COUNTY OF MILWAUKEE
District Attorney's Office
Inter-Office Communication

DATE: May 12, 2008

TO:

FROM: Robert D. Donohoo

SUBJECT: TRIAL EVIDENTIARY ISSUES/TOPICS

INTRODUCTION

This outline contains numerous evidentiary and evidentiary-related topics (and relevant cases) that can 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 only included a listing of the relevant cases (the results of a polygraph test). For other issues I have included a combination of either a listing of the relevant cases and an explanation of some of the cases (gang-related evidence) or an explanation of all or most of the cases (excited utterance).

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 I have prepared a separate outline on a specific topic, 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 absolutely no significance.

There may be an addendum to this outline which, if it exists, will be at the end of this outline.

Prosecution topics include:

1. *Jensen* evidence.
2. Defendant's refusal to be fingerprinted.
3. Defendant's refusal to submit to a test under the implied consent law.
4. Defendant's refusal to perform field sobriety test.
5. Flight, resistance to arrest, etc., by the defendant.
6. Flight by a codefendant.
7. Evidence of acts intended to obstruct justice or avoid punishment.

8A. Defendant's silence.

8B. Defendant's silence in an OWI first offense case.

9. Evidence of the assertion by the defendant of a Fourth Amendment right.
10. Other crimes.
11. Informant privilege.
12. Use of preliminary hearing testimony (right to confrontation issues).
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 test.
16. The *Bruton* 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. Tattoo evidence.
28. Gang-related evidence.
29. Circumstantial evidence of nonconsent.
30. The opinion of a person that a car was speeding and the amount.

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 testimony on mental health issues.
47. Reliability of eyewitness identification testimony.
48. *King* evidence.
49. Evidence whose exclusion would violate the defendant's constitutional right to present a defense.
50. *Shiffra* evidence.
51. *Mayday* examination.
52. Suppression of a witness's involuntary statement.
53. Violation of the defendant's constitutional right of confrontation by the use of hearsay exception or exclusion evidence.
54. Questioning a police officer concerning a false report that he prepared in another case.
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.

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. The definition of a statement for hearsay purposes.
84. Credibility of hearsay declarant.
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. Hypnotically affected/refreshed testimony.
92. Stipulations—*Wallerman.*
93. Stipulations—when must the state accept a proposed defense stipulation?
94. Motion in limine.
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. The use of case law from other jurisdictions.
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.

PROSECUTION

1. ***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. 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); *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).

2. **Defendant's refusal to be fingerprinted**. *State v. Tew*, 54 Wis. 2d 361, 195 N.W.2d 615 (1972).

3. **Consciousness of guilt—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**.

4. **Consciousness of guilt--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**.

5. **Consciousness of guilt—evidence of flight, resistance to arrest, escape from custody, concealment by the defendant**. Cases include *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.

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**. Cases include *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) (defendant shortly before trial called and threatened the victim); *State v. Bettinger*, 100 Wis. 2d 691, 303 N.W.2d 585 (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).

8A. **Evidence of the defendant's silence**. *State v. Cockrell*, 2007 WI App 217, ____ Wis. 2d ____, 741 N.W.2d 267 (the defendant, after his arrest and post-*Miranda*, gave a statement concerning events before the actual crime but then stated that he did not want to talk about the crime until he had an attorney; during the trial he testified concerning the crime—including that he saw a man pointing a shotgun at him just before he fired his gun—and that he declined to answer questions about the crime when questioned by the police because he wanted an attorney present so his story would not be misinterpreted; the state elicited on cross-examination of the defendant that he did not tell the police about the man with the gun even after he obtained an attorney; during closing arguments the prosecutor suggested that the failure of the defendant to tell the police about the man with the shotgun was an indication that the defendant was fabricating that story; neither the cross-examination of the defendant nor the prosecutor's challenged closing argument comments were improper because both were a fair response to the testimony the defendant offered on direct examination; what legal framework is to be

used when addressing a *Doyle* alleged right to silence violation; discussion of the situations where defendant's post-*Miranda* silence can be used for cross-examination impeachment of the defendant's testimony about his or her interactions with the police after the arrest; an extensive discussion of the situation where the defendant volunteers during his direct testimony that he asserted his right to silence and the reason for doing so; a discussion of the distinction between the use of silence to impeach and the use of silence as evidence of guilt); *State v. Mayo*, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115 (the victim of a crime pointed at the defendant and stated that the defendant was the man who robbed him, the defendant—who was seized but had not been given the *Miranda* warnings—did not respond to the victim's accusation, the defendant's silence was referred to/used during the state's case-in-chief—CIC, opening statement—OS, cross-examination of the defendant—CE, and closing argument—CA; the defendant's silence was referred to as a pre-*Miranda* silence; the Court agreed with the defendant's contention and the state's concession that the prosecutor's remarks during OS and the testimony elicited during the state's CIC, prior to the defendant's testimony, were a violation of the defendant's federal and state constitutional right to remain silent; the Court, citing *Brecht*, stated that it is a violation of the right to remain silent for the state to present testimony in its CIC on the defendant's election to remain silent during a custodial investigation after arrest; the error, however, was harmless in that the improper references were infrequent, the defendant's decision to testify was not affected by the state's use of his pre-*Miranda* silence, and the defendant testified he was not silent when the victim identified him; the Court agreed with the position of the state and the defendant that the remarks of the prosecutor during CA and the CE of the defendant were permissible; the Court, citing *Adams*, stated that references by the state during cross-examination, on redirect, and in closing arguments to defendant's pre-*Miranda* silence to suggest guilt did not violate the defendant's right to remain silent when the defendant testifies and pre-*Miranda* silence may be used to impeach a defendant when he or she testifies or substantively to suggest guilt); *State v. Ewing*, 2005

WI App 206, 287 Wis. 2d 327, 704 N.W.2d 405 (defendant gave a statement both before and after his arrest; defendant did not testify but presented an alibi defense that he was moving; state elicited testimony and commented during closing argument that the defendant did not mention during his statements that he was moving; no error since this was a situation where the testimony showed the inconsistencies between what the defendant did say and what his alibi witnesses testified to at trial rather than a comment on the defendant's silence or what the defendant did not say); *State v. Hassel*, 2005 WI App 80, 280 Wis. 2d 637, 696 N.W.2d 270 (a summary of the court's holding in *Fencl* that the state cannot use a defendant's pre-arrest, pre-*Miranda* silence as evidence of the defendant's guilt); *State v. Cooper*, 2003 WI App 227, ¶¶ 18-20, 267 Wis. 2d 886, 897-99, 672 N.W.2d 118 (two separate references, in the context of an ineffective assistance of counsel claim, were at issue; statement of the test that is used to determine if there has been an impermissible comment on a defendant's right to remain silent—whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent and the court must look at the context in which the statement was made in order to determine the manifest intention that prompted it and its natural and necessary impact on the jury; the first reference—a police officer, when asked why she eventually closed her investigation relating to the victim's allegations against the defendant, stated that the defendant chose not to come in and talk to her; this was referred to as pre-arrest silence; the Court held that the testimony did not violate the defendant's right to remain silent—the comment appeared in a long line of questioning wherein the officer previously stated that the defendant did talk to her on the phone and the manifest intention was not to imply that the defendant was invoking his right to remain silent but simply to explain why the initial investigation has gone no further; the second reference—a police officer, when relating his questioning of the defendant after he had been advised of the *Miranda* warnings, testified he posed a rhetorical question to the defendant and in response the defendant remained silent; the officer

continued to ask questions and the defendant answered; the interview took forty-five minutes; this was referred to as post-arrest silence; the Court held that no violation of the defendant's right to remain silent occurred when viewed in the context of a forty-five minute session of questions and answers); *State v. Nielsen*, 2001 WI App 192, 247 Wis. 2d 466, 634 N.W.2d 325 (the defendant, during a post-arrest and post-*Miranda* interview, gave a statement basically denying his involvement in the crime; during the interview the defendant answered most of the questions but declined to answer some of the questions; I don't believe that the state used the defendant's statement during its case-in-chief; the defense called the interviewing officer to testify and elicited that the defendant denied his involvement in the crime numerous times during the interview; the state, during its cross-examination of the officer, elicited that the defendant refused to answer several questions during the interview; the Court addressed the right to silence issue in the context of an ineffective assistance of counsel claim; the Court held that there was no error because the defendant opened the door to the use of the defendant's silence—the defendant had not answered all the questions—for the limited purpose of impeaching the defendant's testimony; discussion of what constitutes "silence" on the part of the defendant; the state did not, by simply asking the questions in this case, argue that the defendant 's silence was inconsistent with his claim of innocence; a discussion of the distinction between the use of silence as evidence of guilt (wrong) and its use for valid purposes such as impeachment and the test that is used to determine if there has been an impermissible comment on the defendant's right to remain silent); *State v. Adams*, 221 Wis. 2d 1, 584 N.W.2d 695 (Ct. App. 1998); *State v. Wulff*, 200 Wis. 2d 318, 546 N.W.2d 522 (Ct. App. 1996); *rev'd on other grounds*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997); *State v. Brecht*, 143 Wis. 2d 297, 421 N.W.2d 96 (1988); *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988); *State v. Price*, 111 Wis. 2d 366, 375-76, 330 N.W.2d 779 (Ct. App. 1982); *State v. Fencl*, 109 Wis. 2d 224, 325 N.W.2d 703 (1982); *State v. Wedgeworth*, 100 Wis. 2d 514, 518, 526-27, 302 N.W.2d 810 (1981) (the defendant, while being questioned, stated that he lived

at a certain place and then the defendant stated he was not to answer this question on advice of his attorney; during the trial the officer testified the defendant stated that he lived at a certain place and then the defendant stopped; the words "and stopped" did not constitute an impermissible comment); *Ryan v. State*, 95 Wis. 2d 83, 98, 289 N.W.2d 349 (Ct. App. 1980); *United States v. Jumper*, 497 F.3d 699 (7th Cir. 2007) (a selective invocation of the *Miranda* right to silence situation); *United States v. Andujar-Basco*, 488 F.3d 549 (1st Cir. 2007) (discussion of the situation where the defendant, after initially waiving his *Miranda* rights, begins to give a statement but then invokes his *Miranda* right to silence and counsel in the midst of questioning, including a discussion of what words are used to inform the jury of what occurred); *United States v. Santiago*, 428 F.3d 699, 702-04 (7th Cir. 2005); *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001) (a discussion of what is silence in the context of demeanor evidence; a defendant's post-arrest, post-*Miranda* waiver does not act as a waiver of his post-arrest, pre-*Miranda silence)*; *State v. Tucker*, 190 N.J. 183, 919 A.2d 130 (2007) (the state can use inconsistencies between two or more statements given by the defendant or inconsistencies between a statement given by the defendant and defendant's trial testimony to impeach the validity of those statements).

8B. **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.

9. **Evidence of the assertion by the defendant of a Fourth Amendment right**. *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. App—Waco 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).

10. **Other acts/crimes evidence**. Cases include *State v. Normington*, 2008 WI App 8, ____ Wis. 2d ____, 744 N.W.2d 867 (defendant was charged with numerous crimes including several sexual assault crimes involving a toilet plunger being placed in the anus of a developmentally disabled adult who had the functional level of an 18-month-old; the other acts evidence, which was found on the defendant's computer and was admitted at the defendant's trial, consisted of: (1) images showing a machine inserting an object into a person's anus; (2) images of a hand being inserted into a women's anus; (3) an image of two hands being inserted into a woman's vagina; (4) a video of a machine inserting two objects into a man's anus; (5) videos of anal intercourse between a man and a woman; (6) testimony concerning the names of websites; the Court set forth some basic other acts evidence law including the *Sullivan* framework; the greater latitude rule is applicable in cases where the other acts evidence is pornography, not prior sexual assaults, if the adult victim functions at the level of a child; the Court found that (1), (2), and (4) evidence was properly admitted; first step—the evidence was offered for the permissible purpose of showing motive; second step—the evidence was relevant because it was more probable that the possessor of "object insertion" pornography would be more likely to put an object into the victim's anus; third step—the evidence satisfied this step; the Court held that even if the (3), (5), and (6) evidence did not meet the second step, its admission was harmless); *State v. Dukes*, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515 (defendant was charged with possession of cocaine with intent to deliver and keeping a drug house; the alleged other acts evidence was evidence of a drug purchase from the same building one month prior to the crime and also other hearsay foot traffic in and out of the building; some basic other acts law including the *Sullivan* analytical framework was set forth; the evidence was not other acts evidence but was evidence needed to prove the drug house charge—it was inextricably intertwined with the drug house crime); *State v. Muckerheide*, 2007 WI 5, 298 Wis. 2d 553, 725

N.W.2d 930 (*see* my separate outline);
State v. Schutte, 2006 WI App 135, 295 Wis. 2d 256, 720 N.W.2d 469 (defendant was convicted of three counts of homicide by negligent operation of a vehicle as a result of the defendant's car crossing the highway center line and colliding with a truck; the other acts evidence was that the defendant smoked marijuana on the day of the collision; the trial court did not err in admitting the marijuana evidence; first step—not addressed by the parties; second step—evidence of the defendant's marijuana use together with the expert testimony was relevant because it tended to make it more probable that the defendant engaged in conduct that she should have realized created a substantial and unreasonable risk of death or great bodily harm to another; third step—evidence was highly probative and its probative value was not substantially outweighed by the danger of unfair prejudice); *State v. McGowan*, 2006 WI App 80, 291 Wis. 2d 212, 715 N.W.2d 631 (the evidence was admitted in error and it was not harmless error; defendant was charged with numerous counts of sexual assault of a child when the child was from 8 to 11 years of age and the defendant was from 18 to 21 years of age; the other acts evidence was that the defendant had sexually assaulted the victim's cousin one time when the defendant was ten years old, it occurred 8 years prior to the assaults of the victim, and the cousin reported it nineteen years after it happened; the Court set forth some basic other acts evidence law including the three-step *Sullivan* analytical framework, the greater latitude rule in child sexual assault cases, wrongly admitted other acts evidence is subject to harmless error analysis, and the appellate review standards; the evidence was admitted to show the defendant's intent and motive; first step—the Court assumed it was offered for a proper purpose; second step—the evidence was inadmissible under this step, the allegations were not sufficiently factually similar to justify admission of the evidence as other acts evidence, the conduct of a ten-year-old does not give context to or provide evidence of the motive or intent of an adult some eight or more years later in that behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult; third step—the evidence was inadmissible; the error was not

harmless); *State v. Davis*, 2006 WI App 23, 289 Wis. 2d 398, 710 N.W.2d 514 (the defendant was convicted of burglary and armed robbery charges; the defendant wanted to introduce other acts evidence—that he was mistakenly identified by a victim and charged as a burglar in a similar burglary occurring within the same time frame; the evidence was erroneously not admitted and the Court reversed because it found that the real controversy had not been fully tried; the *Sullivan* analysis was set forth; first step—the evidence was offered for the admissible purpose of identification (showing that the crimes were committed by another); second step—the evidence was relevant—this was not a situation where someone accused of a crime makes a general claim that someone else must have done it; third—the evidence would not have unfairly prejudiced the state; *State v. Anderson*, 2005 WI App 238, ¶¶ 5, 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); *State v. Norwood*, 2005 WI App 218, ¶¶ 24-28, 287 Wis. 2d 679, 696-98, 706 N.W.2d 683 (defendant's contention that the timing of the other acts evidence [the state's first witness] rendered it unfairly prejudicial rejected; the defendant's contention that the form of the evidence [live testimony instead of a stipulation or judgment of conviction] was either waived [no objection before the trial court] or if deficient performance it was not prejudicial); *State v. Kimberly B.*, 2005 WI App 115, ¶¶ 2, 38-42, 283 Wis. 2d 731, 751-59, 699 N.W.2d 641 (defendant was charged with intentionally causing bodily harm to a child on July 25, 2002 and one of her defenses was the defense of parental privilege of reasonable discipline; the other acts evidence which was introduced during the state's case-in-chief was that the defendant on two prior occasions (1995-1999) had hit the victim with an extension cord or a belt which left marks and bruises that prompted government intervention; the Court set forth some basic other acts evidence law; the evidence was properly admitted because it was relevant and admissible to prove the intent element of the crime and to disprove the defendant's reasonable discipline defense by showing the absence of mistake or accident regarding the kind of knowledge that the defendant brings to the question

of parental discipline and its probative value was not substantially outweighed by any unfair prejudice; although the other acts episodes were several years apart, the evidence was highly relevant because the episodes involved the same child, similar injuries and similar claims of parental discipline for similar types of purported child misbehavior and each required some form of government intervention; the jury was instructed four separate times on the use of other crimes evidence). S*tate v. White*, 2004 WI App 78, 271 Wis. 2d 742, 680 N.W.2d 362; *State v. Franklin*, 2004 WI 38, 270 Wis. 2d 271, 677 N.W.2d 276; *State v. Arredondo*, 2004 WI App 7, ¶¶ 45-49, 269 Wis. 2d 369, 399-402, 674 N.W.2d 647; *State v. Ziebart*, 2003 WI App 258, 268 Wis. 2d 468, 673 N.W.2d 369; *State v. Silva*, 2003 WI App 191, 266 Wis. 2d 907, 670 N.W.2d 385; *State v. Hunt*, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Barreau*, 2002 WI App 198, 257 Wis. 2d 203, 651 N.W.2d 12 [defendant was charged with homicide, robbery, and burglary; the incident happened inside of a house; defendant was twenty; the state was allowed to introduce evidence (that the defendant, when he was thirteen, entered a house for the purpose of stealing money) because it was relevant to show the defendant's intent to steal for the burglary charge; the Court set forth some basic other acts evidence law including the *Sullivan* analysis; first step—the court assumed without deciding that it was offered for the acceptable purpose of showing intent; second step—the evidence satisfied relevancy step 1 but not relevancy step 2 because of the defendant's age at the time of the other acts evidence and there was a lack of similarity between the acts; the error was harmless]; *State v. Opalewski*, 2002 WI App. 145, 256 Wis. 2d 110, 647 N.W.2d 331; *State v. Gribble*, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488; *State v. Meehan*, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722; *State v. Bauer*, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902; *State v. Cofield*, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214; *State v. Koeppen*, 2000 WI App 121, 237 Wis. 2d 418, 614 N.W.2d 530; *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629; *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833 (defendant's possession of videotapes of young girls performing striptease dances was admissible to show intent and

motive in a child enticement case); *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913; *State v. Edmunds*, 229 Wis. 2d 67, 78-81, 598 N.W.2d 290 (Ct. App. 1999); *State v. Thoms*, 228 Wis. 2d 868, 599 N.W.2d 84 (Ct. App. 1999); *State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918 (1999); *State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W.2d 668 (Ct. App. 1998); *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998); *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (1996); *State v. C.V.C.*, 153 Wis. 2d 145, 160-62, 450 N.W.2d 463 (Ct. App. 1989); *State v. Rutchik*, 116 Wis. 2d 61, 341 N.W.2d 639 (1984) (in a burglary prosecution evidence of defendant's previous burglary was admissible to show method of operation, preparation, plan, identity and intent); *State v. Pharr*, 115 Wis. 2d 334, 340 N.W.2d 498 (1983) (in an attempted first-degree murder shooting case the court allowed evidence of another shooting by the defendant shortly after the charged crime to show plan and to provide context for the crime charged); *Haskins v. State*, 97 Wis. 2d 408, 294 N.W.2d 25 (1980) (in a first-degree murder case the Court allowed evidence of earlier violent attempts by members of the defendant's gang to find the victim as proof of plan and motive for murder); *Peasley v. State*, 83 Wis. 2d 224, 265 N.W.2d 506 (1978) (allowing evidence of defendant's prior drug sales to show defendant possessed cocaine with intent to deliver). *See* my separate outline dealing with this evidence issue.

11. **The privilege to withhold information concerning the identity of an informant**. The relevant statutory reference is sec. 905.10. 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).

12. **Prior testimony—preliminary hearing testimony of a witness when the witness is unavailable at the defendant's trial (right to confrontation issues)**. In this situation the possible issues relate to satisfaction of both the rules of evidence [908.04 and 908.045(1)] and the defendant's Sixth Amendment right to confrontation. To satisfy the right to confrontation - issue (prior preliminary hearing testimony is testimonial), the court must find that the defendant had a prior opportunity for cross-examination (prior opportunity issue) and that the preliminary hearing witness is unavailable to testify at the trial (unavailable issue). Cases include *State v. King*, 2005 WI App 224, 287 Wis. 2d 756, 706 N.W.2d 181 (a discussion of the prior opportunity issue but no ruling on this issue; a discussion of the general unavailable law; the Court held, after an extensive discussion, that the state did not demonstrate that the preliminary hearing witness was constitutionally unavailable); *State v. Stuart*, 2005 WI 47, 279 Wis. 2d 659, 695 N.W.2d 259 (no dispute that the witness was unavailable; a detailed discussion of the prior opportunity issue; the preliminary hearing testimony of the witness was improperly admitted at the defendant's trial because the defendant did not have an adequate prior opportunity for cross-examination; the error was not harmless); *State v. Norman*, 2003 WI 72, 262 Wis. 2d 506, 664 N.W.2d 97; *State v. Bintz*, 2002 WI App 204, 257 Wis. 2d 177, 650 N.W.2d 913; *State v. Tomlinson*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367; *State v. Marks*, 194 Wis. 2d 79, 533 N.W.2d 730 (1995); *State v. Drusch*, 139 Wis. 2d 312, 407 N.W.2d 328 (Ct. App. 1987); *State v. Myren*, 133 Wis. 2d 430, 395 N.W.2d 818 (Ct. App. 1986); *State v. Burns*, 112 Wis. 2d 131, 332 N.W.2d 757 (1983); *State v. Bauer*, 109 Wis. 2d 204, 325 N.W.2d 857 (1982); *LaBarge v. State*, 74 Wis. 2d 327, 246 N.W.2d 794 (1976); *Owens v. Frank*, 394 F.3d 490, 501-03 (7th Cir. 2005). All of the cases, except for *King* and *Stuart*, were decided without considering the

impact of *Crawford v. Washington* on this issue.

13. **Prior testimony—testimony of a witness which 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 evidence 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.

16. **The *Bruton* redaction of the confession of a non-testifying codefendant**. Wisconsin 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. 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).

17. **Wisconsin's Electronic Surveillance Control Law (WESCL)**. *See* my outline entitled **POSSIBLE DEFENSE CHALLENGES TO THE ADMISSIBILITY OF A DEFENDANT'S STATEMENT**.

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. 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* my separate outline on this evidence issue.

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. **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.

24. **Videotaped statements of a child**. The relevant statutory reference is sec. 908.08. Cases include *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.

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).

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. **Tatoo evidence**. Cases include *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).

28. **Gang-related evidence**. *State v. Burton*, 2007 WI App 237, ____ Wis. 2d ____, 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. 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. Suggs, 374 F.3d 508 (7th Cir. 2004). The *Burton* case is must reading if a party intends to use this type of evidence.

29. **Circumstantial evidence of nonconsent**. Cases include *State v. Champlain*, 2008 WI App 5, ____ Wis. 2d ____, 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).

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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; *State 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 acting as a reasonable prudent person would under similar beliefs and circumstances. Cases include *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. **Evidence (including *St. George* expert testimony) whose exclusion would violate a defendant's constitutional right to present a defense (CRTPD)**. Cases include *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 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. 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; *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 (when making an evidentiary ruling on the admission of expert opinion testimony in a criminal case where the defendant has alleged that his right to present a defense would be violated if the expert were not allowed to testify, the trial court 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 inquiry to determine if a defendant's Sixth Amendment right to present a defense has been violated in respect to the exclusion of an expert witness's opinion; first, 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 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.); *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); *Dunlap v. Hepp*, 436 F.3d 739 (7th Cir. 2006); *Horton v. Litcher*, 427 F.3d 498 (7th Cir. 2005).

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. 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; *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); *Davis v. Litscher*, 290 F.3d 943 (7th Cir. 2002).

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; *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).

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. **Whether the admission of hearsay exception or exclusion/exemption evidence violates the defendant's constitutional right of confrontation**. *See* my separate outline.

54. **Questioning a police officer concerning a false report that he prepared in another case**. *United States v. Seymour*, 472 F.3d 969 (7th Cir. 2007).

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. 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); *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006).

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. 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.

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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).

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**. Cases include *State v. McCoy*, 2007 WI App 15, 298 Wis. 2d 523, 728 N.W.2d 54; *State v. Buck*, 210 Wis. 2d 115, 565 N.W.2d 168 (Ct. App. 1997); *B.A.C. v. T.L.G.*, 135 Wis. 2d 280, 400 N.W.2d 48 (Ct. App. 1986); *State v. Sarinske*, 91 Wis. 2d 14, 44, 280 N.W.2d 725 (1979); *State v. Simmons*, 57 Wis. 2d 285, 288, 295-96, 203 N.W.2d 887 (1973); *State v. McCarty*, 47 Wis. 2d 781, 786-88, 177 N.W.2d 819 (1970). *See* my separate outline on this evidence 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. 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).

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 that another mentally and physically competent witness is telling the truth. Some cases include *State v. Burton*, 2007 WI App 237, ¶¶ 8, 16 n.7, ____ Wis. 2d ____, ____, 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; *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; *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); *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); *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); *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).

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**. Cases 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).

82. **Tapes and transcripts of recorded conversations**. Cases include *State v. Ford*, 2007 WI 138, ____ Wis. 2d ____, 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).

83. **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.

84. **Credibility of hearsay declarant**. The relevant statutory reference is sec. 908.06. Cases include *State v. Smith*, 2005 WI App 152, 284 Wis. 2d 798, 702 N.W.2d 850 (introduction by the state of out-of-court inconsistent statements of the co-actor, for the purpose of rebutting out-of-court statements of the co-actor which were introduced by the defendant pursuant to sec. 908.045(4) when the co-actor refused to testify, did not violate the defendant's constitutional right to confrontation interpreted in *Crawford v. Washington)*; *State v. Manuel*, 2005 WI 75, ¶¶ 71-75, 281 Wis. 2d 554, 591-94, 697 N.W.2d 811; *State v. Evans*, 187 Wis. 2d 66, 74-84, 522 N.W.2d 554 (Ct. App. 1994); *State v. Rochelt*, 165 Wis. 2d 373, 386-87, 477 N.W.2d 659.

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. *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. 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 coworker 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. **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).

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**? Cases include *State v. Warbelton*, 2008 WI App 42, ____ Wis. 2d ____, ____ N.W.2d ____; *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).

94. **Motion in limine**. Cases include *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).

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).

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. **The use of case law from other jurisdictions**. *State v. Muckerheide*, 2007 WI 5, ¶¶ 7, 35-38, 298 Wis. 2d 553, 571-72, 725 N.W.2d 930.

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**.

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. Van Buren*, 2008 WI App 26, ¶¶ 18-19, ____ Wis. 2d ____, ____, 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 A DEFENDANT'S STATEMENT OR PART OF IT.**

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 *Matos v. State*, 899 So. 2d 403 (Fla. 4th DCA 2005) and *Backman v. General Motors Corporation*, 332 Ill. App. 3d 760, 776 N.E.2d 262 (2002).

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