issued. Those cases/situations would be in those counties in Wisconsin where a *Riverside* and bail setting court appearance, where the defendant is present, is held after the defendant's arrest but prior to the issuance of a criminal complaint.

g. In *State v. Forbush*, 2010 WI App 11, ____ Wis.2d ____, 779 N.W.2d 476, *petition for review granted by the Wisconsin Supreme Court,* the Court addressed several Sixth Amendment right to counsel/*Montejo v. Louisiana* issues. The relevant facts were the defendant was charged with a crime, the defendant had not appeared in Court in Wisconsin with an attorney but the Court assumed for purposes of its opinion that he was represented by an attorney, the defendant was questioned by the police, he was advised of and waived his *Miranda* rights, and he confessed. The Court held that neither the Sixth Amendment nor Article I, section 7 of the Wisconsin Constitution required suppression of the defendant's confession. In its opinion the court: (1) summarized the facts and holding of the Court in *Montejo* and *State v. Dagnall*, 2000 WI 82, 236 Wis.2d 339, 612 N.W.2d 680; (2) overruled the holding of the Court in *Dagnall*, based on *Montejo*, that the Sixth Amendment prohibits the police from questioning a defendant outside the presence of his attorney if the defendant's Sixth Amendment right to counsel has attached (the defendant is formally charged ) and is represented by an attorney on that charge—the right to an attorney is automatically invoked as soon as a defendant is represented; (3) held that the above-stated ruling of the Court in *Dagnall* is not mandated by Article I, section 7 of the Wisconsin Constitution. The Wisconsin Supreme Court has granted the defendant's petition for review. The defendant has asked the Court to consider three issues: (1) whether the state constitution prohibits interrogating a represented individual once the state is aware of the representation; (2) whether Forbush equivocally requested counsel during questioning, thereby invoking his right to counsel under the state constitution and, if so, (3) whether the suppression order should be affirmed, without reaching the viability of *Dagnall*. The state does not concede suppression is required if the state constitution is interpreted consistently with *Dagnall*, noting the Court of Appeals questioned whether the facts actually demonstrated Forbush was represented.

h. In *State v. Lewis*, 2010 WI App 52, ____ Wis.2d ____, ____ N.W.2d ____, the Court addressed the issue of when is a cellmate a government informant or agent for Sixth Amendment purposes when the cellmate deliberately elicits a statement from the defendant. The Court, after an extensive discussion, held that there must be evidence of some formal agreement—which may or may not be evidenced by a promise of consideration—plus evidence of control or instructions by law enforcement. The Court found that the cellmate, who one year earlier had executed a standard federal proffer, was not a government

agent. In so finding, the Court rejected the argument that the hope of a benefit, rather than a promise of a benefit, is sufficient.

9. A Sixth Amendment right to counsel violation—ineffective assistance of counsel.

   a. The argument, in the context of an ineffective assistance of counsel claim, that an attorney abandoned the defendant at a critical stage of the proceedings (police interrogation) in violation of the Sixth Amendment right to counsel.

   b. *People v. Frazier*, 478 Mich. 231, 733 N.W.2d 713 (2007).

10. A Sixth Amendment right to confrontation violation.

   a. In *People v. Cresti*, 155 P.3d 570 (Colo. App 2007) and *State v. Robinson*, 33 Kan. App. 2d 773, 109 P.3d 185, 188-190 (2005) the Court, in rejecting the defendant's contention that the introduction at his trial of his statements to the police violated the Confrontation Clause of the United States Constitution as interpreted in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), held that a defendant does not have a constitutional right to confront himself/herself—the Confrontation Clause does not apply when a court is dealing with a defendant's confession—the rule in *Crawford* does not apply to confessions—the Confrontation Clause does not apply when the defendant is the declarant. *See also Johnson v. State*, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005) (admission of letters written by the defendant could not violate the Confrontation Clause since a defendant does not have a right to confront himself) and *United States v. Crowe*, 563 F.3d 969, 976 n.12 (9th cir. 2009).

11. A statement obtained in violation of the due process clause of the Fourteenth Amendment.

   a. In *State v. Mark*, 2005 WI App 62, 280 Wis.2d 436, 701 N.W.2d 598, *aff'd on other grounds*, 2006 WI 78, 292 Wis.2d 1, 718 N.W.2d 90, the Court rejected the defendant's contention that the due process clause affords criminal defendants a protection against use of his or her involuntary statements that is not afforded by the Fifth Amendment.

12. An unreasonably long detention violation—a "sew-up" confession.

   a. The right to due process under Article I, Section 8 of the Wisconsin Constitution.

   b. This challenge is discussed in my memorandum entitled **SEW-UP CONFESSION LAW.**

13. A *Riverside* 48-hour rule challenge.

    a. The Fourth Amendment to the United States Constitution made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

    b. *State v. McAffee*, 2001 WI App 262, ¶¶ 16-20, 248 Wis.2d 865, 877-80, 637 N.W.2d 774; *State v. Jackson*, 229 Wis.2d 328, 600 N.W.2d 39 (Ct. App. 1999); *State v. Evans*, 187 Wis.2d 66, 522 N.W.2d 554 (Ct. App. 1994); *State v. Golden*, 185 Wis.2d 763, 519 N.W.2d 659 (Ct. App. 1994); *State v. Aniton*, 183 Wis.2d 125, 515 N.W.2d 302 (Ct. App. 1994); *State v. Koch*, 175 Wis.2d 684, 499 N.W.2d 152 (1993*); cert denied*, 510 U.S. 880 (1993*); County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991*)*.

    c. What is the effect of a *Riverside* violation on a defendant's statement? The United States Supreme Court has not decided whether an inculpatory statement obtained during an unreasonably long delay must, for that reason, be suppressed. This issue was extensively discussed in *People v. Willis*, 215 Ill. 2d 517, 831 N.E.2d 531 (2005).

14. A "prompt/reasonable time appearance" challenge.

    a. Sec. 970.01, Stats.

    b. *State v. Golden*, 185 Wis.2d 763, 768, 519 N.W.2d 659 (Ct. App. 1994); *State v. Aniton*, 183 Wis.2d 125, 138-30, 515 N.W.2d 302 (Ct. App. 1994); *State v. Koch*, 175 Wis.2d 684, 695-96, 499 N.W.2d 152 (1993), *cert. denied*, 510 U.S. 880 (1993); *Reimers v. State*, 31 Wis.2d 457, 143 N.W.2d 525, *cert. denied*, 385 U.S. 980 (1966); *State ex rel. Van Ermen v. Burke*, 30 Wis.2d 324, 140 N.W.2d 737 (1966).

    c. The relationship of this challenge to the *McNabb-Mallory* rule (discussed at 37 below) and the Sew-up Confession issue (discussed at 12 above).

15. A statement given by the defendant pursuant to the reporting requirements of Wisconsin's hit-and-run statute—sec. 346.67(1).

    a. The Fifth Amendment to the United States Constitution right against self-incrimination made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.

b. *State v. Harmon*, 2006 WI App 214, 296 Wis.2d 861, 723 N.W.2d 732 (section 346.67(1) does not violate a person's Fifth Amendment privilege against self-incrimination even if it applies to accidents involving intentional conduct).

16. The juvenile status of the defendant.

a. Various constitutional and statutory provisions.

b. The issue of voluntariness. In *State v. Jerrell, C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, the Court held that the defendant's written confession was involuntary under the totality of the circumstances. In its opinion the Court: (1) set forth the applicable appellate standards of review; (2) reiterated that it is the State's burden to prove the voluntariness of a confession by a preponderance of the evidence; (3) reiterated numerous general voluntariness standards/principles; (4) using the balancing test, examined the defendant's relevant personal characteristics and the pressures and tactics used by the police during the interrogation.

c. In *State v. Jerrell C.J.*, 2005 WI 105, ¶ 21, 283 Wis.2d 145, 157-58, 699 N.W.2d 110, the Court noted that the United States Supreme Court has spoken of the need to exercise special caution when assessing the voluntariness of a juvenile's statements, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult.

d. The opportunity to consult with a parent or interested adult. In *State v. Jerrell, C.J.*, 2005 WI 105, ¶¶ 37-43, 283 Wis.2d 145, 164-66, 699 N.W.2d 110, the Court declined to adopt a per se rule excluding in-custody admissions from any child under the age of 16 who has not been given the opportunity to consult with a parent or interested adult. The Court then added, however, that it was reaffirming its prior warning that the failure to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel will be considered strong evidence that coercive tactics were used to elicit the incriminating statements. However, there is no Wisconsin rule mandating parental notification before a juvenile's is admissible. *Theriault v. State,* 66 Wis.2d 33, 46, 50, 223 N.W.2d 850 (1974).

e. The mandatory recording of juvenile interrogations. *See* the discussion of *Jerrell, C.J.* under 20 a. below and 2005 Wisconsin Act 60.

f. The issue of whether a statement of a juvenile may be used in adult

court proceedings. *Theriault v. State*, 66 Wis.2d 33, 223 N.W.2d 815 (1974).

17. Compelled admissions about particular instances of criminal activities by a probationer or parolee given in response to questions by a probation or parole agent.

    a. The Fifth Amendment to the United States Constitution right against self-incrimination made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

    b. *State v. Brimer*, 2010 WI App 57, ____ Wis.2d ____, ____ N.W.2d ____; *State v. Mark*, 2008 WI App 44, 308 Wis.2d 191, 747 N.W.2d 727 (*Mark* I); *State v. Harrell*, 2008 WI App 37, 308 Wis.2d 166, 747 N.W.2d 770; *State v. Mark*, 2006 WI 78, 292 Wis.2d 1, 718 N.W.2d 90; *State ex rel. Tate v. Schwarz*, 2002 WI 127, 257 Wis.2d 40, 654 N.W.2d 438; *State v. Zanelli*, 223 Wis.2d 545, 567-68, 589 N.W.2d 687 (Ct. App. 1998); *State v. Thompson*, 142 Wis.2d 821, 419 N.W.2d 564 (Ct. App 1987); *State v. Evans*, 77 Wis.2d 225, 252 N.W.2d 664 (1977).

    c. In *Harrell* and *Mark*(I) the Court, in the context of expert testimony introduced by the state at a Chapter 980 trial, discussed what is "derivative use" evidence (testimony from a compelled statement/testimony—what evidence/testimony is derived directly or indirectly from a compelled statement/testimony).

    d. In *Brimer*, the Court held that a statement given by a defendant to his parole officer could be used against the defendant at a reconfinement hearing before a court because a reconfinement hearing before a court is part of the revocation process and therefore not a criminal proceeding for Fifth Amendment purposes.

18. Questioning by a law enforcement agent of a person who is on probation, parole, or extended supervision.

    a. *United States v. Cranley*, 350 F.3d 617 (7th Cir. 2003). *See also United States v. Cobb* (W.D. Wis.), March 25, 2009, 2009 WL 817855.

19. The defendant as a condition of probation is ordered into sex offender treatment and he is required to admit to the offense.

    a. The Fifth Amendment to the United States Constitution right against self-incrimination made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States

Constitution.

b. In *State ex rel. Tate v. Schwarz*, 2002 WI 127, 257 Wis.2d 40, 654 N.W.2d 438, the Court addressed the following situation: the defendant is convicted after a trial, he is placed on probation, as a condition of probation he is ordered into sex offender treatment, he is required as part of the treatment to admit to the offense, he refuses by asserting his Fifth Amendment right against self-incrimination, as a result he is terminated from the program, his probation is revoked for failure to cooperate with treatment. The Court held that the immunity rule of *State v. Evans*, 77 Wis.2d 225, 252 N.W.2d 664 (1977), as expanded by *State v. Thompson*, 142 Wis.2d 821, 419 N.W.2d 564 (Ct. App. 1987), should be applied in these circumstances—a defendant in sex offender treatment relating to his conviction cannot be subjected to probation revocation for refusing to admit to the crime of conviction unless the probationer is first offered the protection of use and derivative use immunity for what are otherwise self-incriminatory statements and the probationer is advised of such immunity.

c. In *Tate*, the parties disagreed about whether immunity should extend to admissions made during treatment regarding uncharged conduct and whether immunity should be required where the probationer pled guilty or no contest. Because the case did not present such facts, the Court did not decide these issues.

20. A *Garrity* immunity statement.

a. The Fifth Amendment to the United States Constitution right against self-incrimination made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

b. Wisconsin cases include *State v. McPike*, 2009 WI App 166, ____ Wis.2d _____, 776 N.W.2d 617 (the Court accepted the trial court's finding that the defendant subjectively believed that he would be fired for asserting the privilege against self-incrimination; the Court found that the defendant's belief was not objectively reasonable and therefore did not suppress the statement; summary of the facts and holding of the Court in *Brockdorf*); *State v. Brockdorf*, 2006 WI 76, 291 Wis.2d 635, 717 N.W.2d 657 (the Court held that the defendant's statement was not unconstitutionally obtained/coerced and therefore *Garrity* immunity did not apply); *Herek v. Police & Fire Comm. Of Menomonee Falls*, 226 Wis.2d 504, 595 N.W.2d 113 (Ct. App. 1999

c. In *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967), the Court held that when a government officer is faced with either self-incrimination or job forfeiture, the resulting statement cannot be

considered voluntary—the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and it extends to all, whether they are policemen or other members of the body politic—when a government officer makes statements under threat of removal from office, those statements are coerced as a matter of law and may not be used against the officer in criminal proceedings. *McPike*, 2009 WI App at ¶ 7, ____ Wis.2d at ____. The Court in *Garrity*, however, did not provide a test for determining what is a sufficient "threat of removal from office." In *Brockdorf*, the Wisconsin Supreme Court answered this question.

d. In *Brockdorf*, the Court addressed what test or analysis is to be used to determine if *Garrity* immunity applies—what test is to be used in determining whether, as a matter of law, an officer's statements given in a criminal investigation are coerced and involuntary and therefore subject to suppression under *Garrity.* The Court adopted a two-pronged subjective/objective test for determining whether statements must be suppressed under *Garrity*. *McPike*, 2009 WI App at ¶ 8, _____ Wis.2d at _____. The first prong is that the officer/person must subjectively believe he or she will be fired for asserting the privilege against self-incrimination. *McPike*, 2009 WI App at ¶ 8, _____ Wis.2d at _____. The second prong is that the belief must be objectively reasonable under the circumstances. *McPike*, 2009 WI App at ¶ 8, _____ Wis.2d at _____. In applying this test, courts look to the totality of the circumstances surrounding the statement(s). *McPike*, 2009 WI App at ¶ 8, ____ Wis.2d at ____. An express threat of job termination or a statute, regulation, rule, or policy in effect at the time of the questioning which provides for an officer's termination for failing to answer the questions posed, will be sufficient circumstance to constitute coercion in almost any conceivable situation. *McPike*, 2009 WI App at ¶ 8 n.2, _____ Wis.2d at _____n.2.

e. In *McPike*, 2009 WI App at ¶ 24, ____ Wis.2d at ____, the Court questioned how the Court in *Brockdorf* could apply the objective prong without considering the defendant's knowledge that she had earlier lied to detectives.

21. The requirement that some statements be electronically recorded.

a. In *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, the Court, on July 7, 2005, pursuant to its supervisory power, required that all custodial interrogation of juveniles in future cases shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention. The Court further

stated that audiotaping is sufficient; however, videotaping may provide an even more complete picture of what transpired during the interrogation. In *State v. Elim*, 2006 AP1618-CR, filed May 22, 2007, the Court (District I), in an unpublished opinion, held that the holding of the Court in *Jerrell, C.J.* is not retroactive.

b. 2005 Wisconsin Act 60 (the recommendations of the Avery Task Force) mandated the recording of both juvenile and adult statements in some situations.

c. The recording of juvenile confessions is addressed in my outline entitled **THE RECORDING OF JUVENILE STATEMENTS: A COMPARISON OF JERRELL, C.J. AND ACT 60**. The primary statutory sections are 938.195, 938.31(3) and 968.073.

d. The primary adult recording statutory sections are 968.073 and 972.115.

e. In *State v. Kramer*, 2006 WI App 133, ¶¶ 16-20, 30, 294 Wis.2d 780, 790-93, 799, 720 N.W.2d 459, the Court rejected the defendant's request/contention that it exercise its supervisory authority (the Wisconsin Supreme Court's superintending and supervisory authority and the supervisory authority of the Court of Appeals) to adopt a general exclusionary rule mandating the exclusion of statements made by adults during police interrogations if the interrogation is not electronically recorded.

f. In *State v. Kramer*, 2006 WI App 133, ¶¶ 1, 16, 18-20, 30, 294 Wis.2d 780, 783, 790-93, 799, 720 N.W.2d 459, the Court rejected the defendant's contention that the failure to record an interrogation of an adult is a violation of due process under both the United States and Wisconsin Constitutions.

g. In *Blake v. State*, 972 So.2d 839, 841-45 (Fla. 2007), the Court discussed the admissibility of a recorded statement when the police promise/tell the defendant that the statement will not be recorded and the police then intentionally record the statement.

22. A statement obtained in violation of sec. 968.135.

a. In *State v. Popenhagen*, 2008 WI 55, 309 Wis.2d 601, 749 N.W.2d 611, the police obtained certain bank documents pursuant to sec. 968.135 but without the required probable cause. The defendant then made incriminating statements after the police confronted her with the unlawfully obtained documents. The Court concluded that suppression of both the bank documents and the defendant's incriminating statements was an appropriate remedy in that case.

23. A statement obtained in connection with a deferred prosecution.

    a. Sec. 971.367(4) [Deferred prosecution programs; domestic abuse] and 971.39(2) [Deferred prosecution program; agreements with department].

    b. Can the defendant waive this protection?

24. Rules of Evidence—An offer and related statements to the prosecuting attorney to plead guilty or no contest.

    a. Sec. 904.10 provides that:

> **904.10 Offer to plead guilty; no contest; withdrawn plea of guilty**. Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

    b. The State may take the position that the statement of the defendant is not subject to sec. 904.10 because it: (1) was obtained during confession negotiations versus plea negotiations; (2) was made to the police and not the prosecuting attorney; (3) was made to a prosecuting attorney but not in the context of plea negotiations; (4) the defendant waived the applicability/protections of 904.10. *See* my memorandum entitled **SECTION 904.10 OUT-OF-COURT RELATED STATEMENTS**.

    c. The "is not admissible" in 904.10 prohibits both case-in-chief and impeachment use. *State v. M*ason, 132 Wis.2d 427, 393 N.W.2d 102 (Ct. App. 1986).

    d. A waiver by the defendant (by means of an agreement) of the protections afforded by sec. 904.10—use by the state in its case-in-chief and as impeachment evidence. *United States v. Barrow*, 400 F.3d 109 (2nd Cir. 2005); *State v. Pitt*, 390 Md. 697, 891 A.2d 312 (2006); Adam Robinson, Comment, Waiver of Plea Agreement

Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment, 46 S. Tex. L. Rev. 661 (2005).

e. *See* the discussion under 1. below under **COURT RELATED**—*Specific Challenges.*

25. Rules of Evidence—The statement is protected by one of the privileges in Chapter 905.

a. This includes the lawyer-client privilege (905.03), the husband-wife privilege (905.05), the clergy privilege (905.06), the physician-patient, registered nurse-patient, chiropractor-patient, psychologist-patient, social worker-patient, marriage and family therapist-patient and professional counselor-patient privilege (905.04); domestic violence or sexual assault advocate-victim privilege (905.045).

26. Rules of Evidence—Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

a. Sec. 904.03.

b. *State v. Moss*, 2003 WI App 239, ¶ 21, 267 Wis.2d 772, 781-82, 672 N.W.2d 125; *Boyer v. State*, 91 Wis.2d 647, 662, 284 N.W.2d 30 (1979). *See also State v. Hibl*, 2006 WI 52, ¶¶ 48-55, 290 Wis.2d 595, 615-18, 714 N.W.2d 194.

27. Rules of Evidence—An objection by the defendant that his/her statement is hearsay when it is introduced by the prosecution.

a. A confession, admission, or statement of a defendant, when offered for the truth of the matter asserted by the state, is not hearsay pursuant to sec. 908.01(4)(b)1. which provides that "A statement is not hearsay if . . . the statement is offered against a party and is the party's own statement, in either the party's individual or a representative capacity." *State v. Ziebart*, 2003 WI App 258, ¶ 8 n.4, 268 Wis.2d 468, 476 n.4, 673 N.W.2d 369; *State v. Kutz*, 2003 WI App 205, ¶ 58 n.32, 267 Wis.2d 531, 580-81 n.32, 671 N.W.2d 660; *State v. Joyner*, 2002 WI App 250, ¶ 11, 258 Wis.2d 249, 259, 653 N.W.2d 290; *Haskins v. State*, 97 Wis.2d 408, 420-21, 294 N.W.2d 25 (1980); *State v. Benoit*, 83 Wis.2d 389, 398-99, 402-03, 265 N.W.2d 298 (1978).

b. There is no requirement that a defendant's statement be against the defendant's interest/inculpatory at the time that the defendant made the statement for the statement to be admissible under sec. 908.01(4)(b)1. *Benoit*, 83 Wis.2d at 400-02.

28. Rules of Evidence—The introduction of all or part of the defendant's

statement by the defense.

a. When the defendant seeks to introduce his or her own prior statements for the truth of the matter asserted without testifying, those statements are hearsay. *State v. Johnson*, 74 Wis.2d 26, 36-38, 245 N.W.2d 687 (1976).

> Not falling within any exception to the rule against hearsay, Ziebart's statements to the police would have been inadmissible had he attempted to introduce them. *See* WIS. STAT. §§ 908.01(3), 908.02, & 908.03; *see also State v. Lass*, 194 Wis.2d 591, 605, 535 N.W.2d 904 (Ct.App.1995) ("[A]nything of an exculpatory nature that Lass might have said to his fellow inmate at the jail would have been hearsay, *see* RULE 908.01(3), STATS., and not admissible if offered into evidence by him, *see* RULE 908.02, STATS.").

*State v. Ziebart*, 268 Wis.2d 468, n.4, 673 N.W.2d 369 (Ct App. 2003).

b. The situation where the defendant seeks to introduce all or part of his statement as an exception to the hearsay rule. *State v. Dwyer*, 143 Wis.2d 448, 422 N.W.2d 121 (Ct. App. 1988) (defendant's statement to his mother as to why he had signed a confession was not an excited utterance and therefore not admissible); *State v. Pepin*, 110 Wis.2d 431, 328 N.W.2d 898 (Ct. App. 1993) [a sec. 908.045(4) statement against interest].

c. The situation where part of the defendant's statement is introduced by the prosecution and the defense wants to introduce other parts of the statement or another statement of the defendant under the rule of completeness. *State v. Anderson*, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999); *State v. Eugenio*, 219 Wis.2d 391, 579 N.W.2d 642 (1998).

29. An honesty-testing machine related statement.

a. This discussion addresses statements made by a person in conjunction with the administration of an honesty testing machine examination/ test. This includes a polygraph test and a voice stress analysis test. *See Davis*, 2008 WI at ¶¶ 19, 20, 310 Wis.2d at 596-97.

b. Relevant cases include *State v. Davis*, 2008 WI 71, 310 Wis.2d 583, 751 N.W.2d 332; *State v. Greer*, 2003 WI App 112, 265 Wis.2d 463, 666 N.W.2d 518; *State v. Johnson*, 193 Wis.2d 382, 535 N.W.2d 441 (1995); *Barrera v. State*, 99 Wis.2d 269-298 N.W.2d 820 (1980); *State v. Schlise*, 86 Wis.2d 26, 271 N.W.2d 619 (1978); *McAdoo v. State*, 65 Wis.2d 596, 223 N.W.2d 521 (1974). *See also State v.*

*Gabelbauer*, 2008AP3159-CR, filed December 30, 2009, 2009 WL 5126231, *an unpublished opinion* (the Court found that the test and the defendant's statement were discrete events; the relevant facts were a different room, 15 minutes between the test and the statement, the defendant was not told the test was over, same officer, the test was referenced during the statement).

c. The two main admissibility challenges to an honesty testing machine related statement are that it is not admissible pursuant to sec. 905.065(2) (the test and the statement are not two totally discrete events) and it is not admissible because it is an involuntary statement. *Davis*, 2008 WI at ¶¶ 2, 21, 35, 310 Wis.2d at 589, 597, 604-05. I first discuss the sec. 905.065(2) admissibility issue and then the voluntariness issue.

d. Statements made <u>during</u> an honesty testing machine test are <u>not</u> admissible into evidence pursuant to sec. 905.065(2). *Davis*, 2008 WI at ¶¶ 43-45, 310 Wis.2d at 608-11; *Greer*, 2003 WI App at ¶ 9, 265 Wis.2d at 469. Does this rule apply to the use of such a statement as impeachment evidence?

e. Statements made (during an interview) "after" an honesty testing machine test are admissible into evidence when the interview/statement is not so closely associated with/related to the test so as to render it one event—statements must be suppressed/are not admissible when they are so closely associated with/related to an honesty testing device test that the test and the statement are one event rather than two events. *Davis*, 2008 WI at ¶¶ 2, 3, 23, 310 Wis.2d at 589, 598. The touchstone of admissibility is whether the interview, during which the statement was elicited, was totally discrete from the examination which preceded it. *Davis*, 2008 WI at ¶ 29, 310 Wis.2d at 601. The statement must have been obtained/given during an interview that was <u>totally discrete</u> from the honesty testing device test—the statement and the test must be two totally discrete events. *Davis*, 2008 WI at ¶¶ 3, 21, 23, 31, 34, 45, 310 Wis.2d at 589, 597-98, 602-04, 610-11. Is this rule applicable to the use of such a statement as impeachment evidence?

f. Whether a statement is considered part of the test or a totally discrete event is largely dependent upon whether the test is over at the time the statement is given and the defendant knows the test is over. *Davis*, 2008 WI at ¶ 23, 310 Wis.2d at 598. These two considerations have been referred to as the "core factors." *Davis*, 2008 WI at ¶ 29, 310 Wis.2d at 601. The determination of whether a statement and a test were totally discrete events is made after consideration of the "totality of the circumstances" of the individual case—a totality of the circumstances test/approach is used. *Davis*, 2008 WI at ¶¶ 23, 31, 32,

34, 310 Wis.2d at 598, 602-04. To make this determination, the following factors should be weighed and considered: (1) whether the defendant was told the test was over; (2) whether any time passed between the analysis and the defendant's statement; (3) whether the officer conducting the analysis differed from the officer who took the statement; (4) whether the location where the analysis was conducted differed from where the statement was given; and (5) whether the voice stress analysis was referred to when obtaining a statement from the defendant. *Davis*, 2008 WI at ¶ 23, 310 Wis.2d at 598. There is no bright-line rule of timing. *Johnson*, 193 Wis.2d at 389.

g. An honesty testing device related statement, even if admissible because it was obtained during an interview that was totally discrete from the honesty testing device test, is also subject to the ordinary principles of voluntariness just like other statements of a defendant—an honesty testing device related statement, to be admissible into evidence, must also survive constitutional due process considerations of voluntariness—such a statement must have been given voluntarily. *Davis*, 2008 WI at ¶¶ 3, 21, 34, 42, 310 Wis.2d at 589, 597, 604, 607-08.

30. A statement obtained in violation of sec. 967.06.

a. *State v. Hanson*, 136 Wis.2d 195, 401 N.W.2d 771 (1987).

31. A statement obtained in violation of Wisconsin's Electronic Surveillance Control Law (WESCL).

a. Secs. 968.27-968.37.

b. Cases include: *State v. Ohlinger*, 2009 WI App 44, 317 Wis.2d 445, 767 N.W.2d 336; *State v. Duchow*, 2008 WI 57, 310 Wis.2d 1, 749 N.W.2d 913; *State v. Christensen*, 2007 WI App 170, 304 Wis.2d 147, 737 N.W.2d 38; *State v. House*, 2007 WI 79, 302 Wis.2d 1, 734 N.W.2d 140; *State v. Riley*, 2005 WI App 203, 287 Wis.2d 244, 704 N.W.2d 635; *State v. Maloney*, 2005 WI 74, ¶¶ 31-37, 281 Wis.2d 595, 612-14, 698 N.W.2d 583.

c. A summary of numerous statement related WESCL cases is set forth at the end of this outline in Attachment A at pages 32-34.

d. A warrantless intercept obtained pursuant to the one-party consent exception to the WESCL can be introduced into evidence at a felony proceeding if certain authentication conditions are met. Section 968.29(3)(b); *Ohlinger*, 2009 WI App 44 at ¶ 7, 317 Wis.2d at 450; *State v. Curtis*, 218 Wis.2d 550, 556, 582 N.W.2d 409 (Ct. App. 1998).

e. The prohibition against the interception of communications between an attorney and his or her client, set forth at 968.30(10), was discussed in *State v. Christensen*, 2007 WI App 170, 304 Wis.2d 147, 737 N.W.2d 38.

32. A statement obtained in violation of an ethical rule.

a. The relevant ethical rules include: (1) SCR 20:3.8(c) provides that "When communicating with an unrepresented person who has a constitutional or statutory right to counsel, the prosecutor shall inform the person of the right to counsel and the procedures to obtain counsel and shall give that person a reasonable opportunity to obtain counsel"; (2) SCR 20:3.8(b) provides that when communicating with an unrepresented person in the context of an investigation or proceeding, a prosecutor shall inform the person of the prosecutor's role and interest in the matter; (3) SCR 20:4.2 addresses communication with a person represented by counsel.

b. *State v. Maloney,* 2005 WI 74, 281 Wis.2d 595, 698 N.W.2d 583; *State v. Lale*, 141 Wis.2d 480, 490, 415 N.W.2d 847 (Ct. App. 1987); *United States v. Olson*, 450 F.3d 655 (7th Cir. 2006); *United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000).

c. In *Maloney,* the Court stated that it would not decide whether the former SCR 20:4.2 is applicable to the investigative stage of a criminal case nor whether suppression is an available remedy for an ethics violation.

d. In *Olson*, 450 F.3d at 682, the Court, in the context of a discussion of the former SCR 20:3.8(b), stated: "Even if this was an ethical lapse, and again, we are not deciding that issue today, we see no reason to require suppression. Nothing in the record indicates that this was a wilful or egregious act on the part of these prosecutors; to the contrary, they appeared to be making every effort to comply with their prosecutorial obligations. Nor did their conduct result in a constitutional violation. And finally, there was no clear authority informing them that they were under an obligation to do more than they did. For these reasons, we find no abuse of discretion in the district court's decision not to suppress the evidence obtain at the April 30 meeting."

e. What were the ethical obligations of a prosecutor under the former ethical rules when he or she interrogated a defendant before the

commencement of the criminal case—was the giving of the *Miranda* warnings and obtaining of a wavier of those rights sufficient? *Acosta*, 111 F. Supp. 2d at 1092-95 [SCR 20:3.8(b) is applicable in this situation]; *Olson*, 450 F.3d at 681-82 ("We are doubtful that the prosecutors here violated any ethical rules. They carefully investigated whether Martinez was represented by counsel and insisted on a complete reading of his *Miranda* rights even after he interrupted the recitation to boast that he knew his rights better than Agent Craft. He told the prosecutors that he was smart enough to decide what to do on his own. He then agreed to speak without a lawyer after being told he had a right to an attorney and that one would be appointed for him if he could not afford to hire a lawyer himself. Neither the district court nor the parties nor this court could find any authority requiring anything more specific of the prosecutors than what they did here, and Rule 3.8(b) itself is somewhat ambiguous about its application in the setting of a pre-indictment, custodial interrogation. But we need not decide conclusively whether the district court was correct in finding an ethical violation because the court did not abuse its discretion in declining to suppress the statements."); Ethical opinions E-93-3 and E-92-6; SCR 20:3.8(c) were not a problem because of the comment to the rule.

f. What are the ethical obligations of a prosecutor under the present ethical rules when he or she interrogates a defendant before the commencement of the criminal case—is the giving of the *Miranda* warnings and obtaining a waiver of those rights sufficient? SCR 20:3.8(b) and (c).

g. *In Montejo v. Louisiana*, 556 U.S. ____, ____, 129 S.Ct. 2079, 2087 (2009), the Court, in discussing the Sixth Amendment right to counsel in the context of police interrogation of a person, stated:

> Monejo's rule appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment. The American Br Association's Model Rules of Professional Conduct (which nearly all States have adopted into law in whole or in part) mandate that 'a lawyer shall not communicate about the subject of [a] representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.' Model Rule 4.2 (2008). But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers.

h. In *People v. Santiago,* ____ Ill. 2d ____, ____ N.E.2d ____, the

Illinois Supreme Court discussed, in the context of a criminal case where several Illinois prosecutors questioned the defendant, the Illinois counterpart to SCR 20:4.2.

33. A violation of the defendant's right to consular notification under Article 36 of the Vienna Convention on Consular Relations.

a. The Vienna Convention on Consular Relations is a 79-article, multilateral treaty written in 1963 and ratified by the United States in 1969. Article 36 addresses communication between an individual and his consular officers when the individual is detained by authority in a foreign country. It provides, in pertinent part, that, "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Paragraph 1(b) of Article 36 contains three obligations: (1) the authorities must notify the consular officers of the detainee's home country if the detainee so requests: (2) any communication to the consular officials by a detained alien shall be forwarded without delay; (3) the detaining authorities shall inform the person concerned without delay of his rights under the Convention.

b. In *State v. Navarro*, 2003 WI App 50, 260 Wis.2d 861, 659 N.W.2d 487 the Court held that the Vienna Convention on Consular Relations does not create a private right that a foreign national can enforce in a state criminal proceeding and therefore a defendant has no standing to assert any remedy pursuant to the Vienna Convention—the Vienna Convention simply represents a notice accommodation to a foreign national which does not extend into dictating substantive procedures or dispositions in a state proceeding.

c. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669 (2006), the Court addressed the availability of judicial relief for violations of Article 36. The first issue addressed by the Court was whether Article 36 creates rights that defendants may invoke against the detaining authorities in a criminal trial. The Court declined to address whether Article 36 granted enforceable rights that may be invoked by individuals in judicial proceedings since the Court concluded, even assuming the Convention creates judicially enforceable rights, that suppression of a defendant's statement is not an appropriate remedy for a violation of Article 36.

d. In *Medellin v. Texas*, 552 U.S. ____, _____ n.4, 128 S.Ct. 1346, 1357 n.4 (2008), the Court assumed, without deciding, that Article 36 creates judicially enforceable individual rights.

e. Every jurisdiction, except the Seventh Circuit, has held that the notification requirement of the Vienna Convention cannot be vindicated in a civil rights action for damages because the Convention does not confer private rights on individual detainees. *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008); *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *cert. denied*, ____ U.S. ____, 129 S.Ct. 397 (2008). In *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007), the Court concluded that Article 36 creates individual rights to be informed of consular notification and access that can be vindicated in a private action.

34. The admissibility of "credibility" statements made by an officer during an interrogation especially a recorded interrogation.

a. The issue of whether a recording of an interrogation/testimony concerning what occurred during an interrogation should be edited to remove the interrogating officer's comments concerning the defendant's lack of credibility or veracity has been discussed, either directly or indirectly, in *State v. Patterson*, 2009 WI App 161, ¶ 36, ____ Wis.2d ____, ____, 776 N.W.2d 602, *State v. Snider*, 2003 WI App 172, ¶¶ 1, 2, 25-29, 266 Wis.2d 830, 836, 849-51, 668 N.W.2d 784 and *State v. Smith*,170 Wis.2d 701, 704-05, 717-19, 490 N.W.2d 40 (Ct. App. 1992).

b. The issue of whether a recording of an interrogation should be edited to remove the interrogating officer's comments concerning the defendant's lack of credibility or veracity has been directly addressed in numerous cases from jurisdictions other than Wisconsin. A recent Seventh Circuit case is *United States v. Jumper*, 497 F.3d 699 (7th Cir. 2007). There is an excellent discussion of this issue and the various cases that have addressed it in *State v. Boggs*, 218 Ariz. 325, 185 P.3d 111, 120-21 (2008), *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), and *State v. Elnicki*, 279 Kan. 47, 105 P.3d 1222 (2005).

35. The corroboration rule.

a. In *State v. Bannister*, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892, the Court discussed the corroboration rule which requires the State to present some evidence that the crime charged actually occurred independent of the defendant's confession. In its opinion the Court stated that the rule is one of evidentiary sufficiency—the courts consider the corroboration rule after a jury verdict.

b. *See also State v. Fairconatue*, 2008AP1774-CR, filed July 7, 2009, 2009 WL 1919943, *an unpublished opinion* (a discussion and application of the corroboration rule at ¶¶ 16-21).

36. Denial of the right to make a telephone call after a person is arrested.

a. Some states have a statutory provision that provides a person the right to make a telephone call after he or she has been arrested. Examples are Tennessee Code section 40-7-106(b) and Massachusetts G. L. chapter 276 section 33A.

b. In those states that have such a statutory provision, a defendant may bring a motion to suppress his or her statement because of a violation of the state's telephone call statute. *See State v. Downey*, 259 S.W.3d 723, 734-35 (Tenn. 2008).

c. Wisconsin does not have a telephone call statute.

37. The *McNabb-Mallory* rule.

a. The supervisory authority of the Untied States Supreme Court over the federal courts.

b. The suppression of a statement given by a defendant after an unreasonable delay in bringing him/her before a judge.

c. The applicable federal statutes are Federal Rule of Criminal Procedure(5) and 18 U.S.C. 3501(1)(c).

d. *Corley v. United States*, ____ U.S. ____, 129 S.Ct. 1558 (2009); *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356 (1957); *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608 (1943).

e. In *Corley*, ____ U.S at ____, 129 S.Ct. at 1571, the Court stated/held:

> We hold that § 3501 modified *McNabb-Mallory* without supplanting it. Under the rule as revised by § 3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]'). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was 'made voluntarily and . . . the weight to be given [it] is left to the jury.' *Ibid*. If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.

38. A person was held incommunicado.

a. This issue was discussed in *State v. Ward*, 2009 WI 60, 318 Wis.2d 301, 767 N.W.2d 236.

## COURT RELATED STATEMENTS

### *Introduction*

The admissibility of the defendant's testimony at a prior court hearing, trial, or other proceeding is discussed in my outline entitled **THE INTRODUCTION INTO EVIDENCE, AT THE DEFENDANT'S TRIAL OR SENTENCING, OF THE DEFENDANT'S TESTIMONY AT A PRIOR COURT HEARING, TRIAL, OR OTHER PROCEEDING**. Some of the possible challenges that a defendant may make in an attempt to block the admission into evidence of an in-court or in-court-related statement made by the defendant include:

1. An offer and related statements to the court to plead guilty or no contest or statements made in court in connection with a withdrawn plea: 29, 30.

2. Testimony at a prior proceeding—general law: 30.

3. Testimony at a prior proceeding—the testimony was compelled or involuntary: 30.

4. Testimony at a prior proceeding—the defendant took the stand and testified in order to overcome the impact of illegally obtained and used evidence: 30.

5. A statement was obtained during a Chapter 971 examination or treatment: 30, 31.

6. A statement in a court-ordered presentence investigative report: 31.

7. A statement in a defendant's sentencing memorandum: 31.

8. Statements made by the defendant during his sentencing: 31.

9. A statement obtained pursuant to a grant of immunity: 31, 32.

### *Specific Challenges*

1. An offer and related statements to the court to plead guilty or no contest or statements made in court in connection with a withdrawn plea.

a. Sec. 904.10 (Offer to plead guilty; no contest; withdrawn plea of guilty).

b. *State v. Norwood*, 2005 WI App 218, 287 Wis.2d 679, 706 N.W.2d 683 (defendant's letter to the court contained inculpatory statements and an implicit offer to plead guilty or no contest; any incriminating statements were integrally intertwined with the offer; a defendant's expressed willingness to enter a plea agreement cannot feasibly be separated from his or her reasons for wanting to do so; the letter should not have been admitted pursuant to sec. 904.10); *State v. Mason*, 132 Wis.2d 427, 393 N.W.2d 102 (Ct. App. 1986) (the "is not admissible" in 904.10 prohibits both case-in-chief and impeachment use); *State v. Nash*, 123 Wis.2d 154, 158-60, 366 N.W.2d 146 (Ct. App. 1985) (defendant plead guilty; defendant testified at two trials of other participants to the crime; defendant's guilty plea was withdrawn; defendant's trial testimony was not "in connection with" his guilty plea).

2. Testimony at a prior proceeding—general law.

a. *See* my outline entitled **THE INTRODUCITON INTO EVIDENCE, AT THE DEFENDANT'S TRIAL OR SENTENCING, OF THE DEFENDANT'S TESTIMONY AT A PRIOR COURT HEARING, TRIAL, OR OTHER PROCEEDING**.

3. Testimony at a prior proceeding—the testimony was compelled or involuntary.

a. *State v. Ramirez*, 228 Wis.2d 561, 569 n.2, 598 N.W.2d 247 (Ct. App. 1999); *State v. Krueger*, 224 Wis.2d 59, 69, 588 N.W.2d 921 (1999); *State v. Schultz*, 152 Wis.2d 408, 448 N.W.2d 424 (1989), *cert. denied*, 493 U.S. 1092 (1990).

4. Testimony at a prior proceeding—the defendant took the stand and testified in order to overcome the impact of illegally obtained and used evidence.

a. The testimony is tainted by the same illegality that rendered the evidence itself inadmissible.

b. *State v. Anson*, 2005 WI 96, 282 Wis.2d 629, 698 N.W.2d 776; *State v. Anson*, 2002 WI App 170, ¶¶ 26-29, 258 Wis.2d 433, 450-52, 654 N.W.2d 48; *State v. Middleton*, 135 Wis.2d 297, 315-16, 399 N.W.2d 917 (Ct. App. 1986).

5. A statement was obtained during a Chapter 971 examination or treatment.

a. Section 971.18 (Inadmissibility of statements for purposes of examination) provides that "a statement made by a person subjected to psychiatric examination or treatment pursuant to this chapter for the purposes of such examination or treatment shall not be admissible in

evidence against the person in any criminal proceeding on any issue other than that of the person's mental position."

b. *State v. Jacobson*, 164 Wis.2d 685, 476 N.W.2d 22 (Ct. App. 1991); *Moore v. State*, 83 Wis.2d 285, 265 N.W.2d 540 (1978).

6. A statement in a court-ordered presentence investigative report (PSI).

a. *State v. Jimmie R.R.*, 2004 WI App 168, 276 Wis.2d 447, 688 N.W.2d 1; *State v. Greve*, 2004 WI 69, 272 Wis.2d 444, 681 N.W.2d 479; *State v. Crowell*, 149 Wis.2d 859, 440 N.W.2d 352 (1989).

b. A statement made by a defendant to the preparer of a court-ordered PSI (sec. 972.15) cannot be used against the defendant at a subsequent trial concerning either the same offenses or different offenses.

7. A statement in a defendant's sentencing memorandum.

a. *State v. Jimmie R.R.*, 2004 WI App 168, 276 Wis.2d 447, 688 N.W.2d 1; *State v. Greve*, 2004 WI 69, 272 Wis.2d 444, 681 N.W.2d 479.

b. In *Greve*, the Court held that a statement made by the defendant to the preparer of the defendant's sentencing memorandum can be used against the defendant at a subsequent trial concerning the same offense (and by implication a trial concerning a different offense) by the state in its case-in-chief. In so holding, the Court held that: (1) neither sec. 972.15 nor the Court's decision in *Crowell* prevent the use of the defendant's statement; (2) the use of the defendant's statement does not violate the defendant's constitutional right to due process; (3) public policy considerations do not support the position that the statement cannot be used. A three-person minority in *Greve* would immunize a defendant's inculpatory statements in a sentencing memorandum from future use by the state as direct evidence against the defendant on grounds that it furthers sound policy in the administration of justice.

8. Statements made by the defendant during his sentencing.

a. *State v. Greve*, 2004 WI 69, ¶¶ 66, 81, 272 Wis.2d 444, 480, 86-87, 681 N.W.2d 479.

9. A statement obtained pursuant to a grant of immunity.

a. Wisconsin's primary statutory immunity provisions are 972.08 and 972.085.

b. "Prosecutorial/non-statutory" immunity was discussed in *State v.*

*Jones*, 217 Wis.2d 57, 576 N.W.2d 580 (Ct. App. 1998).

c. Immunity granted pursuant to 972.08 is use and derivative use immunity. Section 972.085.

d. When a witness is granted "use and derivative use" immunity, any statements made by the witness pursuant to the grant of immunity and any evidence/information derived from those statements cannot be used against the witness. This type of immunity, however, permits prosecution for the crimes if the prosecuting agency does not offer the immunized testimony and establishes that the evidence offered is not derived from the immunized testimony. *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 20 n.8, 257 Wis.2d 40, 51 n.8, 654 N.W.2d 438; *Kastigar v. United States*, 406 U.S. 441, 443, 92 S.Ct. 1653, 1655, 61 (1972).

e. In *State v. Mark*, 2008 WI App 44, 308 Wis.2d 191, 747 N.W.2d 727 (*Mark* I) and *State v. Harrell*, 2008 WI App 37, 308 Wis.2d 166, 747 N.W.2d 770, the Court, in the context of expert testimony introduced by the state at a Chapter 980 trial, discussed what is "derivative use" evidence (testimony from a compelled statement/testimony—what evidence/testimony is derived directly or indirectly from a compelled statement/testimony).

## ATTACHMENT A

1. A statement obtained in violation of Wisconsin's Electronic Surveillance Control Law (WESCL).

a. Recent cases which have addressed an attempt to stop the admission into evidence of a statement made by a defendant because of a violation of the WECSL include: *State v. Ohlinger*, 2009 WI App 44, 317 Wis.2d 445, 767 N.W.2d 336 (a telephone conversation between the defendant and two police officers—posing as a mother and daughter—was intercepted and recorded by another officer without a warrant; the issue was the scope of the one-party consent exception to the WESCL set forth at 968.31(2)(b); the defendant's general contention was that the one-party consent exception is not applicable when the intercepting person is a law enforcement officer and the consenting party is also a law enforcement officer and his specific contention was that the intercepting person may never be a police officer because "under color of law" does not include law enforcement officers; the Court rejected both of the defendant's positions; the Court concluded that the one-party consent exception may apply when one or more law enforcement officers are both the intercepting and consenting parties and that "under color of law" includes law enforcement officers; the Court discussed the legislative history of the WESCL, its federal counterpart, and the use of federal decisions in interpreting the WESCL; the Court discussed the one-party consent exception

including the intercepting-person requirement and the consenting-person requirement; the phrase "a person acting under color of law in the intercepting person requirement of the one-party consent exception includes persons who are law enforcement officers and persons working with law enforcement; a discussion of a Seventh Circuit case that discussed the relationship of "under color of law" and "state action. *State v. Duchow*, 2008 WI 57, 310 Wis.2d 1, 749 N.W.2d 913 (the parents of a 9-year-old child, who suffered from Downs Syndrome and Attention Deficit Disorder, surreptitiously recorded numerous statements of the defendant on a school bus driven by the defendant by placing a voice-activated tape recorder in the child's backpack; the issue was whether the defendant's tape-recorded statements were an "oral communication" as defined in sec. 968.27(12) of the WESCL; the Court concluded that the statements were not oral communication because the defendant had no reasonable expectation of privacy in the statements, because the statements were not oral communication they did not fall within the scope of the WESCL and therefore the WESCL provided no basis for suppression; the Court extensively discussed the legislative history of the WESCL and its federal counterpart; the Court used federal decisions interpreting the federal law; the WESCL does not cover every oral statement—it is restricted to those made in certain circumstances; the Court used/adopted the Fourth Amendment reasonable expectation of privacy test to determine if the defendant's statements were covered by 968.27(12); the Court rejected the defendant's test of a reasonable expectation of non-interception; the Court did not address whether the WESCL permits vicarious consent by a parent or whether the statements were recorded under the color of law). *State v. Christensen*, 2007 WI App 170, 304 Wis.2d 147, 737 N.W.2d 38 (numerous telephone calls from the defendant-a jail inmate-to numerous persons were recorded; each call contained the normal jail "this call is being recorded" warning; at least one of the calls was between the defendant and his attorney; discussion of *Riley*; defendant attempted to distinguish his case from *Riley* based on the prohibited interception of communications between an attorney and a client; discussion of sec. 968.30(10); the law enforcement exception was not addressed; the Court rejected the defendant's argument that all intercepts by the jail were unlawful because the telephone intercept system has the potential to record inmates' calls to their attorneys; the Court held that the facts were sufficient to establish implied consent). *State v. House*, 2007 WI 79, 302 Wis.2d 1, 734 N.W.2d 140 (the issues were whether the wiretap order authorized interceptions of communications for three offenses—money laundering, racketeering, continuing criminal enterprise—not specifically enumerated in the wiretapping statutes and if so, the appropriate remedy; discussion of federal law and decisions and the relationship of Wisconsin and federal law; the Court erred in authorizing a wiretap for the abovementioned three offenses which are not enumerated in sec. 968.28; the Court rejected the state's theory that those three offenses are included within the enumerated offense of dealing in controlled substances; the authorization of a wiretap for non-enumerated offenses did not warrant suppression of the evidence obtained from the wiretap in this case since the failure did not conflict with the

statutory objectives of protecting privacy and limiting wiretapping to situations clearly calling for the use of such an extraordinary device; not every failure to follow the wiretapping statutes makes an interception unlawful—the communication was unlawfully intercepted—such that suppression is required; the *Franks* test applies to wiretap applications; a three-person concurring opinion asserted that the circuit court did not err in authorizing a wiretap for offenses not enumerated in sec. 968.28 because the enumerated offense of dealing in controlled substances was broad enough to encompass the allegations of money laundering, racketeering, and continuing criminal enterprise in this case; Chief Justice Abrahamson dissented in that she believed that suppression was required). *State v. Riley*, 2005 WI App 203, 287 Wis.2d 244, 704 N.W.2d 635 (inmate telephone calls from jail that are routinely recorded; so long as an inmate is given meaningful notice that his or her telephone calls over institutional phones are subject to surveillance, his or her decision to engage in conversations over those phones constitutes implied consent to such surveillance; the court concluded, considering the recorded warning together with indicators that the defendant heard and understood the warning, that the defendant consented to their interceptions when he used the jail's phone system because the defendant had meaningful notice that his calls were subject to recording). *State v. Maloney*, 2005 WI 74, ¶¶ 31-37, 281 Wis.2d 595, 612-14, 698 N.W.2d 583 (the Court held that the communication was not intercepted to commit an injurious act under sec. 968.31(2)(c) of the WESCL).

## ATTACHMENT B

1. A direct *Miranda* violation.

   a. Recent *Miranda* cases (by date) include: In *Maryland v. Shatzer*, 559 U.S. ____, 130 S.Ct.1213 (2010), the Court discussed two *Miranda* issues: the *Miranda* right to counsel and *Miranda* custody. The Court specifically addressed the issue of when can the police reinitiate questioning of a defendant after she/he has invoked the *Miranda* right to counsel. The Court created a 14-day break-in-custody rule which allows the police to reinitiate questioning under some circumstances. In its opinion the Court extensively discussed the *Edwards* rule. The Court also held that a defendant who is in a general prison population is not in *Miranda* custody. This is a major *Miranda* decision. In *Florida v. Powell*, 559 U.S. ____, 130 S.Ct.1195 (2010), the Court held that the warning "You have the right to talk to a lawyer <u>before</u> answering any of our questions . . . You have the right to use any of these rights at any time you want during this interview," satisfied/adequately conveyed the third *Miranda* right-to-counsel advisement/warning that a person be advised the he has the right to have an attorney <u>during</u> questioning. The Court found that the two warnings, in combination, reasonably conveyed the defendant's right to have an attorney present, not only at the outset of the

interrogation, but at all times during the interrogation. In its decision the Court extensively stated/discussed the relevant law and prior cases when the issue is whether a particular warning/words of an officer adequately conveyed a particular *Miranda* warning. In *State v. Ward*, 2009 WI 60, 318 Wis.2d 301, 767 N.W.2d 236, the Court addressed numerous voluntariness of a confession issues and two *Miranda* issues: waiver of the *Miranda* rights and invocation of the *Miranda* right to counsel. Addressing waiver of the *Miranda* rights, the Court: (1) extensively discussed numerous general principles; (2) held that the defendant knowingly, voluntarily, and intelligently waived her *Miranda* rights on two occasions when she was interrogated while in custody; (3) held that the fact that the police did not inform the defendant that an attorney (who had been retained by the defendant's husband to represent the defendant) was at the police station and wanted to speak with the defendant and the fact that the attorney was not allowed to speak with the defendant did not affect the validity of the defendant's waiver of her *Miranda* rights; (4) held that the fact that the defendant, after having asked several times about her husband, was not informed that he was outside of the interrogation room did not affect the validity of her waiver of her *Miranda* rights. Addressing the invocation of the *Miranda* right to counsel, the Court: (1) discussed/reiterated numerous general principles including that the *Davis* clear articulation rule and the *Davis* no clarification rule are the law in the state of Wisconsin; (2) held that the defendant's "should I call an attorney" was not an invocation of the right to counsel; (3) addressed the situation where the officer gives the defendant information in response to a "should I call an attorney" question. The Court also reiterated that Article I, Section 8 of the Wisconsin Constitution provides the same (but not more/higher) *Miranda* protections as the United States Constitution. Justice Crooks, in a dissent joined by Chief Justice Abrahamson and Justice Bradley, disagreed with numerous of the positions taken by the majority. The dissent would interpret the Wisconsin Constitution to give a person "greater" *Miranda* rights in some situations. In *State v. Schloegel*, 2009 WI App 85, 319 Wis.2d 741, 769 N.W.2d 130, the Court addressed the issue of what is *Miranda* custody in the context of statements given by a student after drugs were found in his car. The Court agreed with the State's position that the defendant was not free to leave but was not in *Miranda* custody. In *State v. Berggren*, 2009 WI App 82, 320 Wis.2d 209, 769 N.W.2d 110, the Court held: (1) that the failure of the police to re-advise the defendant of the *Miranda* warnings prior to a second questioning/statement did not violate *Miranda* and (2) that the defendant did not invoke his right to counsel. In *State v. Grady*, 2009 WI 47, 317 Wis.2d 344, 766 N.W.2d 729, the Court addressed the general issue of whether precustodial, rather than postcustodial, *Miranda* warnings can satisfy the requirements of *Miranda* in some circumstances and the specific issue of whether *Miranda* was complied with in this case when: (1) the defendant was advised of and waived the *Miranda* warnings before the start of his noncustodial interview and (2) the defendant was not again given the *Miranda* warnings after his interrogation became custodial during the same interview two-and-one-half hours later.

The defendant advocated a bright-line rule/approach answer to the specific issue before the court—*Miranda* requires the administration of *Miranda* warnings after a person is placed in *Miranda* custody and therefore all and any *Miranda* warnings prior to custody are ipso facto ineffective. Stated another way, the defendant's contention was that because *Miranda* warnings are required before a custodial interrogation commences and are not required for noncustodial interrogations, *Miranda* warnings are effective only after a person has been placed in *Miranda* custody. The Court did not adopt the defendant's position—the Court rejected the defendant's proposed bright-line approach. Instead, the Court, as to the general issue, held that precustodial administration of *Miranda* warnings can under certain circumstances be sufficient to satisfy the requirements of *Miranda*. As to the specific issue, the Court held that in light of the facts of this case the noncustodial advisement of the *Miranda* warnings was sufficient to comply with the *Miranda* advisal requirements—the police were not required to readminister those warnings once the defendant's interrogation became custodial two-and-one-half hours later. In so holding, the Court: (1) noted that numerous other jurisdictions have considered this issue and all but one have rejected the defendant's position; (2) stated that the proper framework for analyzing the sufficiency of the timing of *Miranda* warnings/whether a suspect has effectively received his *Miranda* warnings is a flexible approach that examines the totality of the circumstances; (3) stated that the main thrust of the inquiry is whether the suspect being questioned was sufficiently aware of his or her rights during the custodial interrogation. The Court also listed numerous factors that other courts have used/applied in deciding the general issue and then stated: "We do not here adopt any formulaic test. The above factors are helpful, but not individually or collectively determinative or exhaustive. We prefer a flexible approach that examines all relevant facts in an effort to determine whether a suspect was sufficiently aware of his or her constitutional rights." In *State v. Young*, 2009 WI App 22, 316 Wis.2d 114, 762 N.W.2d 736, the Court, in the context of a *Miranda* hearing where the issue was whether the defendant invoked his *Miranda* right to counsel, stated that there is no precedent in Wisconsin which supports the position that a trial court must specifically state its reasons for finding one witness is more credible than another. In *Montejo v. Louisiana*, 556 U.S. ____, 129 S.Ct. 2079 (2009), the Court, in addressing a person's Sixth Amendment right to counsel in the context of police interrogation, commented on numerous *Miranda* topics/issues including the *Miranda* right to counsel and issues related to its invocation. In *State v. Cole*, 2008 WI App 178, 315 Wis.2d 75, 762 N.W.2d 711, the Court held that when a defendant gives the State timely notice that he or she claims that a custodial statement is inadmissible because of a prior invocation of the *Miranda* right to counsel by the defendant, the State has the burden of proving at the suppression hearing that the defendant previously waived that right. In *State v. Hambly*, 2008 WI 10, 307 Wis.2d 98, 745 N.W.2d 48, the fact situation was the defendant invoked his right to counsel, the police ceased questioning, the defendant initiated further dialogue with the police, the defendant was advised of the *Miranda* warnings, and the defendant give a

statement. Only six justices participated in the case. The Court addressed three *Miranda* issues: (1) whether the defendant's request for counsel constituted an effective invocation of the *Miranda* right to counsel from a "when/timeliness" perspective; (2) whether the officer's statement to the defendant after the defendant invoked his right to counsel constituted interrogation; (3) were the statements given by the defendant after he invoked his right to counsel admissible into evidence because the defendant initiated communication with the officer. As to the first issue, three justices adopted the standard that a suspect may effectively invoke the *Miranda* right to counsel when the suspect is in custody even before interrogation is imminent or pending—the earliest point that an invocation is possible is *Miranda* custody. Three other justices concluded that they need not, and did not, address whether the appropriate standard is the "anytime in custody" standard or the "imminent or impending interrogation" standard since under either standard (under the unusual facts of the case) the defendant invoked his *Miranda* right to counsel. As to the second issue, using the *Innis* test of what constitutes interrogation for *Miranda* purposes, the Court held that the officer's explanation (in response to the defendant's statement that he did not understand why he was under arrest) to the defendant why he was being arrested was not *Miranda* interrogation. In so finding, the Court extensively discussed the applicable law and prior "what is" interrogation cases. As to the third issue, the Court held that the defendant initiated communications with the officer and then voluntarily, knowingly, and intelligently waived his *Miranda* right to counsel. In so holding, the Court: (1) reiterated that a person may waive his or her right to counsel after invoking this right; (2) the state must show that the person initiated further communication, exchanges, or conversations with the police and that the defendant waived the right to counsel. In *State v. Markwardt*, 2007 WI App 242, 306 Wis.2d 420, 742 N.W.2d 546, the Court addressed the issue of whether the defendant unequivocally invoked her right to remain silent. The Court, after an extensive discussion of the applicable law, held that the defendant did not invoke her right to silence since more than one reasonable inference could be drawn from the defendant's statement. In *State v. Backstrom*, 2006 WI App 114, 293 Wis.2d 809, 718 N.W.2d 246, the Court addressed the issue of when must a defendant be re-advised of the *Miranda* warnings when he is requestioned during a continuous period of custody. The Court, after an extensive discussion of prior cases, held that the record demonstrated that the defendant recalled and understood his *Miranda* rights from a full and proper recitation twenty-one hours earlier and therefore, the defendant need not have been re-advised of the *Miranda* warnings. In *State v. Kramer*, 2006 WI App 133, ¶¶ 1-15, 294 Wis.2d 780, 783-89, 720 N.W.2d 459, the Court addressed the non-custodial anticipatory invocation of the *Miranda* right to counsel. The Court concluded that pretrial statements made by the defendant were properly admitted because the non-custodial anticipatory invocation of the right to counsel need not be honored. In *State v. Rockette*, 2005 WI App 205, 287 Wis.2d 257, 704 N.W.2d 382, the Court found that the defendant did not waive his right to remain silent. The Court however, in the

context of a no contest plea, found that the error was harmless. In *State v. Jerrell C.J.*, 2005 WI 105, ¶¶ 121-130, 283 Wis.2d 145, 203-07, 699 N.W.2d 110, Justice Butler, in his concurring opinion, stated that he believed that the juvenile defendant invoked his *Miranda* right to remain silent during the his interrogation. In *State v. Hassel*, 2005 WI App 80, 280 Wis.2d 637, 696 N.W.2d 270, the Court addressed numerous issues including what is an invocation of the right to remain silent, requestioning after an invocation of the right to remain silent, and the doctrine of anticipatory invocation of the right to remain silent. In *State v. Lombard*, 2004 WI 95, 273 Wis.2d 538, 684 N.W.2d 103, the Court held that a defendant is not entitled to *Miranda* warnings prior to his/her pre-petition evaluation with the State's examiner in regard to whether a Chapter 980 petition should be filed. In *State v. Jimmie R.R.*, 2004 WI App 168, ¶¶ 28-34, 276 Wis.2d 447, 464-67, 688 N.W.2d 1, the Court rejected the defendant's contention that he was entitled to *Miranda* warnings prior to the court-ordered presentence investigation interview

RDD/kl
Challenges ((STATEMENT I folder)