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TRIAL EVIDENTIARY ISSUES/TOPICS

THIS IS VERSION 2 OF THIS OUTLINE

INTRODUCTION

This outline contains numerous evidentiary and evidentiary-related topics (and relevant cases) that may be an issue in a criminal trial. Most of the topics in this outline are more likely to be an issue in criminal rather than civil trials. This outline can be used both as a trial preparation evidentiary checklist and as a relevant cases resource.

For some issues I have included only a listing of some of the relevant cases. For other issues I have included either a listing of the relevant cases and an explanation of some of the cases (gang-related evidence), an explanation of all or most of the relevant cases (excited utterance), or a listing of the relevant cases (the result of a polygraph test).

The vast majority of cases in this outline are Wisconsin court cases. I have only included cases from other jurisdictions if there are no Wisconsin cases on point or the case contains an excellent discussion of one or more relevant issues.

If a particular topic is discussed in another outline that I have prepared, a reference is made to that outline.

I have divided the topics in this outline into three categories: prosecution, defense, and prosecution and defense. The only reason I did this is because I thought it would be easier to find a specific topic if the topics were divided into several categories. The fact that a specific topic is under one category rather than another has no evidentiary significance.

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Wisconsin Supreme Court Order 08-02, effective July 1, 2009, allows some unpublished opinions to be cited for their persuasive value.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".*

The following evidence issues are discussed in my outline entitled MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 1: (1) General relevancy law; (2) Relevancy based on a witness's unexpected answer; (3) Evidence concerning a defendant's decision not to testify/the nature of the defendant's testimony; (4) The relationship of the charging decision of the prosecutor and a defendant's motion to exclude evidence; (5) The use of unobjected-to hearsay; (6) Evidence admissible for one purpose and inadmissible for another purpose; (7) Obligation of court to *sua sponte* strike inadmissible evidence.

I would appreciate any comments or suggestions concerning the format of this outline and its contents (including, but not limited to, 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 email is diane.bob@att.net.

Prosecution topics include:

1. Consciousness of guilt-general law.
2. Evidence of an attempt by the defendant to suborn perjury.
3. Consciousness of guilt-resistance to a police request for evidence. Specific topics include: (1) evidence at an OWI trial of the defendant's refusal to submit to a test under the implied consent law; (2) evidence at an OWI trial of the defendant's refusal to perform field sobriety tests; (3) the defendant's refusal to cooperate with the police when they attempt to obtain the defendant's blood, hair, etc. pursuant to a search warrant; (4) defendant's refusal to provide a handwriting exemplar and/or evidence that the defendant attempted to disguise his or her handwriting; (5) defendant's refusal to be fingerprinted.
4. Consciousness of guilt-miscellaneous examples.
5. Flight, resistance to arrest, escape from custody, etc., by the defendant.
6. Flight by a codefendant.
7. Evidence of acts intended to obstruct justice or avoid punishment including threats.
8. Defendant's silence-general law.
9. Defendant's silence in an OWI first offense case.
10. Other crimes.

11. Defendant's failure to attend a mandatory meeting.
12. Use of preliminary hearing testimony of a state's witness.
13. Use of the testimony of a witness given at a co-actor's trial.
14. Use of prior testimony of the defendant.
15. Field sobriety tests.
16. *Bruton related* issues including the redaction of the confession of a non-testifying codefendant.
17. Wisconsin's Electronic Surveillance Control Law.
18. Nonlitigation evidence.
19. Rape Shield Law evidence.
20. Letter written by the defendant after the crime.
21. Possession of weapons, stolen goods, etc.
22. Offer to plead guilty, no contest, withdrawn plea of guilty and related statements.
23. Crime Lab report and other reports and/or testimony by a person other than the person who performed the analysis.
24. Videotaped statements of a child.
25. Defendant's use of an alias.
26. Subscription to certain Internet newsgroups.
27. The identity of an informant privilege.
28. Gang-related evidence.
29. Circumstantial evidence of nonconsent.
30. The opinion of a person that a car was speeding and the speed.
31. Evidence of the assertion by the defendant of a Fourth Amendment right.
32. Using the *Physician's Desk Reference* to identify a drug.
33. Circumstantial evidence of venue.
34. *Jensen* evidence.
35. Causation.
36. The use of a mug shot.
37. Impeachment of an alibi witness and corresponding comments by the prosecutor.

Defense topics include:

41. *Richard A.P.* evidence.
42. *Denny* evidence.
43. *Denny* evidence—unknown third party.
44. The defendant was framed.
45. *McMorris* evidence.
46. Expert and lay testimony on mental health issues including intent.

47. Reliability of eyewitness identification testimony.
48. *King* evidence.
49. Defendant's constitutional right to present a defense.
50. *Shiffra* evidence.
51. *Mayday* examination.
52. Suppression of a witness's involuntary statement.
53. The determination of the appropriate sanction for a defense violation of an evidence related court order.
54. Prior job related misconduct by police.
55. Other crimes.
56. Concessions by the state to a witness.
57. Misidentification of the defendant during an identification procedure.
58. Defendant's constitutional right of cross-examination.
59. Introduction of a defendant's statement without the defendant testifying.
60. Voluntary contact between a victim and a defendant to impeach the victim's testimony.

Prosecution and defense topics include:

71. Rule of completeness.
72. Police reports.
73. Expert testimony concerning battered woman's syndrome and/or domestic violence.
74. Chain of custody.
75. Prior factual assertions by an attorney.
76. Polygraph test results.
77. Offer to take a polygraph test or to undergo DNA analysis or withdrawal of the offer.
78. *Haseltine* evidence.
79. Photographs.
80. Computer-generated animation.
81. Pedagogical-device summaries.
82. Tapes and transcripts.
83. Hearsay-general law.
84. Credibility of hearsay declarant (908.06).
85. Hearsay and translators.
86. Hearsay exception—recent perception.
87. Hearsay exception—state of mind.
88. Hearsay exception—statement against penal interest.
89. Hearsay exception—former testimony.
90. Hearsay exception—excited utterance.
91. Hearsay exception—dying declaration.
92. Stipulations—*Wallerman*.
93. Stipulations (when must the state accept a proposed defense

stipulation) and a partial jury waiver.
94. Hearsay exemption—prior inconsistent statement.
95. Probationary status of a witness.
96. Layperson opinion on the intoxicated state (alcohol and/or drug) of a person.
97. Pending criminal charges.
98. The length of a sentence and parole eligibility date.
99. Expert "legal" opinion testimony by an attorney.
100. Having the defendant do something in front of the jury without testifying.
101. Issues related to a statement given by the defendant to law enforcement personnel.
102. Racial, cultural, etc., stereotype evidence.
103. Event data recorder evidence.
104. The best evidence rule.
105. The Opened The Door evidentiary doctrine.
106. 911 calls.
107. Subsequent remedial measures-sec.904.07.
108. Expert testimony-general law.
109. Threats to a witness that are not linked to a particular person.
110. Tattoo Evidence.
111. Evidence from financial institution books (891.24).
112. Expert testimony-death scene analysis.
113. Nonexpert signature comparison.
114. Preliminary Breath Test (PBT) results.
115. Privileges.
116. Demonstrative evidence in general.
117. Alibi related items.
118. Racial bias.
119. Notice by mail and the resulting presumption.
120. Hypnotically affected/refreshed testimony.
121. Motion in limine.
122. Introduction of a transcript of a prior court proceeding.
123. Testimony from a body attachment return hearing.
124. Judicial admission.
125. Relevance based on the content of opposing counsel's opening statement.

PROSECUTION

1. **Consciousness of guilt—general law**. In *Thomas v. State*, 168 Md. App. 682, 899 A.2d 170, 183 (2006), the Court discussed the "consciousness of guilt" evidentiary concept. In *State v. Conley*, 2008AP1936-

Cr, filed September 23, 2009, 2009 WL 3018121, *a RULE 809 case,* the Court, quoting from a New York case, stated at ¶ 36 that "We recognize that even innocent persons, fearing wrongful conviction, may flee or lie or engage in other postcrime conduct suggestive of consciousness of guilt to extricate themselves from situations that look damning. *See People v. Bennett*, 593 N.E.2d 279, 283 (N.Y.Ct.App.1992). Nonetheless, that prospect does not preclude the admission of such evidence. Rather, '[e]ven equivocal consciousness of guilt evidence may be admissible so long as it is relevant, meaning that it has a tendency to establish the fact sought to be proved that-that defendant was aware of guilt.'"

2. **Consciousness of guilt—evidence of an attempt by the defendant to suborn perjury**. *State v. Amos*, 153 Wis. 2d 257, 450 N.W.2d 503 (Ct. App. 1989)(the evidence at issue-it was used to impeach the defendant-was the defendant's attempt to purchase a false alibi, the evidence was properly admitted as consciousness of guilt other acts evidence; first step—the evidence was for the permissible purpose of consciousness of guilt; second step—the evidence was relevant because it tended to show/make it more likely that the defendant committed the crime; third step—the evidence satisfied this step since the probative value of the evidence far outweighed any prejudice from the evidence; the evidence was not prohibited by sec. 906.08(2)-which prohibits impeachment on the basis of specific instances of collateral facts introduced by extrinsic evidence-because the extrinsic evidence was introduced to show corrupt testimonial intent "for the case at hand).

3. **Consciousness of guilt—resistence to a police request for evidence. Evidence at an OWI trial of the defendant's refusal to submit to a test under the implied consent law**. Cases include *State v. Schirmang*, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997); *State v. Donner*, 192 Wis. 2d 305, 531 N.W.2d 369 (Ct. App. 1995); *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994); *State v. Algaier*, 165 Wis. 2d 515, 478 N.W.2d 292 (Ct. App. 1991); *State v.*

Grade, 165 Wis. 2d 143, 477 N.W.2d 315 (Ct. App. 1991); *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986); *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985); *State v. Sayles*, 124 Wis. 2d 593, 370 N.W.2d 265 (1985). This issue is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 2**. **Evidence at an OWI trial of the defendant's refusal to perform field sobriety tests**. Cases include *State v. Mallick*, 210 Wis. 2d 428, 565 N.W.2d 245 (Ct. App. 1997); *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994). This issue is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 2**. **The defendant's refusal to cooperate with the police when they attempt to obtain the defendant's blood, hair, etc., pursuant to a search warrant**. *Thomas v. State*, 168 Md. App. 682, 899 A.2d 170, 180-89 (2006). **The defendant's refusal to provide a handwriting exemplar and/or evidence that the defendant attempted to disguise his or her handwriting**. Cases include *United States v. Lentz*, 419 F.Supp.2d 837 (E.D. Va. 2006); *United States v. McDougal*, 137 F.3d 547, 559-60 (8th Cir. 1998). **Defendant's refusal to be fingerprinted.** *State v. Tew*, 54 Wis. 2d 361, 195 N.W.2d 615 (1972).

4. **Consciousness of guilt—miscellaneous examples**. In *State v. Conley*, 2008AP1936-Cr, filed September 23, 2009, 2009 WL 3018121, *a RULE 809 case,* the state introduced evidence that the defendant, after his child daughter told her mother/his wife that the defendant had sexually assaulted her in her bedroom, put a lock on the inside of her bedroom door which prevented anyone from entering her room when it was locked. The defendant testified that he put the lock on the door after his wife asked him to so that she could have peace of mind. The Court held that this evidence was consciousness of guilt evidence—one reasonable inference is that it was a conscious attempt by the defendant to avoid potential prosecution and incarceration by appeasing his wife and daughter so that they would not report his alleged sexual assaults. ¶¶ 6, 21, 33-37, 39.

5. **Consciousness of guilt—evidence of flight, resistance to arrest, escape from custody,**

concealment by the defendant. Cases include *State v. Quiroz*, 2009 WI App 120, 320 Wis. 2d 706, 772 N.W.2d 710 (evidence of the defendant's flight—the defendant jumped bail and eventually was arrested in Canada—was properly admitted at the defendant's trial; statement of flight evidence general law including that the flight need not occur immediately following the commission of the crime; the Court rejected the defendant's contention that in Wisconsin there is an automatic exception to the trial court's discretionary ability to admit flight evidence whenever a defendant has an independent reason for flight that, if admitted, would unduly prejudice the defendant—flight evidence is not inadmissible anytime a defendant points to an unrelated crime in rebuttal); *State v. Anderson*, 2005 WI App 238, ¶ 29, 288 Wis. 2d 83, 103, 707 N.W.2d 159, *rev'd on other grounds*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 (evidence of flight is not other acts evidence—flight is an admission by conduct); *State v. Miller*, 231 Wis. 2d 447, 605 N.W.2d 567 (Ct. App. 1999); *State v. Knighten*, 212 Wis. 2d 833, 569 N.W.2d 770 (Ct. App. 1997); *State v. Selders*, 163 Wis. 2d 607, 472 N.W.2d 526 (Ct. App. 1991); *State v. Winston*, 120 Wis. 2d 500, 355 N.W.2d 553 (Ct. App. 1984); *Berry v. State*, 90 Wis. 2d 316, 280 N.W.2d 204 (1979); *Wangerin v. State*, 73 Wis. 2d 427, 243 N.W.2d 448 (1976); *Gauthier v. State*, 28 Wis. 2d 412, 137 N.W.2d 101 (1965); *United States v. Pointer*, 17 F.3d 1070 (7th Cir. 1994). The standard jury instruction is Wis JI-Criminal 172. *See also* A.L.R. 886, Flight as evidence of guilt.

6. **Consciousness of guilt—evidence of flight by a codefendant**. *State v. Winston*, 120 Wis. 2d 500, 355 N.W.2d 553 (Ct. App. 1984).

7. **Consciousness of guilt—evidence of acts of the defendant or other persons intended to obstruct justice or avoid punishment including threats**. Cases include *State v. Payette*, 2008 WI App 106, ¶¶ 36-50, 313 Wis. 2d 39, 66-73, 756 N.W.2d 423 (discussion of the use of evidence at the defendant's sentencing of anonymous threats and damage to the property of two victims; the threats and damage were connected to the defendant's case but could not be

linked to the defendant; discussion of the holding of the Court in *Bowie*; the evidence was properly admitted, not as consciousness of guilt evidence, but rather to show the effect of the crime on the victim}; *State v. Bauer*, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902 (defendant solicited the murder of his wife and a friend who were going to testify against him); *State v. Neuser*, 191 Wis. 2d 131, 528 N.W.2d 49 (Ct. App. 1995) (the defendant shortly before trial called and threatened the victim in a sexual assault case); *State v. Bettinger*, 100 Wis. 2d 691, 303 N.W.2d 585 (1981), *amended by* 100 Wis. 2d 691, 305 N.W.2d 57 (1981); (defendant had attempted to bribe his victim to drop the charges); *State v. Bowie*, 85 Wis. 2d 549, 271 N.W.2d 110 (1978) (a prosecution witness received threats concerning her testimony but issue was connection to defendant); *Price v. State*, 37 Wis. 2d 117, 154 N.W.2d 222 (1967), *cert. denied*, 391 U.S. 908 (1968) (threats by defendant to a co-conspirator witness). Suborning of perjury related testimony is addressed at 2 above. Threats that are not linked to the defendant are discussed at 109. below.

8. **Evidence of the defendant's silence**. *See* my separate memo entitled **THE USE OF A DEFENDANT'S SILENCE.**

9. **Evidence of the defendant's silence in an OWI first offense case**. This issue has been addressed in numerous unpublished opinions including *City of Stevens Point v. Wirtz*, 01-1020-FT, September 13, 2001 and *County of Rock v. Goldhagen*, 00-0983-FT, September 28, 2000.

10. **Other acts/crimes evidence**. *See* my separate memo and outline on this topic.

11. **Defendant's failure to attend a mandatory meeting**. Cases include *State v. Adams*, 221 Wis. 2d 1, 584 N.W.2d 695 (Ct. App. 1998) (defendant was a staff member at a detention center; the defendant's supervisors, after learning of allegations of sexual misconduct involving the defendant at the center, summoned the defendant to a mandatory meeting; the defendant failed to attend the meeting; the state argued that the defendant's failure to attend the

meeting reflected on his guilt; the Court, after analyzing the evidence in the context of whether the evidence was prearrest silence evidence, held that its admission was proper); *State v. Davis*, 98 Conn. App. 608, 911 A.2d 753, 766-69 (2006), *aff'd on other grounds*, 286 Conn. 17, 942 A.2d 373 (2008) (defendant failed to attend a monthly parole meeting and meetings thereafter; the evidence was properly admitted as consciousness of guilt; the evidence that the defendant was on parole was properly admitted and was not unduly prejudicial); *People v. Jones*, 276 A.D.2d 292, 714 N.Y.S.2d 24 (2000) (evidence of the defendant's sudden and unexplained cessation of reporting to his parole officer was properly admitted as consciousness of guilty).

12. **Prior testimony—testimony of a state's witness that was given at the defendant's preliminary hearing when the witness is unavailable at the defendant's trial**. This issue is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 1**.

13. **Prior testimony—testimony of a witness that was given at a co-actor's trial when the witness is unavailable at the defendant's trial**. Cases include *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637; *State v. Bintz*, 2002 WI App 204, 257 Wis. 2d 177, 650 N.W.2d 913.

14. **Prior testimony—the defendant**. Cases include *State v. Anson*, 2005 WI 96, 2282 Wis. 2d 629, 698 N.W.2d 776; *State v. Anson*, 2002 WI App 270, 258 Wis. 2d 433, 654 N.W.2d 48; *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); *State v. Middleton*, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986); *Neely v. State*, 97 Wis. 2d 38, 292 N.W.2d 859 (1980). *See* my separate outline on this issue.

15. **Field sobriety tests**. The relevant case is *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 330. This issue is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY**

ISSUES/TOPICS—PART 2.

16. ***Bruton* issues including the redaction of the confession of a non-testifying codefendant**. Wisconsin redaction cases include *State v. Mayhall*, 195 Wis. 2d 53, 535 N.W.2d 473 (Ct. App. 1995); *Pohl v. State*, 96 Wis. 2d 290, 291 N.W.2d 554 (1980); *Cranmore v. State*, 85 Wis. 2d 722, 271 N.W.2d 402 (Ct. App. 1978). United States Supreme Court cases include *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998); *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). Cases from other jurisdictions include *United States v. Jass*, 569 F.3d 47 (2d Cir.2009) (at a joint trial the confession of a non-testifying codefendant was redacted by neutral pronouns or references to "another person"; this procedure did not violate the Confrontation Clause in the context of the facts in this case; extensive discussion of the redaction issue including a discussion of *Bruton*, *Marsh*, and *Gray*); V*azquez v. Wilson*, 550 F.3d 270 (3d Cir. 2008); *Johnson v. Tennis*, 549 F.3d 296 (3d Cir. 2008) (*Bruton* is not applicable in a joint bench trial); *United States v. Hardwick*, 544 F.3d 565 (3d Cir. 2008); *United States v. Molina*, 407 F.3d 511 (1st Cir. 2005); *Commonwealth v. Whitaker*, 2005 PA Super 241, 878 A.2d 914 (2005); *State v. Washington*, 131 Wash. App. 147, 120 P.3d 120 (2005); *Jefferson v. State*, 359 Ark. 454, 198 S.W.3d 527 (2004); *United States v. Williamson*, 339 F.3d 1295 (11th Cir. 2003); *United States v. Sutton*, 337 F.3d 792 (7th Cir. 2003); *Commonwealth v. Travers*, 564 Pa. 362, 768 A.2d 845 (2001); *Sneed v. State*, 783 So. 2d 863 (Ala. 2000); *People v. Archer*, 82 Cal. App. 4th 1380, 99 Cal. Rptr. 2d 230 (2000). *See also* Bryant M. Richardson, *Casting Light on the Gray Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under Bruton, Richardson & Gray*, 55 U. Miami L. Rev. 825 (2001) and "SO I SAYS TO 'THE GUY,' I SAYS . . .": THE CONSTITUTIONALITY OF NEUTRAL PRONOUN REDACTION IN MULTIDEFENDANT CRIMINAL TRIALS, 48 Wm. & Mary L. Rev. 345 (2006).

Cases addressing other issues include *Ray v. Boatwright*, 592 F.3d 793 (7th Cir. 2010)(at the

defendant's non-joint trial the introduction of statements made by a co-actor-in the context of the questioning of the defendant-violated the defendant's right to confrontation; the Court rejected the state's argument that the statements were introduced to give context to the defendant's reaction to them; there was no objection by the defense and no limiting instruction); *United States v. Cruz-Diaz*, 550 F.3d 169, 173-180 (1st Cir. 2008) (at a joint trial the out-of-court statement of the codefendant was properly introduced by the prosecution for a purpose other than to prove the truth of the matter asserted—to rebut the defendant's attempt to cast doubt on the integrity of the government's investigatory efforts; discussion of the relationship of *Bruton* and *Crawford); Klimawicze v. Sigler,* 559 F.Supp.2d 906 (N.D. Ill. 2008) (at the defendant's non-joint trial, evidence was introduced that during the questioning of the defendant: (1) the defendant was told that a codefendant told the police the whole story and (2) the codefendant was then brought into the room and told the defendant that he had told the police the true story; the contents of the codefendant's statement were not otherwise introduced; there was no *Bruton* violation; the evidence was not introduced for the truth of the matter asserted but instead for the non-hearsay purpose to show the circumstances under which the defendant confessed to refute the defendant's claim of undue pressure; discussion of *Bruton*, *Marsh*, and *Gray*).

The Seventh Circuit has held that the *Bruton* rubric is only applicable at a joint trial. *Klimawicze*, 559 F.Supp.2d at 914.

17. **Wisconsin's Electronic Surveillance Control Law (WESCL)**. Challenges to the use of a defendant's statement, based on the WESCL, are addressed in my outline entitled **POSSIBLE CHALLENGES TO THE ADMISSIBILITY OF ALL OR PART OF A DEFENDANT'S STATEMENT**. The relationship of the use of a GPS tracking device and the WESCL was discussed in *State v. Sveum*, 2009 WI App 81, ¶¶ 23-30, 319 Wis. 2d 498, 515-18, 769 N.W.2d 53, *presently pending before the Wisconsin Supreme Court..*

18. **Nonlitigation evidence**. *State v. Johnson*, 149 Wis.

2d 418, 420-28, 439 N.W.2d 122 (1989), confirmed on reconsideration, 153 Wis. 2d 121, 449 N.W.2d 845 (1989) (unless there is a specific attack that a witness has or may start a civil lawsuit against a defendant, evidence that the witness is not pursuing a civil action is inadmissible in a criminal trial when it is used to bolster such witness's credibility).

19. **Evidence of a victim's prior sexual conduct (Rape Shield Law evidence)**. The relevant statutory references are secs. 972.11(2) (Wisconsin's rape shield law) and 971.31(11). Cases include *State v.* Jones, 2008AP1595-CR, 2009 WL 2244374, filed July 29, 2009, *a RULE 809 case*; *State v. Booker*, 2005 WI App 182, 286 Wis. 2d 747, 704 N.W.2d 336, *rev'd on other grounds*, 2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676; *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Dunlap*, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112; *State v. Hammer*, 2002 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629; *State v. Dodson*, 219 Wis. 2d 65, 580 N.W.2d 181 (1998); *State v. Jackson*, 216 Wis. 2d 646, 575 N.W.2d 475 (1998); *State v. Wirts*, 176 Wis. 2d 174, 500 N.W.2d 317 (Ct. App. 1993); *Michael R.B. v. State*, 175 Wis. 2d 713, 499 N.W.2d 641 (1993); *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990); *State v. DeSantis*, 155 Wis. 2d 774, 456 N.W.2d 600 (1990); *State v. Mitchell*, 144 Wis. 2d 596, 424 N.W.2d 698 (1988); *Dunlap v. Hepp*, 436 F.3d 739 (7th Cir. 2006). *See also State v. Ringer*, 2008AP652-Cr, filed June 18, 2009, 2009 WL 1689344, *an unpublished opinion*, *presently pending before the Wisconsin Supreme Court* (the issues are what is the threshold necessary for a defendant in a sexual assault case to introduce evidence of an alleged prior untruthful allegation by the victim and can a prior untruthful allegation be proven by extrinsic evidence).

20. **Letter written by the defendant after the crime**. Cases include *State v. Norwood*, 2005 WI App 218, 287 Wis. 2d 679, 706 N.W.2d 683 (contents of a letter that the defendant sent to the court were not admissible pursuant to sec. 904.10); *Shawn B.N. v. State*, 173 Wis. 2d 343, 497 N.W.2d 141 (Ct. App. 1992).

21. **Possession of weapons, stolen goods, etc**. Cases

include *State v. Stank*, 2005 WI App 236, 288 Wis. 2d 414, 708 N.W.2d 43.

22. **Offer to plead guilty; no contest; withdrawn plea of guilty**. The relevant statutory reference is sec. 904.10. Cases include *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).

23. **Expert testimony—the introduction of a crime lab report or other reports to prove a fact and/or testimony by an expert (who did not perform the analysis) to prove the fact—evidentiary and constitutional issues**. *State v. Barton*, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93; *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919; *Briscoe v. Virginia*, 559 U.S. ____, 130 S.Ct.1316 (2010) (*per curiam*) (a procedure that allows the prosecution to introduce a certificate of a forensic laboratory analysis—instead of the testimony of the analyst—but provides that the defendant has a right to call the analyst as his own witness violates the Confrontation Clause of the Sixth Amendment as interpreted in *Melendez-Diaz*); *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527(2009). Post *Melendez-Diaz* cases include *United States v. Boyd,* ____ F.Supp.2d ____ (S.D. N.Y. 2010)(the situation where a DNA expert, in giving his/her expert final analysis opinion, testifies about/uses the results of preliminary steps performed by others earlier in the testing chain; the defendant's right to confrontation was not violated); *State v. Hough,*

____ N.C. App. ____, 690 S.E.2d 285 (2010)(an extensive discussion of numerous constitutional right to confrontation issues, cases, and situations where the expert who testifies at trial was not the person who actually analyzed the substance at issue); *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010) (having the head of the drug identification unit at a crime laboratory, instead of the analyst who actually analyzed the substance, testify that the substance was cocaine did not violate the defendant's right to confrontation under the facts of this case; the witness had conducted a peer review and testified as to his conclusions and not those of the analyst); *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 98 Cal. Rptr. 3d 390 (2009), *review granted,* December 2, 2009, S176213; *Pendergrass v. State,* 913 N.E.2d 703 (Ind. 2009).

24. **Videotaped statements of a child**. The relevant statutory reference is sec. 908.08. Cases include *State v. Marinez,* 2010 WI App 34, ____ Wis.2d ____, ____ N.W.2d ____ (the playing by a prosecutor during his/her closing argument of an edited portion of a child's video statement, which had been admitted into evidence pursuant to sec. 908.08, is not *per se* precluded by either 908.08 or the due process guarantee of a fair trial; a court can control how the playing occurs; statement of some basic 908.08 law); *State v. Ruiz-Velez*, 2008 WI App 169, 314 Wis. 2d 724, 762 N.W.2d 449 [the court reporter must report and transcribe an audiovisual recording of a statement received into evidence under 908.08, overturned by the creation of subsection (e) of SCR 71.01(2)]; *State v. Anderson*, 2005 WI App 238, ¶¶ 4, 22-24, 288 Wis. 2d 83, 99-101, 707 N.W.2d 159, *rev'd on other grounds*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 (no prejudice was shown, in an ineffectiveness of counsel situation, in the context of the facts of this case even though no formal notice was given to the defendant and the defendant did not see the video before trial; no *Crawford* violation in using sec. 908.08(5) procedure; sec. 908.08(5) provides for the showing of the videotape before the live testimony of the victim; the general rule set forth at sec. 908.01(4)(a)2. does not apply in this situation); *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727 (trial court ruling, based on a possible *Crawford* violation, requiring any live

testimony to occur first overruled; sec. 908.08 represents a proper exercise of legislative power and that statute is not trumped by sec. 904.03 and 906.11; trial court may not dictate alternative procedures based on mere specter of a possible *Crawford* violation in the future); *State v. Jimmie R. R.,* 2004 WI App 168, ¶¶ 39-42, 276 Wis. 2d 447, 468-72, 688 N.W.2d 1; *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784; *State v. Jimmie R. R.,* 2000 WI App 5, ¶¶ 2, 37-50, 232 Wis. 2d 138, 142-43, 157-62, 606 N.W.2d 196; *State v. Tarantino*, 157 Wis. 2d 199, 458 N.W.2d 582. In *Snider*, the Court held sec. 908.08 does <u>not</u> preclude the admission of videotaped statements of children via other hearsay exceptions. *See also Martinez*, 2010 WI App at ¶ 14 n.3, ____ Wis.2d at ____ n.3. The Court further held that the statement was properly admitted pursuant to the residual hearsay exception at sec. 908.03(24). I do not believe that the holding of the Court in *State v. Elam,* 2009AP920-CR, filed April 6, 2010, 2010 WL 1286816, *an unpublished opinion*-that the proponent of the testimony must provide a transcript of the statement-is now valid because *Ruiz-Velez* has been overturned by the amending of SCR 71.01(2).

25. **Defendant's use of an alias**. *State v. Bergeron*, 162 Wis. 2d 521, 470 N.W.2d 322 (Ct. App. 1991) (defendant's use of an alias on several occasions when he met the victim prior to his sexual assault of her was properly admitted into evidence to show the defendant's intent to cover up his participation in the crime and also as part of the background of the case); *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009).

26. **Membership in/subscription to certain internet newsgroups**. *State v. Schroeder*, 2000 WI App 128, ¶ 20, 237 Wis. 2d 575, 589-90, 613 N.W.2d 911.

27. **The privilege to withhold information concerning the identity of an informant**. The relevant statutory reference is sec. 905.10. This statute addresses two scenarios. Subsection (3)(b) addresses testimony in "the merits" situations and subsection (3)(c) addresses "legality of obtaining evidence" situations. Cases include *State v. Vanmanivong*, 2003 WI 41, 261 Wis. 2d 202, 661 N.W.2d 76; *State v. Norfleet*, 2002 WI App

140, 254 Wis. 2d 569, 647 N.W.2d 341; *State v. Lass*, 194 Wis. 2d 591, 535 N.W.2d 904 (Ct. App. 1995); *State v. Gerard*, 189 Wis. 2d 327, 509 N.W.2d 112 (Ct. App. 1993); *rev'd on other grounds*, 189 Wis. 2d 505, 525 N.W.2d 718 (1995); *Mayfair Chrysler-Plymouth v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638 (1991); *State v. Gordon*, 159 Wis. 2d 335, 464 N.W.2d 91 (Ct. App. 1990); *State v. Hargrove*, 159 Wis. 2d 69, 464 N.W.2d 14 (Ct. App. 1990); *State v. Fischer*, 147 Wis. 2d 694, 433 N.W.2d 647 (Ct. App. 1988); *State v. Larsen*, 141 Wis. 2d 412, 415 N.W.2d 535 (Ct. App. 1987); *State v. Dowe*, 120 Wis. 2d 192, 352 N.W.2d 660 (1984); *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982); *Rugendorf v. United States*, 376 U.S. 528, 84 S.Ct. 825 (1964); *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623 (1957).

28. **Gang-related evidence**. *State v. Burton*, 2007 WI App 237, 306 Wis. 2d 403, 743 N.W.2d 152 (an extensive discussion of this issue; the Wisconsin rule is stricter than the federal rule; the main problem in this case was that there was either no evidence or insufficient evidence to show that the defendant and the witnesses were gang members; the error was not harmless); *State v. Rodriguez*, 2006 WI App 163, ¶¶ 1, 29-31, 295 Wis. 2d 801, 807-08, 825-28, 722 N.W.2d 136, *remanded on other grounds and aff'd*, 2007 WI App 252, 306 Wis. 2d 129, 743 N.W.2d 460 (the defendant's brother testified that the victim told him that she lied when she told the police about the defendant's involvement in the crime; the state cross-examined the brother about his street-gang affiliation to show that the victim falsely recanted because she was afraid of him; the evidence was properly admitted); *State v. Long*, 2002 WI App 114, 255 Wis. 2d 729, 647 N.W.2d 884; *State v. Petrovic*, 224 Wis. 2d 477, 490-95, 592 N.W.2d 238 (Ct. App. 1999); *State v. Brewer*, 195 Wis. 2d 295, 536 N.W.2d 406 (Ct. App. 1995); *United States v. Alviar*, 573 F.3d 526, 536-38 (7th Cir. 2009) (an extensive discussion of Seventh Circuit gang related evidence cases); *United States v. Suggs*, 374 F.3d 508 (7th Cir. 2004). The *Burton* case is MUST reading if a party intends to use this type of evidence. *See also* the annotation at 39 A.L.R. 4th 775.

29. **Circumstantial evidence of nonconsent**. Cases

include *State v. Champlain*, 2008 WI App 5, ¶¶ 3, 35-38, 307 Wis. 2d 232, 239, 253-54, 744 N.W.2d 889 (burglary); *LaTender v. State*, 77 Wis. 2d 383, 394-95, 253 N.W.2d 221 (1977) (burglary); *Bohachef v. State*, 50 Wis. 2d 694, 700-01, 185 N.W.2d 339 (1971) (burglary); *Warrix v. State*, 50 Wis. 2d 368, 377, 184 N.W.2d 189 (1971) (burglary).

30. **The opinion of a person that a car was speeding and the speed**. *Dane County v. Baxter*, 2006AP2342, filed July 5, 2007, 2007 WL 1932919, *an unpublished opinion; City of Milwaukee v. Berry*, 44 Wis. 2d 321, 171 N.W.2d 305 (1969).

31. **Evidence of the assertion by the defendant of a Fourth Amendment right**. *State v. Thomas*, 766 N.W.2d 263 (Iowa 2009) (evidence of the defendant's refusal to consent to a search of her residence was admitted at her trial ; a discussion of several cases from other jurisdictions that have held that this type of evidence is error on constitutional grounds; the Court did not decide the case on a constitutional basis, instead the Court held that the evidence was improperly admitted on Rules of Evidence basis—the evidence was irrelevant and unfairly prejudicial; a discussion of several situations where such evidence might be admissible); *Longshore v. State*, 399 Md. 486, 924 A.2d 1129, 1158-59 (2007); *People v. Summitt*, 132 P.3d 320 (Colo. 2006); *United States v. Moreno*, 233 F.3d 937 (7th Cir. 1000); *Reeves v. State*, 969 S.W.2d 471 (Tex. Ct. App. 1998), *cert. denied*, 526 U.S. 1068 (1999); *State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269 (1996), *cert. denied*, 521 U.S. 1120 (1997); *United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992) (evidence of defendant's refusal to consent to search was admissible to respond to defendant's claim that police planted evidence); Kenneth J. Melilli, *The Consequences of Refusing to Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901 (2002).

32. **Using the *Physician's Desk Reference* to identify an item/substance as a specific drug**. *See State v. Stank*, 2005 WI App 236, 288 Wis. 2d 414, 708 N.W.2d 43.

33. **Circumstantial evidence of venue**. *State v. Lippold*, 2008 WI App 130, 313 Wis. 2d 699, 757 N.W.2d 825.

34. **Expert testimony-*Jensen* evidence.** Because the behavior of the complainant in a sexual assault case frequently may not conform to commonly held expectations of how a victim reacts to a sexual assault, in some circumstances expert testimony about the consistency of a sexual assault complainant's behavior with victims of the same type of crime may be offered for the limited purpose of helping the trier of fact understand the evidence to determine a fact in issue. Cases include *State v. Prineas*, 2009 WI App 28, ¶¶ 1, 5, 8-12, 316 Wis. 2d 414, 421, 423-26, 766 N.W.2d 206 (discussed in 78. below); *State v. Krueger*, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114 (discussed in 78. below); *State v. Rizzo*, 2003 WI App 236, 267 Wis. 2d 902, 672 N.W.2d 162; *State v. Delgado*, 2002 WI App 38, 250 Wis. 2d 689, 641 N.W.2d 490; *State v. Dunlap*, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112; *State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93; *State v. Ross*, 203 Wis. 2d 66, 552 N.W.2d 428 (Ct. App. 1996) (discussed in 78. below); *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Ct. App. 1996); *State v. Richardson*, 189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994); *State v. Pittman*, 174 Wis. 2d 255, 496 N.W.2d 74, *cert. denied*, 510 U.S. 845 (1993); *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). *See* also 51. (*Mayday* evidence) below.

35. **Causation**. Cases include *State v. Payette*, 2008 WI App 106, ¶ 15-24, 313 Wis. 2d 39, 56-61, 756 N.W.2d 423; *State v. Block*, 170 Wis. 2d 676, 489 N.W.2d 715 (Ct. App. 1992). The Wisconsin standard jury instruction is Wis. JI-Criminal 901.

36. **The use of a mug shot/booking photograph of a defendant**. The use by the prosecution at the defendant's trial of a mug shot/booking photograph of the defendant, either as evidence or as part of a pedagogical device summary, was addressed in *United States v. Simmons*, 581 F.3d 582, 588-89 (7th Cir. 2009) and *United States v. Castaldi*, 547 F.3d 699, 704-05 (7th Cir. 2008). In *Simmons*, the Court addressed the situation where the defense requests a

mistrial after an improper use by the prosecution of a mug shot.

37. **Impeachment of an alibi witness and corresponding comments by the prosecutor**. *See* my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 1**.

DEFENSE

41. ***Richard A.P.* evidence**. Expert opinion evidence introduced by a defendant to show that he or she lacked the psychological characteristics of a sex offender and therefore was unlikely to have committed the charged crime. Cases include *State v. Walters*, 2004 WI 18, 269 Wis. 2d 142, 675 N.W.2d 778; *State v. Davis*, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913; *State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

42. ***Denny* evidence**. Evidence that a known third party had either a motive to commit the charged crime or committed the charged crime—third party guilt evidence. Cases include *State v. Davis*, 2006 WI App 23, ¶ 33, 289 Wis. 2d 398, 420, 710 N.W.2d 514 (*see* the discussion under 10. above); *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded by* 542 U.S. 952 (2004), *reinstated in material part by* 2005 WI 127, ¶ 2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999); *State v. Avery*, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997); *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997); *State v. Jackson*, 188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994); *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984); *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727 (2006).

43. **Evidence that an unknown third party committed the crime**. *State v. Davis*, 2006 WI App 23, ¶ 33, 289 Wis. 2d 398, 420, 710 N.W.2d 514 (*see* the discussion under 10. above); *State v. Wright*, 2003 WI 252, 268 Wis. 2d 692, 673 N.W.2d 386; S*tate v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999).

44. **Evidence that a third party has framed the**

defendant. The relevant case is *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997).

45. ***McMorris* evidence**. When there is a sufficient factual basis for a claim of self-defense, a defendant may, in support of the defense, establish what the defendant believed to be the victim's violent character by proving prior specific instances of violence within his knowledge at the time of the incident. Such evidence enlightens the jury regarding the defendant's state of mind at the time of the incident and assists the jury in deciding whether the defendant acted as a reasonable prudent person would under similar beliefs and circumstances. Cases include *State v. McClaren*, 2009 WI 69, 318 Wis. 2d 739, 767 N.W.2d 550 (a discussion of the authority and legality of a court order requiring the defendant to disclose *McMorris* evidence prior to the actual testimony; a court can order a defendant prior to trial/the actual testimony to disclose a summary of the evidence that the defendant intends to introduce at trial as *McMorris* evidence so that the court can make a pretrial determination of its relevance and admissibility; the court can/must order the prosecution to disclose evidence that it may introduce to rebut the defendant's *McMorris* evidence/to show a lack of self-defense; statement of some *McMorris* evidence law);
State v. Kramer, 2006 WI App 133, ¶¶ 23-29, 294 Wis. 2d 780, 794-99, 720 N.W.2d 459; *State v. Head*, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413; *State v. Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481; *State v. Wenger*, 225 Wis. 2d 495, 593 N.W.2d 467 (Ct. App. 1999); *State v. Daniels*, 160 Wis. 2d 85, 465 N.W.2d 633 (1991); *State v. Boykins*, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984); *McAllister v. State*, 74 Wis. 2d 246, 246 N.W.2d 511 (1976); *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

46. **Expert testimony, including psychiatric testimony, regarding a defendant's mental capacity to form intent, and lay and expert testimony concerning a defendant's mental health history**. *State v. Davis*, 2002 WI 75, ¶¶ 14, 25, 254 Wis. 2d 1, 13, 18, 645 N.W.2d 913; *State v. Gardner*, 230 Wis. 2d 32, 37-39, 601 N.W.2d 670 (Ct. App. 1999); *State v. Hampton*, 207

Wis. 2d 367, 378-79, 558 N.W.2d 884 (Ct. App. 1996); *State v. Morgan*, 195 Wis. 2d 388, 536 N.W.2d 425 (Ct. App. 1995); *State v. Richardson*, 189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994); *State v. Borrell*, 167 Wis. 2d 749, 782-84, 482 N.W.2d 883 (1992); *State v. Flattum*, 122 Wis. 2d 282, 361 N.W.2d 705 (1985); *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980); *Clark v. Arizona*, 548 U.S. 735, 126 S.Ct. 2709 (2006); *Morgan v. Krenke*, 72 F.Supp.2d 980 (E.D. Wis. 1999), *rev'd,* 232 F.3d 562 (7th Cir. 2000).

47. **Expert testimony on the reliability of eyewitness identification**. Cases include *State v. Shomberg*, 2006 WI 9, 288 Wis. 2d 1, 709 N.W.2d 370; *State v. Wright*, 2003 WI 252, 268 Wis. 2d 694, 673 N.W.2d 386; *State v. Wilson*, 179 Wis. 2d 660, 666-68, 675-80, 508 N.W.2d 44 (Ct. App. 1993); *cert. denied*, 513 U.S. 829 (1994); *State v. Blair*, 164 Wis. 2d 64, 74-81, 473 N.W.2d 566 (Ct. App. 1991); *State v. Hamm*, 146 Wis. 2d 130, 135-37, 141-50, 430 N.W.2d 584 (Ct. App. 1988); *State v. Johnson*, 118 Wis. 2d 472, 348 N.W.2d 196 (Ct. App. 1984); *Hampton v. State*, 92 Wis. 2d 450, 452-61, 285 N.W.2d 868 (1979); *United States v. Crotteau*, 218 F.3d 826, 831-33 (7th Cir. 2000).

48. ***King* evidence**. Expert opinion testimony concerning the defendant's general character trait of nonhostility and nonaggressiveness. *State v. Davis*, 2002 WI 75, ¶¶ 13, 24-25, 48 n.1, 254 Wis. 2d 1, 12-13, 17-18, 30-31 n.1, 645 N.W.2d 913*; State v. Richard A.P.*, 223 Wis. 2d 777, 793-94, 589 N.W.2d 674 (Ct. App. 1998); *King v. State*, 75 Wis. 2d 26, 248 N.W.2d 458 (1977).

49. **Defendant's constitutional right to present a defense (CRTPD) including *St. George* expert testimony**. Cases include *State v. Fischer*, 2010 WI 6, _____ Wis.2d _____, 778 N.W.2d 629 (the rule that sec. 343.303 prohibits in OWI cases expert testimony, including absorption curve opinion evidence, based in whole or part on a PBT test result does not violate a defendant's constitutional right to present a defense; the Court reached this result by using the *St. George* test; statement/discussion of general *St. George* law; statement of some CRTPD general law; the Court assumed, without deciding, that the defendant satisfied the first part of the test; the Court based its ruling on

the second part of the test—the defendant's constitutional right in an OWI case to present an expert opinion that is based in part on PBT results is outweighed by the State's compelling interest to exclude that evidence); *State v. Jensen*, 2007 WI App 256, 306 Wis. 2d 572, 743 N.W.2d 468 (the defendant, a state legislator, in a misconduct in public office case was not allowed to present testimony from himself and other witnesses concerning certain campaign practices of other legislators; the defendant's CRTPD was not violated in relation to the testimony from other witnesses but it was violated in relation to his testimony; statement of general CRTPD law; the testimony from other witnesses was not relevant to defendant's intent under the rules of evidence; defendant's testimony was relevant to the issue of the defendant's intent); *State v. Muckerheide*, 2007 WI 5, ¶¶ 39-43, 298 Wis. 2d 553, 572-74, 725 N.W.2d 930 (defendant was charged with homicide by use of a motor vehicle-PAC; defendant's defense was pursuant to sec. 940.09(2)(a); defendant testified that the victim had grabbed the steering wheel just prior to the accident and the accident occurred when the defendant was trying to steer the vehicle to counteract the victim's pulling on the wheel; the court would not allow the defendant to introduce certain testimony—the victim's father that the victim on prior occasions gestured as if to grab the steering wheel and on one occasion had actually grabbed the wheel—because it did not qualify as other acts evidence; the defendant's CRTPD was not violated; statement of general CRTPD law; the rejected testimony was properly excluded under the rules of evidence, the defendant was allowed to testify about the victim allegedly grabbing the wheel, and the jury was instructed on the defendant's defense); *State v. Williams*, 2006 WI App 212, ¶ 38, 296 Wis. 2d 834, 858-59, 723 N.W.2d 719 (exclusion of evidence of how the defendant was disciplined as a child did not deny the defendant his CRTPD—the trial court did not deny the defendant an opportunity to present testimony evidence but rather required an offer of proof before he could do so); *State v. Kramer*, 2006 WI App 133, ¶¶ 1, 21-30, 294 Wis. 2d 780, 793-99, 720 N.W.2d 459 (defendant contended that his constitutional right to present a defense was violated, in the context of an imperfect self-defense theory/defense, when testimony

showing his mistrust and fear of local law enforcement was excluded; the Court held that assuming the court violated the defendant's right to present a defense by excluding the testimony, the error was harmless error; brief statement of general law); *State v. Rockette*, 2006 WI App 103, ¶¶ 31-37, 294 Wis. 2d 611, 629-32, 718 N.W.2d 269 (witness Grandberry testified against the defendant; the court denied the defendant's request to introduce certain evidence—that Grandberry in two unrelated matters allegedly lied to police in an effort to obtain more favorable sentencing in his own criminal matters—because it constituted an impermissible attempt to impeach Grandberry by extrinsic evidence on collateral matters; the defendant's CRTPD was not violated; the defendant did not challenge the court's ruling on rules of evidence grounds; statement of general law; the defendant's ability to present his defense was not adversely affected, the defendant's defense did not hinge on the excluded evidence, the excluded evidence was cumulative to other evidence that called into question Grandberry's credibility, the exclusion of the evidence was necessary to avoid a mini-trial on an issue clearly collateral to defendant's guilt); *State v. Campbell*, 2006 WI 99, ¶¶ 33, 34, 294 Wis. 2d 100, 117, 718 N.W.2d 649 (statement of some basic law); *State v. Davis*, 2006 WI App 23, ¶ 24, 289 Wis. 2d 398, 415, 710 N.W.2d 514 (brief statement of general law); *State v. Shomberg*, 2006 WI 9, 288 Wis. 2d 1, 709 N.W.2d 370; *Brown County v. Shannon R.*, 2005 WI 160, ¶¶ 106, 124-130, 286 Wis. 2d 278, 324, 333-36, 706 N.W.2d 269 (Roggensack, J., dissenting) (discussion of some basic law and *St. George*; *State v. White*, 2004 WI App 78, ¶¶ 22-25, 271 Wis. 2d 742, 756-59, 680 N.W.2d 362; *State v. Knapp*, 2003 WI 121, ¶¶ 7, 27, 29, 157-193, 265 Wis. 2d 278, 290, 297-98, 345-57, 666 N.W.2d 881, *vacated on other grounds*, 542 U.S. 952 (2004); *State v. Tucker*, 2003 WI 12, ¶¶ 5, 8, 28-34, 259 Wis. 2d 484, 490-92, 502-05, 657 N.W.2d 374; *State v. Miller*, 2002 WI App 197, ¶¶ 3, 38-50, 257 Wis. 2d 124, 130-31, 146-51, 650 N.W.2d 850; *State v. Smith*, 2002 WI App 118, 254 Wis. 2d 654, 648 N.W.2d 15; *State v. Williams*, 2002 WI 58, ¶¶ 56-73, 253 Wis. 2d 99, 125-30, 644 N.W.2d 919; *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777 (*see* the discussion below); *State v. Scheidell*, 227 Wis. 2d 285, 293-94, 595 N.W.2d 661 (1999); *Holmes v.South*

Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006); *Simonson v. Hepp*, 549 F.3d 1101 (7th Cir. 2008) (a federal writ of habeas corpus case; in a child sexual assault case the state presented evidence that the lower portion of the victim's hymenal tissue was virtually missing and the only explanation was the insertion of an object; not allowing the defendant to place into evidence an alternative explanation for the hymen injury—it could have been caused by her mother and grandmother's efforts to relieve constipation—did not violate the defendant's constitutional right to present a defense/was not "objectively unreasonable" because without the proper expert testimony it would have required the jury to speculate; statement of basic general law); *Dunlap v. Hepp*, 436 F.3d 739 (7th Cir. 2006); *Horton v. Litcher*, 427 F.3d 498 (7th Cir. 2005).

In *State v. St. George,* 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777, the Court held that a trial court, when making an evidentiary ruling on the admission of expert opinion testimony in a criminal case when the defendant has alleged that his right to present a defense would be violated if the expert were not allowed to testify, is required not only to adhere to evidentiary rules applicable to expert witnesses but also to consider constitutional law principles in making its evidentiary ruling. The Court set forth a two-part/step inquiry or test that is to be used when a court evaluates a defendant's claim that the exclusion of expert testimony would violate his/her Sixth Amendment right to present a defense. The first step/part is that the defendant must show/satisfy each of the following four factors through an offer of proof: (1) the testimony of the expert witness met the standards of Wis. Stat. § 907.02 governing the admission of expert testimony; (2) the expert witness's testimony was clearly relevant to a material issue in this case; (3) the expert witness's testimony was necessary to the defendant's case; and (4) the probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect. After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part/step of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the

State's compelling interest to exclude the evidence.

In *Brown County v. Shannon R.*, 2005 WI 160, ¶¶ 5, 53, 63-72, 106, 124-30, 286 Wis. 2d 278, 284, 306, 310-14, 324, 333-36, 706 N.W.2d 269, the Court discussed the Fourteenth Amendment Due Process of law right of a parent in a termination of parental rights case to present a defense.

50. ***Shiffra* evidence**. Defendant seeks to have the trial court make an in-camera inspection of documents/records (in the possession of third parties) that are privileged or protected to determine whether they contain exculpatory evidence and to have access to those documents/records if they are found to contain exculpatory evidence after the inspection. Cases include *State v. Kletzien*, 2008 WI App 182, 314 Wis. 2d 750, 762 N.W.2d 788 (defendant was convicted of numerous drunk driving related crimes; addressed in the context of a defendant's postconviction motion for discovery—a request for an in-camera review of the victim's medical and toxicology records; discussion of the defendant's burden of proof, under the *Schiffra-Green* materiality test, to obtain an in-camera review of privileged records; defendant did not meet his burden of proof—defendant's claims were based upon nothing but speculation and conjecture); *State v. Allen*, 2004 WI 106, ¶¶ 31-34, 274 Wis. 2d 568, 591-93, 682 N.W.2d 433; *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105*; State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; *State v. Rizzo*, 2002 WI 20, ¶¶ 48-54, 250 Wis. 2d 407, 438-41, 640 N.W.2d 93, *aff'd*, *Rizzo v. Smith*, 528 F.3d 501 (7th Cir. 2008); *State v. Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481; *State v. Walther*, 2001 WI App 23, 240 Wis. 2d 619, 623 N.W.2d 205; *State v. Ballos*, 230 Wis. 2d 500, 602 N.W.2d 117 (Ct. App. 1999); *State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998); *Jessica J.L. v. State*, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998); *State v. Darcy N.K.*, 218 Wis. 2d 640, 581 N.W.2d 567 (Ct. App. 1998); *State v. Salentine*, 206 Wis. 2d 418, 557 N.W.2d 439 (Ct. App. 1996); *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996); *State v. Munoz*, 200 Wis. 2d 391, 546 N.W.2d 570 (Ct. App. 1996); *State v.*

Speese, 199 Wis. 2d 597, 545 N.W.2d 510 (1996); *State v. Mainiero*, 189 Wis. 2d 80, 525 N.W.2d 304 (Ct. App. 1994); *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *Rizzo v. Smith*, 528 F.3d 501 (7th Cir. 2008); *Davis v. Litscher*, 290 F.3d 943 (7th Cir. 2002).

A defendant may obtain an in-camera review of a victim's confidential mental health records upon showing that the records are relevant and may be necessary to a fair determination of guilt or innocence. The defendant bears the burden of making a preliminary evidentiary showing before an in-camera review is conducted by the court. The threshold the defendant must satisfy to be entitled to an in-camera review is the *Shiffra-Green* materiality test. To be entitled to an in-camera review of confidential records, a defendant must set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information that is necessary to a determination of guilt or innocence and not merely cumulative to evidence already available to the defendant. In setting forth a fact-specific evidentiary showing, a defendant must describe as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense. Further, a defendant must undertake a reasonable investigation into the victim's background and counseling through other means first before the records will be made available. From this investigation, the defendant, when seeking an in-camera review, must then make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records. The evidence sought from the records must not be merely cumulative to evidence already available to the defendant. A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense.

51. ***Mayday* examination**. In some cases the defendant is entitled to a pretrial psychological examination of the alleged sexual assault victim when the state seeks to offer *Jensen* evidence (*see* 1. above). In *Mayday*, the Court recognized seven factors to consider when deciding a defendant's motion to subject the victim to a

psychological examination: (1) the nature of the examination and its intrusiveness; (2) the victim's age; (3) any resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to issues before the court; (5) remoteness in time from the examination to the alleged criminal act; (6) evidence already available for the defendant's use; and (7) whether a personal interview with the victim is essential for the expert to form an opinion to a reasonable degree of psychological or psychiatric certainty. Cases include *State v. Anderson*, 2005 WI App 238, ¶¶ 5, 26-27, 288 Wis. 2d 83, 101-02, 707 N.W.2d 159, *rev'd on other grounds,* 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 (the defendant was not entitled to a *Mayday* examination because the state expert never interviewed the victim nor did the expert view the videotape of the victim's interview); *State v. Rizzo*, 2003 WI App 236, 267 Wis. 2d 902, 672 N.W.2d 162, *aff'd*, *Rizzo v. Smith*, 528 F.3d 501 (7th Cir. 2008); *State v. Vanmanivong*, 2003 WI 41, ¶¶ 55-56, 261 Wis. 2d 202, 240-41, 661 N.W.2d 76 (Abrahamson, C.J., dissenting); *State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93; *State v. Schaller*, 199 Wis. 2d 23, 544 N.W.2d 247 (Ct. App. 1995); *State v. Mayday*, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993); *Rizzo v. Smith*, 528 F.3d 501 (7th Cir. 2008)..

52. **The suppression of a statement of a witness on involuntariness grounds**. *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423, *cert. denied*, 537 U.S. 1018 (2002) (when a defendant seeks to suppress an allegedly involuntary witness statement, the coercive police misconduct at issue must be egregious such that it produces statements that are unreliable as a matter of law; the Court rejected the state's proposed test of extreme coercion or torture and the defendant's proposed test that the rule should be the same rule that is used to determine if a defendant's statement is involuntary; the Court referred to the test as a *State v. Clappes*, 136 Wis. 2d 222 (1987) plus test; the procedure to be used to determine this issue is set forth in *State v. Velez*, 224 Wis. 2d 1, 589 N.W.2d 9 (1999); the defendant has the initial burden of production, the state has the burden of persuasion, and the standard is preponderance of the evidence; the Court set forth several factors that a court should use

in deciding this issue; factors that weigh in favor of suppression are whether a witness was coached on what to say, whether investigatory authorities asked questions blatantly tailored to extract a particular answer, whether the authorities made a threat with consequences that would be unlawful if carried out, and whether the witness was given an express and unlawful quid pro quo; factors that weigh in favor of no suppression are whether the state had a separate legitimate purpose for its conduct and whether the witness was represented by an attorney at the time of the coercion or statement; the statement should not have been suppressed).

53. **The determination of the appropriate sanction, including exclusion, for a defense violation of an evidence related procedural court order**. This issue was discussed in *State v. McClaren*, 2009 WI 69, ¶¶ 4, 6, 40-46, 50, 318 Wis. 2d 739, 744-46, 759-61, 763-64, 767 N.W.2d 550.

54. **Prior job related misconduct by one or more police officers involved in the case**. Cases include *State v. Jackson*, 2007AP2186, filed December 30, 2008, 2008 WL 5396834, *an unpublished opinion*; S*tate v. Missouri*, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595; *United States v. Holt*, 486 F.3d 997, 999-1002 (7th Cir. 2007) (underlying conduct that served as a basis for a complaint, the complaint itself, and the departmental punishment); *United States v. Seymour*, 472 F.3d 969 (7th Cir. 2007) (questioning concerning a false report that was prepared in a prior case).

55. **Other acts/crimes evidence offered by the defendant**. *See* 10. above.

56. **Concessions (dismissed charges, specific sentencing recommendations, etc.) by the State to a witness**. Cases include *State v. Stuart*, 2005 WI 47, ¶¶ 32-44, 279 Wis. 2d 659, 673-78, 695 N.W.2d 259; *State v. Hoover*, 2003 WI App 117, 265 Wis. 2d 607, 666 N.W.2d 74; *State v. Barreau*, 2002 WI App 198, ¶¶ 1-2, 45-57, 257 Wis. 2d 203, 210-11, 228-35, 651 N.W.2d 12; *State v. Samuel*, 2002 WI 34, ¶ 24, 252 Wis. 2d 26,

39-40, 643 N.W.2d 423, *cert denied*, 537 U.S. 1018 (2002); *State v. Miller*, 231 Wis. 2d 447, 463-66, 605 N.W.2d 567 (Ct. App. 1999); *State v. McCall*, 202 Wis. 2d 29, 549 N.W.2d 418 (1996); *State v. Kaster*, 148 Wis. 2d 789, 436 N.W.2d 891 (Ct. App. 1989); *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1987); *State v. Haskins*, 97 Wis. 2d 408, 419-20, 294 N.W.2d 25 (1980); *State v. Lenarchick*, 74 Wis. 2d 425, 247 N.W.2d 80 (1976); *Penister v. State*, 74 Wis. 2d 94, 246 N.W.2d 115 (1976); *State v. Gresens*, 40 Wis. 2d 179, 186, 161 N.W.2d 245 (1968); *Woods v. United States,* 902 A.2d 451 (D.C. 2010) (the situation where the prosecution wants to introduce evidence of a plea agreement with a government witness on direct examination where the defense has stipulate that it will refrain from any cross-examination regarding bias relating to the plea agreement); *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008), *cert. denied,* ____ U.S._____, 129 S. Ct. 114 (2008).

57. **Misidentification of the defendant during an identification procedure**. *State v. Davis*, 2006 WI App 23, 289 Wis. 2d 398, 710 Wis. 2d 514.

58. **Violation of the defendant's constitutional right of confrontation by limiting a defendant's cross-examination of a witness—defendant's constitutional right of cross-examination (CROCE)**. Cases include *State v. Yang*, 2006 WI App 48, 290 Wis. 2d 235, 712 N.W.2d 400 (a statement of the basic law; the mother—the former wife of the defendant—of the sexual assault victim had English language difficulties; a violation of the defendant's CROCE in the context of bias); *State v. Barreau*, 2002 WI App 198, ¶ 45-57, 257 Wis. 2d 203, 228-235, 651 N.W.2d 12 (a statement of the basic law; an acquaintance of the defendant who testified that the defendant confessed to him; pending charges involving him and another person who also was involved in the defendant's crime to show bias; gaining favor from the state on a pending charge); *United States v. Figueroa*, 548 F.3d 222 (2d Cir. 2008) (discussion of this issue in the context of bias/credibility—the defendant was not allowed to cross-examine a state's witness about his swastika tattoos; *see* 110. below); *United States v. Romero*, 469 F.3d 1139 (7th Cir. 2006); *United States v. Smith*, 454 F.3d 707 (7th Cir. 2006) (statement of basic law).

59. **Introduction of a defendant's statement by the defendant for the truth of the matter asserted without the defendant testifying and the state has either introduced no part of the statement or only some part of the statement**. Cases include *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999) (rule of completeness); *State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998) (rule of completeness); *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); *State v. Johnson*, 74 Wis. 2d 26, 33-38, 245 N.W.2d 687 (1976); *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) (constitutional grounds). When the defendant seeks to introduce his own prior statements for the truth of the matter asserted without testifying, those statements are hearsay. *State v. Ziebart*, 268 Wis. 2d 468, 476 n.4, 673 N.W.2d 369 (Ct. App. 2003); *Johnson*, 74 Wis. 2d at 36-38.

60. **Voluntary contact between a victim and a defendant to impeach the victim's testimony that he was afraid of the defendant, the defendant threatened him, etc**. *State v. Sveum*, 2009 WI App 81, ¶¶ 49-51, 319 Wis. 2d 498, 525-26, 769 N.W.2d 53, *petition for review granted on other grounds.*

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71. **Rule of completeness**. The applicable statute is sec. 901.07. Situations include part of the same statement and a statement given at another time. Cases include *State v. Booker*, 2005 WI App 182, 286 Wis. 2d 747, 704 N.W.2d 336, *rev'd on other grounds*, 2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676; *State v. Meehan*, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722; *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); *State v. Sharp*, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993).

72. **Police reports as nonimpeaching substantive evidence**. *State v. Williams*, 2002 WI 58, ¶¶ 32-55, 253 Wis. 2d 99, 118-25, 644 N.W.2d 919*; State v. Ballos*, 230 Wis. 2d 495, 508, 602 N.W.2d 117 (Ct. App. 1999); *State v. Gilles*, 173 Wis. 2d 101, 496 N.W.2d 133 (Ct. App. 1992); *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978). This issue is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 2**

73. **Expert testimony concerning battered woman's syndrome and/or domestic violence**. *State v. Peters*, 2002 WI App 243, ¶ 23, 258 Wis. 2d 148, 160-62, 653 N.W.2d 300; *State v. Mayer*, 220 Wis. 2d 419, 583 N.W.2d 430 (Ct. App. 1998); *State v. Hampton*, 207 Wis. 2d 367, 382, 558 N.W.2d 884 (Ct. App. 1996); *State v. Schaller*, 199 Wis. 2d 23, 35-37, 544 N.W.2d 247 (Ct. App. 1995); *State v. Morgan*, 195 Wis. 2d 388, 424-28, 449-51, 536 N.W.2d 425 (Ct. App. 1995); *State v. Richardson*, 189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994); *State v. Bednarz*, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993); *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983).

74. **Chain of custody**. *See* my separate outline on this issue.

75. **The admission into evidence of factual assertions made by an attorney at a prior criminal proceeding**. *State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 579 N.W.2d 678 (1998).

76. **The results of a polygraph test**. *State v. Davis*, 2008 WI 71, ¶ 44, 310 Wis. 2d 583, 609-10, 751 N.W.2d 332; *State v. Pfaff*, 2004 WI App 31, ¶ 26, 269 Wis. 2d 786, 800-01, 676 N.W.2d 562*; State v. Santana-Lopez*, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918; *State v. Wofford*, 202 Wis. 2d 524, 551 N.W.2d 46 (Ct. App. 1996); *State v. Ramey*, 121 Wis. 2d 177, 359 N.W.2d 177 (Ct. App. 1984); *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (1981); *United States v. Lea*, 249 F.3d 632 (7th Cir. 2001). *See also* Note, Lie Detection: A Changing Of The Guard In The Quest For Truth In Court?, 33 Law & Psychol. Rev. 139 (2009).

77. **Consciousness of innocence—the offer by a**

defendant or a witness to take a polygraph test or to undergo a DNA analysis or the withdrawal of such an offer. *State v. Shomberg*, 2006 WI 9, ¶¶ 39-41, 288 Wis. 2d 1, 30-32, 709 N.W.2d 370; *State v. Pfaff*, 2004 WI App 31, ¶¶ 23-31, 269 Wis. 2d 786, 799-803, 676 N.W.2d 562; *State v. Santana-Lopez*, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918; *State v. Wofford*, 202 Wis. 2d 524, 530-31, 551 N.W.2d 46 (Ct. App. 1996); *State v. Lhost*, 85 Wis. 2d 620, 634 n.4, 271 N.W.2d 121 (1978); *State v. Turner*, 76 Wis. 2d 1, 24-26, 250 N.W.2d 706 (1977).

78. ***Haseltine* evidence**. No witness, expert or otherwise, should be permitted to give an opinion on direct or cross-examination that another mentally and physically competent witness is telling the truth. Cases include *State v. Patterson*, 2009 WI App 161, ¶¶ 33-37, 321 Wis. 2d 752, 771-73, 776 N.W.2d 602, *petition for review granted by the Wisconsin Supreme Court* (on several occasions the prosecutor sought to demonstrate the possible unreliability of one witness's recollection by using seemingly inconsistent recollections of another witness—the Court saw no *Haseltine* problem because the prosecutor was not asking a witness to opine as to whether another witness was telling the truth; the prosecutor asked a police officer if he believed a witness was being truthful when she gave certain information to the officer and the officer answered that he believed the witness was being truthful—the Court stated that this appeared to be a *Haseltine* violation since it was not offered for any purpose other than bolstering the credibility of the other witness; the trial court's denial of a mistrial was upheld); *State v. Prineas*, 2009 WI App 28, ¶¶ 1, 5, 8-12, 316 Wis. 2d 414, 421, 423-26, 766 N.W.2d 206 (a certified sexual assault nurse examiner, in a sexual assault case, testified that an abrasion on the victim's labia minora was consistent with forced intercourse and that to the best of her knowledge she had never had a sexual assault complainant give her an inaccurate history during an exam—the examiner had been allowed to tell the jury what the victim said during the exam; the Court did not review the testimony on *Haseltine*/*Jensen* grounds—the defense did not object on these grounds—it reviewed the testimony on interest of

justice grounds; Court held that the testimony did not require a reversal in the interest of justice; the patient history testimony was elicited by the defense during cross-examination; the abrasion testimony was that it was "consistent" with an injury from "penetration" and the witness acknowledged that she did not know what caused it—testimony was like the testimony in *Ross*); *State v. Krueger*, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114 (a child social worker, called as a *Jensen* expert, was asked whether the victim's story was the product of any suggestibility or any coaching; in response the social worker in part stated: "She did not appear to me to be highly sophisticated so that she could maintain that kind of consistency throughout unless it was something that she had experienced"; the Court found, in the context of an ineffective assistance of counsel claim, that the italicized part of the testimony was improper *Haseltine* testimony; the testimony—that the victim had to have experienced the alleged contact with the defendant—was tantamount to an opinion that the victim had been assaulted/that she was telling the truth; extensive discussion of the *Haseltine* rule and related law especially in the context of *Jensen* evidence); *State v. Morin*, 2007AP1905-CR, filed July 3, 2008, 2008 WL 2609710, *an unpublished opinion* (the Court stated, in regards to the testimony of a social worker—Hansen—in a child sexual assault case, that arguably Hanson gave inadmissible testimony under this rule when she testified that only two percent of sexual assault allegations are false, she has rarely seen false allegations in her own experience, and the allegations in this case were substantiated by her department); *State v. Burton,* 2007 WI App 237, ¶¶ 8, 16 n.7, 306 Wis. 2d 403, 709-10, 414-15 n.7, 743 N.W.2d 152 (an officer's testimony that an excited utterance is usually a "very truthful statement" at the very least veered dangerously close to the prohibition against one witness opining on the truthfulness of another's testimony); *State v. Maloney*, 2005 WI 74, ¶¶ 38-44, 281 Wis. 2d 595, 614-17, 698 N.W.2d 583 (the defendant's attorney elicited from the lead officer during cross-examination that the officer did not believe the defendant during the investigation and that he thought the defendant lied in some of his statements during the investigation; the Court, in the

context of an ineffective of assistance challenge, held that this was not a *Haseltine* violation because the purpose and effect of the cross was not to impermissibly comment on the credibility of the defendant but rather it was to impeach the officer by portraying him as a good but closed-minded investigator who failed to consider other suspects); *State v. Jimmie R. R.,* 2004 WI App 168, ¶¶ 2, 28, 36-38, 276 Wis. 2d 447, 453, 464-65, 467-68, 688 N.W.2d 1 (during his trial on a sexual assault charge, the defendant took the stand and denied the assault; after his conviction he admitted to a defense PSI person that the committed the crime; the defendant was then charged with perjury based on the theory that he lied during his trial; during his perjury trial the fact that he was convicted of the sexual assault crime by the jury was introduced by the state; this evidence was not a *Haseltine* violation because a jury is not a witness and a verdict is not an opinion); *State v. Johnson*, 2004 WI 94, 273 Wis. 2d 626, 681 N.W.2d 901; *State v. Snider*, 2003 WI App 172, ¶¶ 1,2, 25-29, 266 Wis. 2d 830, 836, 849-51, 668 N.W.2d 784 (the Court, in an ineffective assistance of counsel context, addressed the situation where the defense attorney repeatedly asked a detective whether he believed the defendant's statement or the victim's version of what occurred; the detective's testimony was not a *Haseltine* violation because it was introduced for a purpose other than to bolster the credibility of the victim—the detective testified as to what he believed at the time he was conducting the investigation/his thought processes when he interrogated the defendant and <u>not</u> whether the defendant or the victim was telling the truth at trial; the questioning was not ineffective since it was done in an attempt to show that the detective was biased against the defendant during the investigation); *State v. Bolden*, 2003 WI App 155, 265 Wis. 2d 853, 667 N.W.2d 364; *State v. Delgado*, 2002 WI App 38, 250 Wis. 2d 689, 641 N.W.2d 490; *State v. Rizzo*, 2002 WI 20, ¶¶ 56-76, 250 Wis. 2d 407, 442-51, 640 N.W.2d 93; *State v. Tutlewski*, 231 Wis. 2d 379, 605 N.W.2d 561 (Ct. App. 1999); *State v. Huntington*, 216 Wis. 2d 671, 676-80, 696-98, 575 N.W.2d 268 (1998); *State v. Ross*, 203 Wis. 2d 66, 70-71, 79-82, 552 N.W.2d 428 (Ct. App. 1996) (a nurse, in a sexual assault case, testified that

the victim's physical condition at the time of her treatment was consistent with the victim's statement to her that her vagina had been penetrated; statement of basic *Haseltine/Jensen* law; the testimony was not improper *Haseltine/Jensen* evidence because she did not testify that the victim's physical condition was the result of a sexual assault—this would be clearly inadmissible; rather she only gave expert testimony that the victim's condition was consistent with the victim's statement that her vagina had been penetrated); *State v. Elm*, 201 Wis. 2d 452, 456-61, 549 N.W.2d 471 (Ct. App. 1996); *State v. Davis*, 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996); *State v. Kuehl,* 199 Wis. 2d 143, 545 N.W.2d 840 (Ct. App. 1995*); State v. Kirschbaum*, 195 Wis. 2d 11, 18-27, 535 N.W.2d 462 (Ct. App. 1995); *State v. Jackson*, 187 Wis. 2d 431, 523 N.W.2d 126 (Ct. App. 1994); *State v. Bednarz*, 179 Wis. 2d 460, 461-65, 507 N.W.2d 168 (Ct. App. 1993); *State v. Pittman*, 174 Wis. 2d 255, 267-72, 496 N.W.2d 74 (1993), *cert. denied*, 510 U.S. 845 (1993); *State v. Smith*, 170 Wis. 2d 701, 704-05, 717-19, 490 N.W.2d 40 (Ct. App. 1992) (an accomplice—*Kentopp*—testified against the defendant; the detective who interrogated Kentopp testified that Kentopp initially denied involvement in the crime but later changed his story to reflect what the detective perceived to be the truth; the Court concluded that the evidence was not *Haseltine* evidence because neither the purpose nor the effect of it was to attest to Kentopp's truthfulness; the testimony was an explanation of the course of events during the interrogation of Kentopp—the detective made the statement as he was explaining the circumstances of Kentopp's interrogation and the reasons why he continued to interrogate Kentopp; the jury would have perceived the testimony in the same way); *State v. Selders*, 163 Wis. 2d 607, 610-11, 616-20, 472 N.W.2d 526 (Ct. App. 1991); *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988) (the Court held that a witness could not testify that the complainant was being totally truthful with us); *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988); *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984) (the defendant was charged with sexual contact with his daughter; the daughter's psychiatrist testified that there "was no doubt whatsoever" that the

daughter was an incest victim; the Court determined that this statement invaded the province of the jury, as it was tantamount to saying that the daughter was telling the truth; the Court held that no witness, expert or otherwise, should be permitted to give an opinion that another competent witness is telling the truth); *Earls v. McCaughtry*, 379 F.3d 489 (7th Circuit 2004).

Cases where the Court has found that the evidence was not *Haseltine* evidence, because it was introduced for a purpose other than to show that another witness's testimony was truthful, include *Snider* and *Smith*. *See also Patterson*, 2009 WI App at ¶ 36, 321 Wis. 2d at 772.

79. **Photographs**. Cases include *State v. Pfaff*, 2004 WI App 31, ¶¶ 32-37, 269 Wis. 2d 786, 803-06, 676 N.W.2d 562 (admission into evidence of an autopsy photograph of the victim upheld against defendant's contention that it should not have been admitted because its probative value was outweighed by its prejudicial effect and the photograph represented the needless presentation of cumulative evidence); *Ellsworth v. Schelbrock*, 229 Wis. 2d 542, 558-59, 600 N.W.2d 247 (Ct. App. 1999), *aff'd on other grounds*, 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764; *State v. Lindvig*, 205 Wis. 2d 100, 107-08, 555 N.W.2d 197 (Ct. App. 1996) (photographs of an arrow piercing the victim's leg were relevant and not unfairly prejudicial); *State v. Hagen*, 181 Wis. 2d 934, 946-47, 512 N.W.2d 180 (Ct. App. 1994) (a photograph of the victim was relevant and not unfairly prejudicial); *State v. Fleming*, 181 Wis. 2d 546, 562-64, 510 N.W.2d 837 (Ct. App. 1993) (photographs of a child's injuries as they appeared on the day after the physical abuse were relevant and not unfairly prejudicial); *State v. Thompson*, 142 Wis. 2d 821, 840-42, 419 N.W.2d 564 (Ct. App. 1987) (admission into evidence and sending to the jury room of photographs of victim's body upheld against defendant's contention that photographs added nothing to the testimony and prejudiced and inflamed the jury); *State v. Marshall*, 92 Wis. 2d 101, 123-24, 284 N.W.2d 592 (1979) (photograph of the victim in a homicide case which showed only the victim's face and did not show the

nature and extent of the victim's wounds was not highly prejudicial and inflammatory); *Moes v. State*, 91 Wis. 2d 756, 771-72, 284 N.W.2d 66 (1979) (numerous photographs of the victim in a homicide case); *State v. Sarinske*, 91 Wis. 2d 14, 41-44, 280 N.W.2d 725 (1979) (two photographs of the victim's corpse were relevant and not inflammatory and the proper foundation was laid for several other photographs); *Sage v. State*, 87 Wis. 2d 783, 275 N.W.2d 705 (1979) (admission into evidence of six photographs of the body of the victim at the time it was discovered and at the autopsy upheld against defendant's contention that they were unnecessary and prejudicial); *Hayzes v. State*, 64 Wis. 2d 189, 198-200, 218 N.W.2d 717 (1974) (admission into evidence of color photographs which showed portions of the victim's body and a photograph of bloodstained car seat upheld against defendant's contention that they were cumulative in nature and gruesome and inflammatory); *State v. Wallace*, 59 Wis. 2d 66, 85-86, 207 N.W.2d 855 (1973) (two color photographs of victim in the morgue not error).

80. **Computer-generated animation**. In *State v. Denton,* 2009 WI App 78, 319 Wis. 2d 718, 768 N.W. 2d 250, this issue was extensively discussed. Cases from other jurisdictions include *Dunkle v. State*, 139 P.3d 228 (2006); *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d 1170 (2006); *People v. Cauley*, 32 P.3d 602 (Colo. Ct. App. 2001).

81. **Pedagogical-device summaries or illustrations**. The relevant case is *State v. Olson*, 217 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998). *See also State v. Jones*, 2008AP1854-CR, filed October 14, 2009, 2009 WL 3271312, *an unpublished opinion* (the trial court properly exercised its discretion in allowing the display of eleven poster sized photographs of the alleged victims—each containing the name, description of the charges, and the dates and whereabouts of each alleged offense—throughout the trial as pedagogical devices).

82. **Tapes and transcripts of recorded conversations**. Cases include *State v. Ford*, 2007 WI 138, 306 Wis. 2d 1, 742 N.W.2d 61 (witnesses were allowed to testify

regarding the contents of a surveillance tape based on their viewing of the tape; the trial court did not err in concluding that the tape was destroyed within sec. 910.04(1) because the tape was unplayable and the state made reasonable efforts to restore it to playability); *State v. Ballos*, 230 Wis. 2d 500, 602 N.W.2d 117 (Ct. App. 1999); *State v. Curtis*, 218 N.W.2d 550, 582 N.W.2d 409 (Ct. App. 1998). *See also* sec. 968.29(3)(b).

83. **Hearsay—general law. The definition of a "statement" for hearsay purposes**. The relevant statutory reference is sec. 908.01(1). Cases include *State v. Anderson*, 2005 WI 54, ¶¶ 18-19, 55, 280 Wis. 2d 104, 118-19, 138, 695 N.W.2d 731; *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660 (what is an "assertion" for hearsay purposes). *See also Stoddard v. State*, 157 Md. App. 247, 850 A.2d 406 (2004) for an excellent discussion of this issue. **Burden of proof**. It is the proponent's burden to prove that specific evidence fits into a specific exception to the hearsay rule. *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

84. **Credibility of hearsay declarant**. The relevant statutory reference is sec. 908.06. Section 908.06 is discussed in my outline **EVIDENCE: ADMISSIBILITY UNDER THE "OPENED THE DOOR" DOCTRINE AND SEC. 908.06.**

85. **Hearsay and translators**. The issue of whether an out-of-court translator or interpreter adds another level of hearsay to a witness's testimony was addressed in *State v. Patino*, 177 Wis. 2d 348, 502 N.W.2d 601 (Ct. App. 1993) and *State v. Robles*, 157 Wis. 2d 55, 458 N.W.2d 818 (Ct. App. 1990).

86. **Hearsay exception—recent perception**. The relevant statutory reference is sec. 908.045(2). Cases include *State v. Manuel*, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811; *State v. Anderson*, 2005 WI 54, ¶¶ 18-19, 59, 280 Wis. 2d 104, 118-19, 140-43, 695 N.W.2d 731; *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660; *State v. Weed*, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485.

87. **Hearsay exception—state of mind**. The relevant statutory reference is sec. 908.03(3). Cases include *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660.

88. **Hearsay exception—statement against penal interest**. The relevant statutory reference is sec. 908.045(4). Cases which have addressed the issue of whether the statement was against the declarant's interest include: *State v. Jackson*, 2007 WI App 145, ¶¶ 2-11, 19-20, 302 Wis. 2d 766, 770-73, 777-79, 735 N.W.2d 178; *State v. Bintz*, 2002 WI App 204, 257 Wis. 2d 177, 650 N.W.2d 913; *State v. Joyner*, 2002 WI App 250, 258 Wis. 2d 249, 653 N.W.2d 290; *State v. King*, 205 Wis. 2d 81, 94-95, 555 N.W.2d 189 (Ct. App. 1996). Cases which have addressed the corroboration requirement include *State v. Guerard*, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12. In *Guerard*, the Court discussed the corroboration requirement for the admission of a hearsay statement against penal interest under sec. 908.045(4) and specifically the extent of corroboration that is required. The Court summarized its holding in paragraph 5 of its decision. The main issue in this case was the interaction of the two main cases addressing this issue—*State v. Anderson*, 141 Wis. 2d 653, 416 N.W.2d 276 (1987) and *State v. Johnson*, 181 Wis. 2d 470, 510 N.W.2d 811 (Ct. App. 1993). The Court basically disavowed how the Court's opinion in *Johnson* has been interpreted and reaffirmed that the *Anderson* standard of corroboration is the law in the state of Wisconsin. Basically the Court interpreted multiple hearsay statements against penal interest as corroborating each other. *See also* the discussion of *Smith* under 53. above.

89. **Hearsay exception—former testimony**. The relevant statutory reference is sec. 908.045(1). *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637.

90. **Hearsay exception—excited utterance**. The relevant statutory reference is sec. 908.03(2). The excited utterance exception requires three

foundational facts: (1) There must be a startling event or condition; (2) The statement must relate to the startling event or condition; and (3) The statement must be made while the declarant is still under the stress or excitement caused by the event or condition. For the purpose of determining the admissibility of hearsay statements under the excited utterance exception, the interval between the incident and the declaration is not measured by the mere lapse of time but by the duration of the excitement the event caused (the time issue). *State v. Boshcka*, 178 Wis. 2d 628, 640, 496 N.W.2d 627 (Ct. App. 1992). There is a special species of the exited utterance rule (special considerations) that is applicable to statements made by a child alleged to have been the victim of a sexual assault/abuse. This situation is hereafter referred to as the special species situation. Allegations of sexual abuse by children are not, however, pro forma guaranteed admission as excited utterances in proceedings against their abusers. *Huntington*, 216 Wis. 2d at 683. The three factors to determine if a statement falls under the special species situation which were set forth in *Gerald L.C.* are not dispositive or a bright-line rule. *Huntington*, 216 Wis. 2d at 683-84.

Cases include *State v. Mayo*, 2007 WI 78, ¶¶ 2, 6, 13, 20-24, 27, 31, 53-55, 301 Wis. 2d 642, 650, 652, 654, 656-58, 659, 660-61, 671-72, 734 N.W.2d 115 (statement made by the victim of an armed robbery during an interview with a police officer who responded after the victim called 911, statement of appellate review law; statement was admissible as excited utterance—the victim was describing a startling event, the victim spoke with the officer only a few minutes after the incident, the victim was visibly upset and bleeding; no in-depth legal analysis); *State v. Rodriguez*, 2006 WI App 163, ¶¶ 1-14, 27, 295 Wis. 2d 801, 807-14, 824-25, 722 N.W.2d 136, *remanded on other grounds and aff'd*, 2007 WI App 252, 306 Wis. 2d 129, 743 N.W.2d 460 (a domestic violence situation; two sets of statements were at issue—statements made by the victim and her seven-year-old victim daughter to the police who responded to the scene pursuant to a call and statements made by both of those persons to the police who returned

the next day to return some property; the defendant did not dispute that the statements were excited utterances; statement of the basis for the rule); *State v. Searcy*, 2006 WI App 8, ¶¶ 11, 47-48, 288 Wis. 2d 804, 816-17, 834-35, 709 N.W.2d 497 (spontaneous, unsolicited statements made by a person to a police officer at the scene of the defendant's arrest that the defendant was her cousin and was staying with her; a listing of the required foundational facts; statements were admissible as excited utterances); *State v. Hemphill*, 2005 WI App 248, ¶¶ 2, 13, 287 Wis. 2d 600, 602, 606, 707 N.W.2d 313 (police, who are responding to a subject with a gun dispatch, arrive at the scene and a person, without any solicitation from the police, states: "Those are the ones. That's them"; the Court, in the context of a right to confrontation discussion and without any analysis, found that the statement was an excited utterance); *State v. Anderson*, 2005 WI 54, ¶¶ 18-19, 59, 62, 280 Wis. 2d 104, 118-19, 140-44, 695 N.W.2d 731 (a statement by the victim to a co-worker that the defendant had threatened him and had attacked him—it was the coworker's understanding that the incident had occurred recently although the victim did not specifically state when it occurred; a listing of the three required foundational facts; the statement satisfied the first two requirements but not the third); *State v. Kutz*, 2003 WI App 205, ¶¶ 2, 19-23, 64-65, 267 Wis. 2d 531, 539, 549-52, 585-87, 671 N.W.2d 660 (a statement of the victim—of a threat made by the defendant to the victim—made to a civilian the morning after the night that the threat was made); *State v. Ballos*, 230 Wis. 2d 495, 503-06, 602 N.W.2d 117 (Ct. App. 1999) (911 calls were admissible as excited utterances); *State v. Huntington*, 216 Wis. 2d 671, 575 N.W.2d 268 (1998) (the sexual assaults occurred over a one year time period when the victim was ten; three sets of statements were at issue—statements made by the victim to her mother when she had just turned eleven and within two weeks of the last assault, statements made by the victim to her sister contemporaneous with and shortly after the statements to the mother, statements made by the victim two hours later to an officer; all three statements were admissible as excited utterances; statement of appellate review law; extensive

discussion of the excited utterance exception including the reasons for it and the required foundational facts; discussion of the time issue; extensive discussion of the special species situation including the reason for it and the three *Gerald L.C.* factors/test are not dispositive/a bright-line rule; the victim had at an earlier time mentioned the abuse to a cousin and to someone's aunt; statements to the mother and sister were made while the victim was crying, hysterical, scared and the victim had just discovered that she would be spending two weeks alone with the defendant; statements to the officer were made while the victim continued to exhibit indications of emotional distress); *State v. Gerald L.C.*, 194 Wis. 2d 548, 535 N.W.2d 777 (Ct. App. 1995) (statement of a child sexual assault victim to a police officer; an extensive discussion of the special species situation; statement was not an excited utterance); *State v. Boshcka*, 178 Wis. 2d 628, 496 N.W.2d 627 (Ct. App. 1992) (statements of an adult sexual assault victim to her job supervisor—approximately three hours after the incident—and the defendant's parole agent—four to five hours after the incident; statements were admissible as excited utterances); *State v. Patino*, 177 Wis. 2d 348, 502 N.W.2d 601 (Ct. App. 1993) (statement of a witness to a police officer thru a translator within an hour of the incident; statement was an excited utterance); *State v. Lindberg*, 175 Wis. 2d 332, 500 N.W.2d 322 (Ct. App. 1993) (statements of a three-year-old victim of a child sexual assault to a close friend of her mother within four or five hours after the incident; discussion of the special species situation; statements were excited utterances); *State v. Jenkins*, 168 Wis. 2d 175, 483 N.W.2d 262 (Ct. App. 1992) (statement of the three-year-old son of the murder victim made four days later to an assistant district attorney; statement was not an excited utterance); *State v. Moats*, 156 Wis. 2d 74, 95-98, 457 N.W.2d 299 (1990) (statement of the five-year-old victim of a child sexual assault to her mother; it was unclear when the statement was made but it could have been up to two weeks after the incident; discussion of the special species situation; a discussion of the time issue; statement was an excited utterance); *State v. Johnson*, 153 Wis. 2d 121, 130-32, 449 N.W.2d 845 (1990); *State v. Martinez*, 150 Wis. 2d

62, 440 N.W.2d 783 (1989) (statements of the defendant's brother/co-actor during a fight; excited utterances are not limited to statements which describe a startling event or condition—requirement is that they relate to the event or condition; statements were excited utterances); *State v. Dwyer*, 143 Wis. 2d 448, 422 N.W.2d 121 (Ct. App. 1988) (three sets of statements were at issue—statements made by the three year victim of a child sexual assault on the day of the assault to her mother when her mother asked her some questions, statements made by the same victim later on the same day or the next day to a county protective service worker during questioning by the worker, and a statement by the defendant to his mother as to why he signed a confession; the reasons why an excited utterance is admissible; a discussion of the special species situation; a statement can be an excited utterance even if made in response to questioning; the statements of the victim were excited utterances; the statement of the defendant to his mother was not an excited utterance because it lacked spontaneity); *State v. Sorenson*, 143 Wis. 2d 226, 244-45, 421 N.W.2d 77 (1988) (discussion of the special species situation); *State v. Teynor*, 141 Wis. 2d 187, 414 N.W.2d 76 (Ct. App. 1987) (the defendant was charged with false imprisonment relating to his wife and children; statements made by the children during the incident to their mother and also made by them to a victim-witness coordinator almost 24 hours after they were released were excited utterances; the court noted, in the context of the statements to the victim-witness coordinator, that the events of the previous evening were undoubtedly still foremost in their minds and followed an extended period of stress for the children; discussion of the time issue; use of the special species situation in other than a child sexual assault); *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (1982) (statement by a 10-year-old victim of a sexual assault to her mother three days after the assault and at the prodding of the mother; the statement was admissible as an excited utterance; a discussion of the excited utterance exception and the reasons for it; an extensive discussion of the time issue; an extensive discussion of the special species situation and a summary of numerous prior cases; two of the factors

used by the court were that the victim was still afraid/scared and the defendant told the victim that he would hit her if she told her mother).

91. **Hearsay exception—dying declaration**. The relevant statutory reference is sec. 908.045(3). Cases include *State v. Beauchamp*, 2010 WI App 42, ____ Wis.2d ____, ____ N.W.2d ____ (statement and discussion of law; the statements at issue in the case qualified as dying declarations; a dying declaration is an exception to the *Crawford* right of confrontation rule/analysis—the Sixth Amendment right to confrontation does not apply to dying declarations).

92. **Stipulations—*Wallerman***. Cases include *State v. Cooper*, 2003 WI App 227, ¶¶ 18, 21, 267 Wis. 2d 886, 897, 899, 672 N.W.2d 118; *State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447; *State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W.2d 668 (Ct. App. 1998); *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996).

93. **Stipulations (when must the state accept a proposed defense stipulation) and a partial jury waiver.** Cases include *State v. Conner*, 2009 WI App 143, ¶ 27, 321 Wis.2d 449, 469, 775 N.W.2d 105, *petition for review granted on other grounds*; *State v. Warbelton*, 2009 WI 6, ¶¶ 1-18, 41-61, 315 Wis. 2d 253, 257-63, 273-81, 759 N.W.2d 557, *State v. Veach*, 2002 WI 110, ¶¶ 9, 100-133, 255 Wis. 2d 390, 398, 431-43, 648 N.W.2d 447*; State v. Cleveland*, 2000 WI App 142, 237 Wis. 2d 558, 614 N.W.2d 543; *State v. Lindvig*, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996); *State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997); *State v. McAllister*, 153 Wis. 2d 523, 451 N.W.2d 764 (Ct. App. 1989); *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644 (1997).

94. **Hearsay exemption—prior inconsistent statement**. The relevant statutory reference is sec. 908.01(4)(a)1. Cases include *State v. Beauchamp*, 2010 WI App 42, ¶¶ 1, 13-19, ____ Wis. 2d ____, ____, ____ N.W.2d ____ [the Court refused to adopt for Wisconsin the five factors that were adopted in *Vogel v. Percy*, 691 F.2d 843, 846-48 (7th Cir. 1982) for assessing whether the receipt of a witness's prior inconsistent statements as

substantive evidence violates the due process rights of a defendant; statement of some basic law including that receipt of such a statement does not violate a defendant's right to confrontation].

95. **The probationary status of a witness**. *State v. White*, 2004 WI App 78, ¶¶ 22-25, 271 Wis. 2d 742, 756-59, 680 N.W.2d 362.

96. **Layperson opinion on the intoxicated state (alcohol and/or drug) of a person**. Alcohol cases include *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 21, 278 Wis. 2d 643, 654, 693 N.W.2d 324; *State v. Powers*, 2004 WI 143, ¶ 13, 275 Wis. 2d 456, 466-67, 685 N.W.2d 869; *State v. Burkman*, 96 Wis. 2d 630, 645, 292 N.W.2d 641 (1980); *Milwaukee v. Kelly*, 40 Wis. 2d 136, 138, 161 N.W.2d 271 (1968). Drug cases include *State v. Bealor*, 187 N.J. 574, 902 A.2d 226 (2006).

97. **Pending criminal charges**. *State v. Barreau*, 2002 WI App 198, ¶¶ 45-57, 257 Wis. 2d 203, 228-35, 651 N.W.2d 12; *State v. Randall*, 197 Wis. 2d 29, 539 N.W.2d 708 (Ct. App. 1995); *United States v. Thurmer*, 514 F.3d 729 (7th Cir. 2008).

98. **The length of a sentence and parole eligibility date**. *State v. Scott*, 2000 WI App 51, ¶¶ 1, 17-29, 234 Wis. 2d 129, 132, 142-48, 608 N.W.2d 753.

99. **Expert "legal" opinion testimony by an attorney**. *State v. La Count*, 2008 WI 59, ¶¶ 3, 4, 11, 15-24, 71-92, 310 Wis. 2d 85, 91, 92, 95, 96-100, 123-137, 750 N.W.2d 780.

100. **Having the defendant do something in front of the jury without testifying**. Cases include *State v. Mallick*, 210 Wis. 2d 428, 433-34, 565 N.W.2d 245 (Ct. App. 1997); *State v. Hubanks*, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993); *United States v. Williams*, 461 F.3d 441 (4th Cir. 2006). *See also Williams v. State*, 116 S.W.2d 788 (2003) (a voice exemplar is not testimonial

evidence/testimony and does not subject a defendant to cross-examination). This issue is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 2**.

101. **Issues related to a statement given by the defendant to law enforcement personnel**. Some of these issues are (1) an unsigned confession—*Kutchera v. State*, 69 Wis. 2d 534, 544-46, 230 N.W.2d 750 (1975); (2) the exact language of the defendant is not used when the defendant's statement is reduced to writing—*Carrillo v. State*, 634 S.W.2d 21, 23 (Tex. Cr. App. 1982); *Knight v. State*, 538 S.W.2d 101, 106 (Tex. Cr. App. 1976); (3) the introduction by the defendant of the facts surrounding the securing of his/her statement or the defendant's explanation for making the statement—*State v. Mordica*, 168 Wis. 2d 593, 484 N.W.2d 352 (Ct. App. 1992); *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142 (1986); (4) testimony concerning the defendant's request that an interrogation not be electronically recorded—*State v. Rodrigues*, 113 Hawai'i 41, 147 P.3d 825 (2006); (5) introduction of the defendant's statement by the defendant for the truth of the matter asserted without the defendant testifying—*see* 59. above; (6) the use at trial of an expert on false confessions—*State v. VanBuren*, 2008 WI App 26, ¶¶ 16-19, 307 Wis. 2d 447, 458-61, 746 N.W.2d 545; (7) redacting part of a defendant's statement to remove the opinion of a law enforcement officer as to the defendant's truthfulness-*See* my outline entitled **POSSIBLE CHALLENGES TO THE ADMISSIBILITY OF ALL OR PART OF A DEFENDANT'S STATEMENT.**

102. **Racial, cultural, etc., stereotype evidence**. *State v. Chu*, 2002 WI App 98, ¶¶ 1-28, 253 Wis. 2d 666, 672-81, 643 N.W.2d 878.

103. **Event data recorder evidence**. Cases include *State v. Shabazz*, 400 N.J. Super. 203, 946 A.2d 626 (2005); *Matos v. State*, 899 So. 2d 403 (Fla. 4th DCA 2005); *Backman v. General Motors Corporation*, 332 Ill. App. 3d 760, 776 N.E.2d 262 (2002). *See also* RETRIEVING BLACK BOX EVIDENCE FROM VEHICLES Uses and Abuses of Vehicle Data Recorder Evidence in Criminal Trials, 33 Champion 12 (2009; Admissibility of

Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes", 40 A.L.R.6th 595 (2008); Patrick R. Mueller, Comment, Every Time You Break, Every Time You Make—I'll Be Watching You: Protecting Driver Privacy in Event Data Recorder Information, 2006 Wis. L. Rev. 135 (2006).

104. **The best evidence rule**. *See* my separate outline on this topic.

105. **The Opened The Door evidentiary doctrine**. *See* my separate outline on this topic entitled **EVIDENCE: ADMISSIBLITY UNDER THE OPENED THE DOOR DOCTRINE AND SEC. 908.06.**

106. **911 calls**. In *State v. Ballos*, 230 Wis. 2d 495, 602 N.W.2d 117 (Ct. App. 1999), the Court discussed numerous rules of evidence hearsay issues relating to the introduction into evidence of a 911 call tape and/or transcript by either the state or the defendant. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court established the analysis that is to be used when determining whether a 911 call, when introduced by the state, is testimonial or nontestimonial for constitutional right of confrontation purposes when the call is introduced for the truth of the matter asserted and the caller does not testify. In *State v. Rodriguez*, 2006 WI App 163, ¶¶ 16-18, 295 Wis. 2d 801, 815-17, 722 N.W.2d 136, *aff'd on other grounds*, 2007 WI App 252, 306 Wis. 2d 129, 743 N.W.2d 460 and *State v. DeBauche,* 2008AP683-CR, filed December 9, 2008, 2008 WL 5146870, *an unpublished opinion,* the Court discussed the *Davis* 911 call analysis. *See also Michigan v. Bryant,* 09-150, which is presently pending before the United States Supreme Court. The right of confrontation analysis in *Ballos*, 230 Wis. 2d at 510, is only applicable (if at all) if the court determines that the 911 call is nontestimonial.

107. **Subsequent remedial measures.** The relevant statute is 904.07. In *State v. Conley*, 2008AP1936-CR, filed September 23, 2009, 2009 WL 3018121, *a RULE 809 case,* the Court in ¶¶ 32-38 held that sec. 904.07 (Subsequent remedial measures) is <u>not</u> applicable in

criminal cases.

108. **Expert testimony—general law**. Recent cases include *State v. Fischer*, 2010 WI 6, ____ Wis.2d ____, 778 N.W.2d 629 (discussion of expert witness testimony in the context absorption curve opinion evidence based on a PBT result; extensive discussion of that part of sec. 907.03 that allows expert testimony based on facts that are not admissible into evidence; the Court did not revisit Wisconsin's "limited gatekeeper" approach to expert testimony and declined to adopt a *Daubert*-like approach to expert testimony; exclusion of the expert witness testimony did not violate defendant's constitutional right to present a defense—*see* the discussion under 49 above); *State v. Swope*, 2008 WI App 175, 315 Wis. 2d 120, 762 N.W.2d 725 (discussion of expert witness testimony in the context of death-scene analysis testimony; extensive discussion of the general law including Wisconsin's relevancy test and its requirements of relevancy, qualification, and assistance; discussion of the right of confrontation issue when a state's expert relies on "hearsay" data).

109. **Threats to a witness that are not linked to a particular person**. *State v. Adams*, 221 Wis. 2d 1, 14-16, 584 N.W.2d 695 (Ct. App. 1998) (evidence of threats to a witness, which were not linked to the defendant, were relevant to the issue of the credibility of the witness; the threats were not hearsay; the threats were not unfairly prejudicial to the defendant). *See also People v. Garcia*, 168 Cal. App. 4th 261, 85 Cal. Rptr. 3d 393, 402, 416, 417 (2009). Threats that are linked to the defendant are discussed under 7. above.

110. **Tattoo evidence**. Cases include *United States v. Figueroa*, 548 F.3d 222 (2d Cir. 2008) (the Court held, in the context y of a defendant's constitutional right of cross-examination, that the trial court abused its discretion when it ruled that the defense could not cross-examine a witness for the state about his two swastika tattoos; the defendant was a member of a racial or ethnic minority group, the tattoos were

relevant to and probative of the witness's credibility, bias, motive to lie when testifying inasmuch as the tattoos suggested that the witness harbored animus against racial or ethnic minority groups and their members; the Court did not rule on the issue of whether the evidence was properly excluded under the unfair prejudice rule since the trial court did not use this as an exclusion reason; the error was harmless); *United States v. Suggs*, 374 F.3d 508, 517 (7th Cir. 2004) (tattoos that help to establish gang membership); *Belmar v. State*, 279 Ga. 795, 621 S.E.2d 441, 444-46 (2005) (an excellent and extensive discussion of the admissibility of tattoo evidence). *United States v. Figueroa*, 548 F.3d 222 (2d Cir. 2008) (trial court's ruling that the defense could not cross-examine a government witness about his swastika tattoos violated the defendant's confrontation rights under the Sixth Amendment; tattoos were relevant to and probative of the witness's credibility, bias, and motive to lie; error was harmless).

111. **Evidence from financial institution books (891.24)**. *State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, 754 N.W.2d 150. What is the effect of the decision in *Melendez-Diaz v. Massachusetts,* 557 U.S. _____, 129 S.Ct. 2527 (2009) on the right of confrontation discussion/holding in *Doss*?

112. **Expert testimony—death scene analysis**. *State v. Swope*, 2008 WI App 175, 315 Wis. 2d 120, 762 N.W.2d 725.

113. **Having the trier of fact, without expert testimony, form an opinion as to the authenticity of a signature**. *Jax v. Jax*, 73 Wis. 2d 572, 589, 243 N.W.2d 831 (1976).

114. **Preliminary Breath Test (PBT) results**. *State v. Fischer*, 2010 WI 6, ____ Wis. 2d ____, 778 N.W.2d 629.

115. **Privileges**. In *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶ 23-33, 312 Wis. 2d 1, 17-23, 754 N.W.2d 439, the Court discussed privileges and 905.01 in general.

In *Sands*, 2008 WI at ¶¶ 60-70, 312 Wis. 2d at 36-41,

the Court held that there is no "deliberative process" privilege in Wisconsin. In *Sands*, the Court held that the closed session exemption (19.85) to the open meetings law does not create an evidentiary privilege. The *Sands* case is discussed in the October 2009 issue of the WISCONSIN LAWYER beginning at page 8.

116. **Demonstrative evidence in general**. Wisconsin cases include *State v. Denton*, 2009 WI App 78, 319 Wis. 2d 718, 768 N.W.2d 250. *See also* **Pedagogical-device summaries** (81), **Computer-generated animation** (80), and **Photographs** (79) above.

117. **Alibi related items**. Wisconsin's alibi statute is 971.23(8). Impeachment of an alibi witness, including the defendant, is discussed in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 1**. What is an "alibi/alibi testimony" is discussed in *State v. Harp*, 2005 WI App 250, 288 Wis. 2d 441, 707 N.W.2d 304; *State v. Brown*, 2003 WI App 34, 260 Wis. 2d 125, 659 N.W.2d 110; *State v. Guzman*, 2001 WI App 54, ¶¶ 18-23, 241 Wis. 2d 310, 323-25, 624 N.W.2d 717.

118. **Racial bias**. In *Brinson v. Walker*, 547 F.3d 387 (2d Cir. 2008), the Court discussed the issue of cross-examining a witness about his or her racial bias.

119. **Notice by mail and the presumption that the addressee received it**. *American Family Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶¶ 31-37, 319 Wis. 2d 397, 416-19, 768 N.W.2d. 729.

120. **Hypnotically affected/refreshed testimony**. Cases include *State v. Zimmerman*, 2003 WI App 196, 266 Wis. 2d 1003, 669 N.W.2d 762; *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983); *State v. Moore*, 188 N.J. 182, 902 A.2d 1212 (2006).

121. **Motion in limine**. Cases include *State v. McClaren*, 2009 WI 69, 318 Wis. 2d 739, 767 N.W.2d 550 (a must read case); *State v. Sigarroa*, 2004 WI App 16, 269 Wis. 2d 234, 674 N.W.2d 894; *State v. Wright*, 2003 WI App 252, 268 Wis. 2d 692, 673 N.W.2d 386; *State v. Bergeron*, 162 Wis. 2d 521, 470 N.W.2d 322

(Ct. App. 1991); *State v. Eichman*, 155 Wis. 2d 552, 455 N.W.2d 143 (1990).

122. **The introduction into evidence of a transcript of a prior court proceeding for a purpose other than to impeach a witness**. Cases include *State v. Jorgensen*, 2008 WI 60,310 Wis. 2d 138, 754 N.W.2d 77.

123. **Testimony from a body attachment return hearing**. In *State v. Carter*, 2010 WI App 37, ____ Wis.2d ____, ____ N.W.2d ____, the Court held that the state's use of sworn testimony relating to the substantive issues in the case elicited by the trial court at a bench warrant/body attachment return hearing from the witness who had been arrested pursuant to the warrant, to impeach the testimony of that witness at the defendant's trial was error because the defendant was denied his constitutional right to counsel and his constitutional and statutory right to be present (since the defense was not present at the return hearing). The Court also held that the error was not harmless.

124. **Judicial admission**. *Olson v. Darlington Mut. Ins. Co.*, 2009 WI App 122, 321 Wis.2d 125, 772 N.W.2d 718.

125. **Relevance based on the content of opposing counsel's opening statement**. *See* the discussion in my outline entitled **MISCELLANEOUS EVIDENTIARY ISSUES/TOPICS—PART 1**.