

STATE OF WISCONSIN
Division of Hearings & Appeals

Resource Book for Probation and Parole Revocation Hearings

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Every effort has been taken to assure that the references and citations included in this book are accurate and up-to-date. As in the case of any compilation of reference materials, however, users are cautioned to refer to the original source materials whenever possible to avoid any inadvertent errors or omissions. The editorial comments found in the digest portions of this book are intended to provide a brief summary of the cited cases and are the considered thoughts and opinions of its editors.

Selected excerpts from the Wisconsin Statutes:

227.03(4) Inapplicability of Wis. Stats., Chapter 227

The provisions of this chapter relating to contested cases do not apply to proceedings involving the revocation of aftercare supervision under §48.366(5) or 938.357(5), the revocation of parole, extended supervision or probation, the grant of probation, prison discipline, mandatory release under §302.11 or any other proceeding involving the care and treatment of a resident or an inmate of a correctional institution.

NW (2d) 769 (Ct. App. 1986).

302.11 Mandatory release (New Law)

The warden or superintendent shall keep a record of the conduct of each inmate, specifying each infraction of the rules. Except as provided in subs. (1g), (1m), (1q), (1z), (7) and (10), each inmate is entitled to mandatory release on parole by the department. The mandatory release date is established at two-thirds of the sentence. Any calculations under this subsection or sub. (1q) (b) or (2) (b) resulting in fractions of a day shall be rounded in the inmate's favor to a whole day. December 31, 1999, is not entitled to mandatory release on parole under this section.

302.335 50-day rule

Restrictions on detaining probationers, parolees and persons on extended supervision in county or tribal jail. (1) In this section, "division" means Division of Hearings and Appeals in the Department of Administration. (2) If a probationer, parolee or person on extended supervision is detained in a county jail or other county facility, or in a tribal jail under §302.445, pending disposition of probation, parole or extended supervision revocation proceedings, the following conditions apply:

- (a) The department shall begin a preliminary revocation hearing within 15 working days after the probationer, parolee or person on extended supervision is detained in the county jail, other county facility or the tribal jail. The department may extend, for cause, this deadline by not more than 5 additional working days upon written notice to the probationer, parolee or person on extended supervision and the sheriff, the tribal chief of police or other person in charge of the county facility. This paragraph does not apply under any of the following circumstances:
1. The probationer, parolee or person on extended supervision has waived, in writing, the right to a preliminary hearing.
 2. The probationer, parolee or person on extended supervision has given and signed a written statement that admits the violation.
 3. There has been a finding of probable cause in a felony criminal action and the probationer, parolee or person on extended supervision is bound over for trial for the same or similar conduct that is alleged to be a violation of supervision.

4. There has been an adjudication of guilt by a court for the same conduct that is alleged to be a violation of supervision.
- (b) The division shall begin a final revocation hearing within 50 calendar days after the person is detained in the county jail, other county facility or the tribal jail. The department may request the division to extend this deadline by not more than 10 additional calendar days, upon notice to the probationer, parolee or person on extended supervision, the sheriff, the tribal chief of police or other person in charge of the facility, and the division. The division may grant the request. This paragraph does not apply if the probationer, parolee or person on extended supervision has waived the right to a final revocation.
- (3) If there is a failure to begin a hearing within the time requirements under sub. (2), the sheriff, the tribal chief of police or other person in charge of a county facility shall notify the department at least 24 hours before releasing a probationer, parolee or person on extended supervision under this subsection.
- (4) This section applies to probationers, parolees or persons on extended supervision who begin detainment in a county jail, other county facility or a tribal jail on or after July 1, 1990, except that this section does not apply to any probationer, parolee or person on extended supervision who is in the county jail, other facility or the tribal jail and serving a sentence.

304.06(3) Parole Revocation Hearings

Every paroled prisoner remains in the legal custody of the department unless otherwise provided by the department. If the department alleges that any condition or rule of parole has been violated by the prisoner, the department may take physical custody of the prisoner for the investigation of the alleged violation. If the department is satisfied that any condition or rule of parole has been violated it shall afford the prisoner such administrative hearings as are required by law. Unless waived by the parolee, the final administrative hearing shall be held before a hearing examiner from the Division of Hearings and Appeals in the Department of Administration who is licensed to practice law in this state. The hearing examiner shall enter an order revoking or not revoking parole. Upon request by either party, the administrator of the Division of Hearings and Appeals shall review the order. The hearing examiner may order the taking and allow the use of a videotaped deposition under §967.04(7) to (10). If the parolee waives the final administrative hearing, the secretary of corrections shall enter an order revoking or not revoking parole. If the examiner, the administrator upon review, or the secretary in the case of a waiver finds that the prisoner has violated the rules or conditions of parole, the examiner, the administrator upon review, or the secretary in the case of a waiver, may order the prisoner returned to prison to continue serving his or her sentence, or to continue on parole. If the prisoner claims or appears to be indigent, the department shall refer the prisoner to the authority for indigence determinations specified under §977.07(1).

304.06(3m) Record and Transcripts

The Division of Hearings and Appeals in the Department of Administration shall make either an electronic or stenographic record of all testimony at each probation revocation hearing. The division shall prepare a written transcript of the testimony only at the request of a judge who has granted a petition for judicial review of the revocation decision. Each hearing notice shall

include notice of the provisions of this subsection and a statement that any person who wants a written transcript may record the hearing at his or her own expense.

901.01(4) Rules of Evidence Inapplicable

Chapters 901 to 911, other than ch. 905 with respect to privileges or §901.05 with respect to admissibility, do not apply in the following situations:

- (a) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under §901.04(1).
- (b) *Grand jury; John Doe proceedings.* Proceedings before grand juries or a John Doe proceeding.
- (c) *Miscellaneous proceedings.* Proceedings for extradition or rendition; sentencing, or granting or revoking probation, issuance of arrest warrants, criminal summonses and search warrants; proceedings under §971.14(1)(c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969.
- (d) *Small claims actions.* Proceedings under ch. 799, except jury trials.

973.10(2) Probation Revocation Hearings

If a probationer violates the conditions of probation, the Department of Corrections may initiate a proceeding before the Division of Hearings and Appeals in the Department of Administration. Unless waived by the probationer, a hearing examiner for the division shall conduct an administrative hearing and enter an order either revoking or not revoking probation. Upon request of either party, the administrator of the division shall review the order. If the probationer waives the final administrative hearing, the secretary of corrections shall enter an order either revoking or not revoking probation. If probation is revoked, the department shall:

- (a) If the probationer has not already been sentenced, order the probationer brought before the court for sentence which shall then be imposed without further stay under 973.15; or
- (b) If the probationer has already been sentenced, order the probation to prison, and the term of the sentence shall begin on the date the probationer enters the prison.

973.10(4) Record and Transcripts

The Division of Hearings and Appeals in the Department of Administration shall make either an electronic or stenographic record of all testimony at each probation revocation hearing. The division shall prepare a written transcript of the testimony only at the request of a judge who has granted a petition for judicial review of the revocation decision. Each hearing notice shall include notice of the provisions of this subsection and a statement that any person who wants a written transcript may record the hearing at his or her own expense.

973.155 Sentence Credit

- (1) (a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, “actual days spent in custody” includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
1. While the offender is awaiting trial;
 2. While the offender is being tried; and
 3. While the offender is awaiting imposition of sentence after trial.
- (b) The categories in par. (a) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under §304.06(3) or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.
- (2) After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction. In the case of revocation of probation, extended supervision or parole, the department, if the hearing is waived, or the Division of Hearings and Appeals in the Department of Administration, in the case of a hearing, shall make such a finding, which shall be included in the revocation.
- (3) The credit provided in sub. (1) shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.
- (4) The credit provided in sub. (1) shall include earned good time for those inmates subject to §302.43, 303.07(3) or 303.19(3) serving sentences of one year or less and confined in a county jail, house of correction or county reforestation camp.
- (5) If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation, extended supervision or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person. If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief. This subsection applies to any person, regardless of the date he or she was sentenced.
- (6) A defendant aggrieved by a determination by a court under this section may appeal in accordance with §809.30.

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ABSCONDING

State ex rel. Cutler v. Schmidt, 73 Wis. 2d 620 (1976), 244 N.W. 2d 230 (Wis. 1976)

COMMENT: Uncontroverted testimony at revocation hearing, which established that the parolee violated expressed conditions or terms of parole when he left the state and failed to notify his parole officer of his exact whereabouts until several days later, was sufficient to justify revocation of petitioner's parole.

See *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76 (1976).

State ex rel. Shock v. H&SS Department, 77 Wis. 2d 362, 253 N.W. 2d 55 (1977)

COMMENT:

- (1) There is neither a statutory right, nor a right established in case law, that entitles a probationer, whose supervision was revoked, to bail pending review of the revocation decision.
- (2) Absconding provided a sufficient basis for revocation where probationer jumped bond, left the state without permission, rejected court ordered treatment, changed his name and social security number to evade apprehension, refused to heed a judge's admonition to return to Wisconsin, failed to pay restitution, was gone three years, and his return was involuntary.

"...absconding or not advising the probation agent of whereabouts is a serious probation violation that often goes to the heart of probation supervision. If the agent does not know where the probationer is there can hardly be any supervision."

State ex rel. Solie v. Schmidt. 73 Wis. 2d 76, 242 N.W. 2d 244 (1976)

COMMENT: Solie left the state without permission from his agent, knowing the agent would deny him permission, but told his agent that he was going to Nebraska to find employment and that he planned to return to "get things straightened out."

- (1) "...Under the facts and circumstances of this case, leaving Wisconsin without permission and going to Lincoln, Nebraska, with plans and prospects as nebulous as those described in the record, was a serious violation of probation..." that warranted revocation.
- (2) Probationers/parolees should receive custody credit for time served in jail awaiting the revocation order.

AGENT TESTIMONY IN CRIMINAL PROCEEDINGS

State v. Ingram, 204 Wis. 2d 177, 554 N.W. 2d 833 (Ct.App. 1996)

COMMENT: Parolee, who had been drinking, fled police when traffic stop was attempted and was charged with fleeing an officer. Defendant's parole agent was permitted to testify against the defendant regarding aspects of his supervision, such as his no drink rule. The agents' testimony was evaluated under the relevancy standard [Wis. Stat. §904.03], not the other acts standard [Wis. Stat. §904.04] and was found to be

relevant to offender's motive for fleeing, and more probative than prejudicial. Thus, it was admissible.

AGREEMENT ON DETAINERS

Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401 (1985).

COMMENT: The *Interstate Agreement on Detainers* that is found at *Wis. Stat. §976.05* does not apply to detainers of another jurisdiction for violation of probation or parole. A detainer based on a probation or parole violation charge does not come within the plain language of the *Interstate Agreement on Detainers* in that it is not an "untried indictment."

ALJ

Autonomy

George v. Schwarz, 2000 WI App 72, 242 Wis. 2d 450, 626 N.W. 2d 57 (Ct.App. 2001)

COMMENT: The Division of Hearings and Appeals **IS NOT** a part of the Department of Corrections. The Legislature has not granted the Department any authority to bind the Division to Department rules. Therefore, the Department cannot promulgate and enforce rules that bind the Division of Hearings and Appeals.

Because the Division is independent of the Department, the Administrative Law Judge (ALJ) does not need to follow the guidelines established in the DOC Operations Manual regarding recommended periods of reincarceration. ALJs are not to blindly accept or adopt sentencing or reincarceration recommendations from any particular source.

The court clearly stated that Due Process requires the Division of Hearings and Appeals to be and remain independent of the Department of Corrections.

State ex rel. Lewis v. DH&SS, 89 Wis. 2d 220, 278 N.W. 2d 232 (Ct.App. 1979)

COMMENT: This Court of Appeals decision was rendered when revocation decisions were administratively appealed to the Secretary of the Department of Corrections. The court stated that on an administrative appeal, the Secretary is not bound by an agent's promise not to recommend revocation, but that such a promise should be a factor considered by the Secretary in his determination of whether parole should be revoked. Applying the case to current procedure, the inference is that the Administrative Law Judge or Division Administrator is not bound by any agreement made between an agent and defense counsel/parolee, but that the Administrative Law Judge/Division Administrator should consider such an agreement in determining whether to revoke supervision.

Ex Parte Contact

Ramaker v. State, 73 Wis. 2d 563, 243 N.W. 2d 534 (1976)

COMMENT: Evidence that is submitted *ex-parte* may not be received into the record. However, if the acceptance of such evidence constitutes “harmless error,” the ALJ’s decision to revoke may be sustained.

State ex rel. Gibson v. H&SS Department, 86 Wis. 2d 345, 272 N.W. 2d 395 (Ct.App. 1978)

COMMENT: Administrative Law Judges and Hearing Examiners should be held to the same standard of judicial ethics as judges. Therefore, *ex parte* communications should be avoided while a matter is pending.

The reviewing court has the authority to remand a matter to the Department for the purpose of taking further testimony on behalf of the client, but it may not remand for purposes of allowing the Department another opportunity to supplement the record. The Department is not entitled to a second kick at the can.

ALTERNATIVES TO REVOCATION

Black v. Romano, 471 U.S. 606, 105 S.Ct. 2254, 53 L.W. 4580 (1985)

COMMENT: The Fourteenth Amendment’s Due Process Clause does not generally require a court to consider alternatives to incarceration before revoking probation.

State ex rel. Foshey v. H&SS Dept., 102 Wis. 2d 505, 307 N.W. 2d 315 (Ct.App. 1981)

COMMENT:

- (1) Administrative appeals are reviewed *de novo*.
- (2) The circuit court does not have the authority to release probationers pending revocation either with or without bail.
- (3) Citing to *Van Erman*, the Department must consider the feasibility and availability of Alternatives to Revocation. Merely giving reasons favoring revocation is not enough. Where the record fails to disclose formal consideration of those alternatives, the reviewing court may examine the record and conduct its own inquiry. 519-520.

State ex rel. Plotkin v. H&SS Department, 63 Wis. 2d 535, 217 N.W. 2d 641 (1974)

COMMENT: The only issue raised in this appeal was whether the Department of Health and Social Services abused its discretion in revoking Plotkin’s probation. In affirming the decision to revoke, the court adopted section 5.1 of the American Bar Association’s Standards Relating to Probation. This standard has become known as the “Plotkin Analysis” and must be applied in every case before supervision may be revoked.

§5.1 Ground for and alternatives to probation [or parole] revocation:

- (a) Violation of a condition is both necessary and a sufficient ground for revocation of probation. [The factual determination that a violation of a condition of supervision has occurred triggers the exercise of the revoking authority’s jurisdiction to revoke or not in its discretion.] Revocation followed by imprisonment should not be the disposition, however, unless the court [here the Division of Hearings & Appeals] finds on the basis of the original offense and the intervening conduct of the offender that:

- (i) confinement is necessary to protect the public from further criminal activity by the offender; **or**
 - (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; **or**
 - (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.
- (b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:
- (i) A review of conditions, followed by changes where necessary or desirable [amended rules];
 - (ii) A formal or informal conference with the probationer to re-emphasize the necessity of compliance with conditions [agent counseling];
 - (iii) A formal or informal warning that further violation could result in revocation.

See *Van Ermen v. H&SS Department*, 84 Wis. 2d 57 (1978); *Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254, 53 L.W. 4580 (1985).

Van Ermen v. H&SS Department, 84 Wis. 2d 57 (1978), 267 N.W. 2d 17 (Wis. 1978)

COMMENT:

- (1) The court applied *Plotkin* standards to parole revocation cases.
 - (a) Although the Department is not obligated to try alternatives before seeking revocation, the Department must exercise its discretion by at least considering whether alternatives are available and feasible. Merely setting forth reasons for revocation is not enough.
 - (b) Failure to consider alternatives was not fatal where the record showed consideration of factors which favored the continuance of parole, and where evidence showed the agent and his supervisor met several times to discuss whether revocation was appropriate.
- (2) Violation of a “no drink” rule as sole basis of revocation was sufficient to warrant revocation where parolee’s underlying conviction was alcohol related and there was evidence showing that the parolee was dangerous when intoxicated. The Department’s failure to address an earlier drinking violation does not excuse a later drinking violation.

See *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 708 (Ct.App. 1997).

APPEAL

Writ of Certiorari

State ex rel. McMillian v. Dickey, 132 Wis. 2d 266, 392 N.W. 2d 453 (Ct.App. 1986)

COMMENT: McMillian petitioned the court and obtained a *Writ of Certiorari* in March, 1974, mandating judicial review of his probation revocation. The Department was ordered to file its return to the writ by April 10, 1974. The return failed to include a transcript of McMillian’s final revocation hearing. In June and July, 1974, respectively,

McMillian and his attorneys wrote subsequent letters requesting a copy of the transcript, but none was produced. The Department initially stated that the reporter's notes had been lost, but in a letter dated July 8, 1980, the Department stated that the reporter's notes had been destroyed. Ten years after McMillian's initial petition for a *writ of certiorari*, he still had not received a judicial determination on the merits. In 1984, McMillian filed a *pro se writ of certiorari* asserting that the Department's failure to produce the transcript resulted in a denial of the client's right to due process. The trial court denied the client's requests for relief.

The Court of Appeals stated that the delay was unreasonable and, therefore, violated McMillian's right to due process because: (1) McMillian followed all legal requirements and properly obtained the *writ of certiorari* in a timely fashion, (2) McMillian and his attorneys sent letters to the Department requesting a copy of the records, (3) McMillian could *not* be faulted for the delay as it was caused either by the Department's failure to comply with the command of the writ, or the failure of the circuit court to conduct the review, and (4) the revocation hearing transcript was never produced. As such, there could be no meaningful review of the record.

The Court of Appeals remanded the case to the circuit court with directions to vacate the order revoking McMillian's probation.

BAIL

State ex rel. DH&SS v. Second Jud. Cir. Ct., 84 Wis. 2d 707, 267 N.W. 2d 373 (1978)

COMMENT: The circuit court had no jurisdiction to allow a probationer whose sentence had been withheld to be released on bail while revocation proceedings are pending. *State ex rel. Shock v. H&SS Department*, 77 Wis. 2d 362, 253 N.W. 2d 55 (1977) (circuit court has no authority to allow release on bail for revoked probationer).

COLLATERAL ESTOPPEL

Hughes v. State, 28 Wis. 2d 665 (1965), 137 N.W. 2d 439 (Wis. 1965)

COMMENT: The court sustained a decision to revoke that was based upon "new convictions," even though the "new convictions" were overturned. The record still supported a decision to revoke probation.

State ex rel. Flowers v. H&SS Department, 81 Wis. 2d 376, 260 N.W. 2d 727. (1978)

COMMENT:

- (1) The Department did not violate the double jeopardy clause by commencing a revocation action that alleged conduct for which the defendant was acquitted in an earlier criminal proceeding because revocation hearings are civil matters, not criminal matters.
- (2) The Department is not collaterally estopped from commencing a revocation action alleging conduct for which a defendant was acquitted in a criminal proceeding because there is a higher burden of proof in criminal proceedings.
- (3) A second preliminary hearing is not required for allegations added to an amended notice of violation when a prior preliminary hearing has established probable cause

for the allegations enumerated on the original notice of violation. Preliminary hearings are not required when grounds for detention are established in some other manner, *i.e.* a conviction or guilty plea. The test is whether a parolee received adequate and proper notice of the additional charges prior to the holding of the revocation hearing.

- (4) The Department is not collaterally estopped from pursuing an allegation it could not establish at the preliminary hearing. The Court of Appeals implied that there were circumstances when the Department could be collaterally estopped, but it did not establish the parameters of when the Department is precluded from reinstating a charge that it could not prove at a preliminary hearing.
- (5) Receipt of the notice of violation three days before the final revocation hearing did not prejudice the client when the charges were given at the preliminary hearing.
- (6) A two-month delay in conducting the final revocation hearing was not unreasonable given the specific facts of this case. The delay was due to pending criminal charges.

State ex rel. Leroy v. H&SS Department, 110 Wis. 2d 291, 329 N.W. 2d 229 (Ct.App.1982)

COMMENT: The Department sought revocation of Leroy's parole, asserting that he stabbed Sharon Reed on October 9, 1980. On March 18, 1981, the Department issued a final decision affirming a hearing examiner's decision to not revoke Leroy's parole. Leroy later obtained a criminal conviction, based upon the stabbing of Ms. Reed. The Department commenced a new revocation proceeding, reasserting Ms. Reed's stabbing as the basis for revocation.

- (1) A second hearing may not be commenced merely for the purpose of "shoring up" the record with additional evidence. However, a second hearing may be held on the basis of newly discovered evidence without violating the concept of due process. The judgment of conviction was new evidence that entitled the Department to commence a second revocation hearing.
- (2) For the same reasons, the Department was not collaterally estopped from commencing a second revocation proceeding. "The matters raised in the second hearing were not identical to those raised at the first hearing. The evidence of Leroy's conviction was a new relevant fact to be considered by the examiner. Here, the controlling fact and applicable legal rules have not remained unchanged."
- (3) The hearing examiner's decision to commence without counsel did not violate due process because, a) Leroy was appointed counsel, but the attorney failed to appear, and b) the matters before the hearing examiner were not complicated. The Court cited Leroy as saying, "What type of defense can I put up against a conviction? I was found guilty by a jury and was sentenced by a judge."

State ex rel. Ludtke v. Dept. of Corrections, 215 Wis. 2d 1, 572 N.W. 2d 864 (Ct.App.1997)

COMMENT:

- (1) If parole is revoked, a parolee is not entitled, as a matter of right, to custody credit for time successfully served on parole. See Wis. Stat. §302.11(7)(a).
- (2) Because the parolee is provided with a hearing to determine credit for time served on parole, there is no violation of due process when an Administrative Law Judge denies credit for time successfully served on probation.
- (3) Denial of such credit does not violate the Double Jeopardy Clause because parole is not considered punishment, it is instituted for the purposes of rehabilitation. Further,

parole revocation is a continuing consequence of the original conviction and, as such, cannot form the basis for a claim of double jeopardy.

State v. Spanbauer, 108 Wis. 2d 548, 322 N.W. 2d 511 (Ct.App. 1982)

COMMENT: The court held that a “no revoke” decision in a probation/parole revocation case does not bar a criminal prosecution for the same conduct. The doctrine of “collateral estoppel” does not apply because the issues, rules, and interests in revocation cases are different than they are in a criminal prosecution.

See, *State ex rel. Flowers v. H&SS Department*, 81 Wis. 2d 376 (1978). The revocation decision is not a criminal adjudication.

Also see, *State ex rel. Hanson v. H&SS Dept.*, 64 (Wis. 2d 367 (1974).

State v. Terry, 2000 WI App 250, 239 Wis. 2d 519, 620 N.W. 2d 217 (Ct.App. 2000)

COMMENT: The Administrative Law Judge found insufficient evidence to prove Terry possessed cocaine. Asserting the doctrine of issue preclusion, Terry argued that the State was precluded from charging him criminally with possession of cocaine.

The Court of Appeals held that the doctrine of issue preclusion did not bar the State from bringing criminal charges. The court stated, “...while administrative agency decisions are given preclusive effect between the same parties in some instances, the doctrine of issue preclusion should not be applied to findings made in parole and probation revocation proceedings for three reasons: (1) the executive branch oversees revocation hearings through the Department of Corrections, and the district attorney is not a party...; (2) parole and probation revocation proceedings in this state and criminal trials have critical differences in procedure and function which militate against applying issue preclusion to revocation proceedings; and (3) public policy considerations weigh against applying issue preclusion to revocation proceedings.”

CONDITIONAL RELEASE OF NGI OFFENDER

State v. Jefferson, 163 Wis. 2d 332, 471 N.W. 2d 274 (Ct.App. 1991)

COMMENT: Defendant was found not guilty by reason of mental disease and was committed to DHSS and placed at Mendota Mental Health Institution. He was conditionally released to a community mental health facility. He misbehaved in many, some serious, ways and was removed from the facility. His conditional release was revoked pursuant to Wis. Stat. §971.17(3).

Revocation of conditional release to parole requires the same kind of a hearing that is afforded to probationers and parolees. The court repeated the holding in *State v. Mahone*, 127 Wis. 2d at 370 (1985). Also, the department was not required to consider alternatives to revocation of the defendant’s conditional release, since consideration of alternatives to revocation of the defendant’s conditional release is not a part of the minimum due process to be accorded in such a proceeding.

See *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), for a statement of due process rights to be afforded to a probationer/parolee at a revocation hearing.

See *Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254, 53 L.W. 4580 (1985), for the U.S. Supreme Court's determination that consideration of alternatives to revocation are not constitutionally required.

See *State ex rel. Plotkin v. H&SS Department*, 63 Wis. 2d 535 (1974).

CONDITIONS

State v. Garner, 54 Wis. 2d 100, 194 N.W. 2d 649 (1972)

COMMENT: Offender convicted of non-support; court imposed as condition of probation that offender take his family off county welfare.

The court has the authority to impose conditions which are "appropriate and reasonable" as authorized in *Wis. Stat. §973.09*. Individualization of justice is a tenet of probation system. Probation conditions must be individualized to the offender and were in this case.

State v. Handley, 173 Wis. 2d 838, 496 N.W. 2d 725 (Ct.App. 1993)

COMMENT: Trial court ordered as condition of probation that offender put \$2000 in an account to cover future counseling needs of 15- and 16-year-old sexual assault victims, to be returned with interest if not used. Victims and mom said at sentencing they didn't need counseling and didn't anticipate needing it. There was no evidence at sentencing that the victims needed psychological treatment; order was based upon a recommendation in Presentence investigation only.

Court has broad discretion to impose conditions of probation but exercise of that discretion requires reasoning based on facts in or inferred from the record. The condition was invalid because there were no facts in the record or inferences to support the imposition of the condition. Victims could have later requested modification of conditions if injuries manifested themselves. Didn't reach question of whether condition was restitution and subject to Wis. Stat. §§973.09(1)(b) and 973.20. *Dissent*: Majority wrongly assumes condition is restitution. Condition was reasonable under §973.09(1)(a).

See *State v. Stowers*, 177 Wis. 2d 798 (Ct.App. 1993).

State v. McClinton, 195 Wis. 2d 344, 536 N.W. 2d 413 (Ct.App. 1995)

COMMENT: Some statutes create minimum mandatory periods of confinement and state that the offender is entitled to earn good time. Defendants sentenced under these statutes *must* be allowed to earn good time, even if they are serving their jail term as a condition of probation.

State v. Miller, 175 Wis. 2d 204, 499 N.W. 2d 215 (Ct.App. 1993)

COMMENT: A condition of probation prohibited the defendant from making any telephone calls to unrelated women without his agent's permission, even though his present conviction was for burglary and theft. The court held that the condition was reasonable and appropriate pursuant to the provisions of *Wis. Stat. §973.09(1)(a)* which, in part, says: "any conditions which appear to be reasonable and appropriate..." may be imposed by the court.

State v. Nienhardt, 196 Wis. 2d 161, 537 N.W. 2d 123 (Ct.App. 1995)

COMMENT: The defendant was convicted of making harassing phone calls. On other occasions she was seen in Cedarburg spying on another. The sentencing court ordered the defendant to stay out of Cedarburg. The defendant argued that that condition was not sufficiently related to the underlying conviction. The court disagreed with the defendant and stated that the condition was reasonable and appropriate.

State v. Oakley, 2000 WI 37, 234 Wis. 2d 528, 609 N.W. 2d 786 (2000)

COMMENT: Reversed and Remanded *State v. Oakley*, 226 Wis. 2d 437 (Ct.App. 1999). *Wis. Stat. §973.07* limits a court's means of collecting fines by incarceration to six months jail time. Therefore, where revocation can result in incarceration greater than six months, the court cannot impose, as a condition of probation, a requirement that the defendant pay an old fine.

Note: This case does **not** discuss the Department's authority to impose such a rule as a condition of probation.

Under *Wis. Stat. §973.09(1)(a)*, the circuit court has broad discretion to impose conditions of probation that appear to be reasonable and appropriate. Reasonable and appropriate conditions of probation are those that rehabilitate the offender and protect the interests of society. See *State v. Heyn*, 155 Wis. 2d 621 (1990).

State v. Reagles, 177 Wis. 2d 168, 501 N.W. 2d 861 (Ct.App. 1993)

COMMENT: In an unusual sentence, the court imposed concurrent prison and probation terms and ordered the defendant to serve a "transitional" jail term as a condition of probation to commence upon his release from prison. The court held that such a sentence did not unlawfully infringe upon the authority of the parole board.

State v. Stefanovic, 215 Wis. 2d 310, 572 N.W. 2d 140 (Ct.App. 1997)

COMMENT: The circuit court does not have jurisdiction to order a probationer to serve a stayed period of conditional jail time when the probationer has been formally discharged from probation, i.e. issued a certificate of discharge.

Alcohol

State ex rel. Mulligan v. DH&SS, 86 Wis. 2d 517, 273 N.W. 2d 290 (1979)

COMMENT: The imposition of a no-alcohol rule as a condition of probation was proper in the absence of any showing that the client was a chronic alcoholic whose drinking was

non-volitional and uncontrollable. The client's criminal history was alcohol related and that provided a reasonable basis for the imposition of the rule. *Note:* The court did *not* state that the imposition of the rule would be improper or unconstitutional, even if the client could have shown that he was a chronic alcoholic incapable of controlling his alcohol consumption. The court declined to make any ruling in that regard.

EMP

State ex rel. Macemon v. McReynolds, 208 Wis. 2d 594, 561 N.W. 2d 779 (Ct.App. 1997)

COMMENT: The Department has substantial discretionary authority to develop rules and conditions of parole. Therefore, the Department acted within its authority by requiring Macemon to be placed on electronic monitoring immediately upon his release from prison as a condition of his parole.

Procreation

State v. Oakley, 2001 WI 103, 245 Wis. 2d 447, 629 N.W. 2d 200 (2001)

COMMENT: The Court upheld a condition of probation that required Oakley to refrain from having any more children unless he could prove that he could be financially responsible for the new children and the nine children that he already had. Oakley was on probation for intentionally refusing to support his children.

Psychotropic Medications

Felce v. Fiedler, 974 F.2d 1484 (7th Cir. 1992)

COMMENT: Involuntary administration of psychotropic drugs as a condition of mandatory release parole is permitted only if the state demonstrates that such administration "is medically indicated to accomplish the goals" of parole supervision. 974 F.2d at 1495-96. The demonstration of such a need requires a neutral and independent finding that involuntary administration of the psychotropic drugs is medically indicated.

Rational Relationship To Rehabilitation

Krebs v. Schwartz, 212 Wis. 2d 127, 568 N.W. 2d 26 (Ct.App. 1997)

COMMENT: "Conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." Condition of probation prohibiting sex offender from entering into intimate relationship with any person without first discussing it with and obtaining approval from his agent was both reasonable and not overly broad and did not violate the sex offender's constitutional right to procreate. Condition is rationally related to accused's rehabilitation because it forces him to be honest with others by confronting and admitting to his sexually deviant behavior, and the condition serves to protect the public.

Review Procedure

State ex rel. Taylor v. Linse, 161 Wis. 2d 719, 469 N.W. 2d 201 (Ct.App. 1991)

COMMENT:

- (1) Wis. Stat. §973.09(3)(a) permits courts to review and modify special rules of supervision imposed by the Department.
- (2) The general rules of supervision established by the Department for all probationers are not subject to direct court review, but must be appealed through the administrative procedure established by §DOC 328.11.
- (3) If a court-ordered condition and a general rule conflict, the court condition will prevail because §973.09(1)(a) specifically authorizes the court to impose such conditions.

Sex Offender Registration

In re Joseph E.G., 2001 WI App 29, 240 Wis. 2d 481, 623 N.W. 2d 137 (Ct.App. 2000) WI App 29

COMMENT: *This case only applies to Probation and Parole matters peripherally in that Sex Offender Registration is often a condition of supervision, as well as a requirement in law.* Fifteen-year-old Joseph E.G., was convicted of False Imprisonment-Party To a Crime and ordered to register as a sex offender pursuant to Wis. Stat. §938.34(15m)(bm). He asked to be excused from the registration requirement pursuant to Wis. Stat. §301.45(1m). The circuit court denied the request stating that those convicted of false imprisonment were not excused from the registration requirement. Joseph E.G. appealed claiming the §301.45(1m) violated his right to equal protection.

The court held that the legislature's purpose in drafting Wis. Stat. §301.45(1m) was to craft a narrow exception to mandatory registration for sex offenders in cases of factually consensual sexual contact between minors who, but for the age of the younger child, would have broken no law. The basis for creating separate classes of sex offenders was rational and, therefore, did not violate equal protection. Consequently, Joseph E.B. was obligated to register as a sex offender.

State ex rel. Kaminski v. Schwarz, 2000 WI App 159, 238 Wis. 2d 16, 616 N.W. 2d 148 (Ct.App. 2000) WI App 159

COMMENT: The Department cannot require a sex offender to notify neighbors of his/her convicted sex offender status, nor can an agent divulge a sex offender's status to his neighbors. Wis. Stat. §§301.45 and 301.46 requires the Department to keep sex offender registration information confidential except under circumstances specifically stated in those statutes. Neighbor notification is not one of those exceptions.

Petition for review granted on August 29, 2000.

CONFRONTATION

Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988)

COMMENT: State statute that permitted child witness to testify behind screen, so that a criminal defendant could observe the witness but that witness was shielded from seeing the defendant, violates the Confrontation Clause of the Sixth Amendment. Court leaves open the possibility that exceptions to this rule may exist “when necessary to further an important public policy,” and left open the possibility that in a particular case, such a measure may be constitutional if there are individualized findings that a particular witness needed special protection. See *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, *supra*.

See also *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 60 LW 4094 (1992), where the court held that the Confrontation Clause is not violated upon admission of hearsay that is admissible under a “firmly rooted” exception to the hearsay rule, such as the “excited utterance” exception (e.g. Wis. Stat. §908.03(2)).

See *State v. Thomas*, 150 Wis. 2d 374, 442 N.W. 2d 10 (1989), where the court, in the wake of *Coy v. Iowa* upheld the constitutionality and the application of portions of Wis. Stat. §967.04(7) which provides a procedure in criminal proceedings for videotaping a deposition of a child victim/witness for use at trial upon a particularized showing of need for special protection.

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed 2d 638 (1990)

COMMENT: To meet requirements of the Confrontation Clause, admissible hearsay that is not based in a firmly rooted exception to the hearsay rule must have “particularized guarantees of trustworthiness” and must be so trustworthy that adversarial testing would add little to its reliability. In child abuse prosecutions, factors used to determine trustworthiness guarantees – such as the child’s mental state and the use of terminology unexpected of a child of similar age – must relate to whether the child was particularly likely to be telling the truth when the statement was made.

Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990)

COMMENT: Court ruled that live testimony of a child victim witness by one-way closed circuit television advanced a significant state interest in protecting the child, and did not violate the Confrontation Clause. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them. A State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face an accuser in court. The requisite finding of need for special protection must be case specific. Where such a need is shown, then live testimony by one-way closed circuit television was constitutional.

State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis.2d 214, 640 N.W.2d 527 (Ct. App. 2001)

COMMENT: Simpson, a sex offender, violated the rules of his probation by having sexual contact with a six-year-old girl. The victim was not called as a witness at the final revocation hearing. Instead, the department presented evidence of the victim's hearsay statements to her mother and the police. The ALJ found that the hearsay statements were reliable and used those statements as the basis for a finding that Simpson violated the rules of his probation.

The Court of Appeals held that it was reversible error for the ALJ to receive evidence of the victim's hearsay statements without finding, in the words of *Morrissey v. Brewer*, that there was “good cause for not allowing confrontation.”

In other words, hearsay evidence is generally inadmissible at a final revocation hearing because it deprives an offender of the opportunity to challenge the reliability of the evidence by shielding its source from cross-examination. *Inadmissible hearsay* can be converted to *admissible hearsay* by a finding that there is good cause for not allowing cross-examination. A finding of good cause can be based on a determination that the evidence qualifies for admission under one or more of 24 exceptions to the hearsay rule. See Wis. Stats. §908.03. It can also be based upon a determination that there is good cause to dispense with cross-examination. The latter requires the ALJ to weigh three factors, the relevance of the evidence to a material issue in the case, the reliability of the evidence, and any burdens associated with the production of the witness, including (but not limited to) physical, psychological, and financial burdens.

The ALJ must balance the reliability of the evidence against the burden of producing the source for cross-examination. At a minimum, there must be a determination that the evidence is reliable and the proponent has some reasonable explanation for not calling the source as a witness. As the reliability of the hearsay increases, the need to justify the source's absence decreases but never to the point where no justification is required. Beyond this, the Court's opinion offers little guidance on what combination of circumstances would warrant a determination that there is good cause to dispense with cross-examination if the proffered testimony does not fall within one of the exceptions to the hearsay rule (including the residual exception) enumerated in Wis. Stats. §908.03

An ALJ has two options when confronted with hearsay evidence that is inadmissible under this decision. The ALJ may exclude the evidence or give the offender an opportunity for cross-examination at an adjourned hearing.

State v. Ballos, 230 Wis. 2d 495, 620 N.W. 2d 177 (1999)

COMMENT: “Generally, when evidence is admissible under a firmly rooted hearsay exception, the Confrontation Clause has been satisfied, and no further showing of particularized guarantees of trustworthiness is required. Such evidence may be excluded, however, ‘if there are unusual circumstances warranting its exclusion.’”

State v. Gilbert, 109 Wis.2d 501, 326 N.W.2d 744 Wis. (1982)

COMMENT: Mother charged with crimes against two children. Ten-year-old daughter-victim subpoenaed to testify against mother at preliminary hearing. Circuit court quashed subpoena to compel testimony.

Child had no statutory, constitutional or common law privilege not to testify. Circuit Court had no authority to quash subpoena to compel testimony on grounds that subpoena was oppressive or unreasonable. That only applies to subpoenas to produce documents.

Adversarial system depends on virtually everybody testifying as needed. However, we should be sensitive and try to protect victims. Those closest to the proceedings can best devise ways to do this, case by case.

See *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 60 LW 4094 (1992); see also, *State v. Sorenson*, 143 Wis.2d 226 (1988).

Child Witness And Hearsay

State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W. 2d 890 (1975)

COMMENT: Harris was being supervised in Tennessee, under the provision of the Uniform Act for Out-of-State Parolee Supervision; State Compacts. He violated the terms of his probation by sexually assaulting his five-year-old stepson. Harris was returned to Wisconsin where his preliminary hearing and final revocation hearing were held. The child did not testify at the hearing, but his statements were brought into evidence through his mother's testimony. The court ruled as follows:

- (1) Failure to hold preliminary and final revocation hearing in the state where the violation was committed violated due process *in this case* because witnesses who could provide exculpatory testimony were all located in Tennessee. Without these witnesses, Harris had only his word upon which to rely. Therefore, live testimony from those exculpatory witnesses was necessary.
 - If a witness's testimony is cumulative or merely provides character evidence, their live testimony is not required and the hearings need not be held in the state where the violation took place.
- (2) The admissibility of polygraphs is subject to the discretion of the hearing examiner. In order for polygraphs to be admitted, defense counsel or the probationer/parolee must give written consent to the polygraph's admission. The opposing party has the right to cross-examine the person who administered the polygraph test about their experience and the conditions under which the test was given. The court cited *State v. Stanislavski*, 62 Wis. 2d 730 (1974).

Note: In *State ex rel. Ramy*, the court of Appeals stated polygraph results may not be used.

- (3) One may apply a more liberal interpretation of what constitutes an excited utterance when the victim of a sexual assault is a young child. Given the nature of the charge and the young age of the child, the Court considered the non-production of the boy to be reasonable. In this case, the child's well being constituted good cause for non-production and superceded the probationer's right to confrontation.

For more information on hearsay, see *Gagnon v. Scarpelli*, 411 U.S. 776, 93 S.Ct. 1756 (1973), *Egerstaffer v. Israel*, 756 F.2d 1231 (7th Cir. 1978).

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reliable and used those statements as the basis for a finding that Simpson violated the rules of his probation.

The Court of Appeals held that it was reversible error for the ALJ to receive evidence of the victim's hearsay statements without finding, in the words of *Morrissey v. Brewer*, that there was "good cause for not allowing confrontation."

In other words, hearsay evidence is generally inadmissible at a final revocation hearing because it deprives an offender of the opportunity to challenge the reliability of the evidence by shielding its source from cross-examination. *Inadmissible hearsay* can be converted to *admissible hearsay* by a finding that there is good cause for not allowing cross-examination. A finding of good cause can be based on a determination that the evidence qualifies for admission under one or more of 24 exceptions to the hearsay rule. See Wis. Stats. §908.03. It can also be based upon a determination that there is good cause to dispense with cross-examination. The latter requires the ALJ to weigh three factors, the relevance of the evidence to a material issue in the case, the reliability of the evidence, and any burdens associated with the production of the witness, including (but not limited to) physical, psychological, and financial burdens.

The ALJ must balance the reliability of the evidence against the burden of producing the source for cross-examination. At a minimum, there must be a determination that the evidence is reliable and the proponent has some reasonable explanation for not calling the source as a witness. As the reliability of the hearsay increases, the need to justify the source's absence decreases but never to the point where no justification is required. Beyond this, the Court's opinion offers little guidance on what combination of circumstances would warrant a determination that there is good cause to dispense with cross-examination if the proffered testimony does not fall within one of the exceptions to the hearsay rule (including the residual exception) enumerated in Wis. Stats. §908.03

An ALJ has two options when confronted with hearsay evidence that is inadmissible under this decision. The ALJ may exclude the evidence or give the offender an opportunity for cross-examination at an adjourned hearing.

State v. Gerald L.C., 194 Wis. 2d 549, 535 N.W. 2d 777 (Ct.App. 1995)

COMMENT: An out of court statement made to police, two weeks after the incident, by the fourteen-year-old daughter of the defendant charged with sexually assaulting her, was admitted at a preliminary hearing, as an excited utterance.

The out of court statement should not have been admitted as an excited utterance, based on three factors to be used to determine when a child makes an excited utterance. The factors are: (1) Whether the child is under ten years old; (2) whether the time between the incident and the child's report is less than a week; and (3) whether the child first reports the incident to his/her mother. Her statement also does not qualify for admission under the residual exception [Wis. Stat. §908.03(24)], based on the Sorenson factors, restated in *State v. Jagielski*, 161 Wis. 2d 67 (1991). All this is in spite of the court's recognition of the "unusually compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to express themselves in court when the child and the perpetrator are the sole witnesses." See *State v. Sorenson*, 143 Wis. 2d (1988) at 243.

State v. Gollon, 115 Wis. 2d 592, 340 N.W. 2d 912 (Ct.App. 1983)

COMMENT: In criminal trial, out of court statement of two six-year-old girls who were victims of sexual assault by defendant were admitted as evidence.

Trial court properly exercised discretion in admitting girls' out of court statements under excited utterance exception, based on timing of statement and age of children.

But this use of an out of court statement violated the confrontation clause. To satisfy confrontation clause prosecution must either produce or demonstrate unavailability of declarant whose statement it wishes to use against accused, and then show that statement bears indicia of reliability.

When confrontation clause requires testimony, courts can protect child victim-witness in sexual assault cases from aggressive cross-examination and alter courtroom procedures to limit harm to child.

State v. Hanna, 163 Wis. 2d 193, 471 N.W. 2d 238 (Ct.App. 1991)

COMMENT: Four-year-old girl victim of sexual assault by adult female babysitter was almost totally unresponsive to questions at the preliminary hearing. She was declared unavailable as a witness and her out-of-court statements to her mother and grandmother were admitted. The girl was declared unavailable to testify at trial based on similar behavior at a motion hearing. Remanded the proceeding back to the trial court for a new trial.

Witness's apparent inability to testify truthfully or communicate effectively was not a basis for excluding her testimony. It goes to credibility and weight of evidence.

See *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 60 LW 4094 (1992).

State v. Hanson, 149 Wis. 2d 474, 439 N.W. 2d 133 (Wis. 1989)

COMMENT: Five-year-old sexual assault victim testified at preliminary hearing. Unclear whether she understood difference between "truth" and "lie."

Young child does not have to be formally "sworn." Purpose of oath is to stimulate truthfulness, not to exclude witnesses.

Trial court erred as a matter of law in striking the testimony of child at preliminary hearing, since court exceeded its authority in determining the competence of the child to testify. Competency is no longer the test for the admission of witness testimony. The court should have taken the child's testimony for what it appeared to be worth and dealt with the deficiency in her testimony by assessing her credibility, an issue to be determined by fact finder in arriving in decision on merits of the case.

Court cautions judges to be sensitive to children who may have useful information but are easily frightened and confused in a courtroom setting, specifically by avoiding asking them questions that make no sense, even to adults.

See *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 60 LW 4094 (1992).

State v. Jagielski, 161 Wis. 2d 67, 467 N.W. 2d 196 (Ct.App. 1991)

COMMENT: In trial resulting in conviction for sexual assault of defendant's four-year-old step-daughter, court admitted child's out of court statement to social worker and excluded evidence that, in the same statement to the social worker, she accused other men of similar crimes. Defendant was convicted and appealed.

State v. Sorenson, 143 Wis. 2d 226, 243 (1988) stated five factors to be considered in admitting a child's statements under the residual exception [Wis. Stat. §908.03(24)] to the hearsay rule: (1) attributes of child, including age; (2) person to whom statements were made; (3) circumstances of statement; (4) content of statement; and (5) corroborating evidence. Based on those factors, the child's statement was properly admitted in this case.

Exclusion of evidence that child accused other men was abuse of discretion. In rare cases, defendant has right to evidence related to prior sexual assault of victim, in spite of rape shield law. The purpose of that law makes it inapplicable to a child this young.

See *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 60 LW 4094 (1992).

State v. Nelson, 138 Wis. 2d 418, 406 N.W. 2d 385 (Wis. 1987)

COMMENT: The court finds that statements made by a four-year-old sexual assault victim to her therapist are admissible under the "medical examination" exception to the hearsay rule. See *Wis. Stat. §908.03(4)*.

In *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 60 LW 4094 (1992), the U.S. Supreme Court held that the Confrontation Clause is not offended when hearsay is admitted under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule, without a showing that the declarant was unavailable.

See also *Egerstaffer v. Israel*, 726 F.2d 1231 (7th Cir. 1984).

State v. Oliver, 161 Wis. 2d 140, 467 N.W. 2d 211 (Ct.App. 1991)

COMMENT: The court uses the analytical framework in *State v. Sorenson*, 143 Wis. 2d 226 (1988), a case of sexual abuse, to uphold the use of hearsay in a case where a four-year-old boy was physically abused.

And see, *Egerstaffer v. Israel*, 726 F.2d 1231 (7th Cir. 1984).

State v. Sorenson, 143 Wis. 2d 226, 421 N.W. 2d 77 (1988)

COMMENT: In criminal proceeding dealing with charges of sexual assault, a child victim's statements made to social worker possessed sufficient guarantees of trustworthiness to be admissible at preliminary hearing under residual hearsay exception. There was no evidence in the record of deliberate fabrication on the part of the child victim, the social worker was experienced in counseling and child sexual abuse cases, the social worker had no possible motive to fabricate or distort statements made to her, the victim's statements were sufficiently contemporaneous to be considered reliable, the statements established knowledge well beyond ordinary familiarity of a child her age, and

other circumstantial evidence corroborated the veracity of the child victim's statements. See *Wis. Stat. §§908.045(1), (4) and (6)*.

State v. Street, 202 Wis. 2d 533, 551 N.W. 2d 830 (Ct.App. 1996)

COMMENT: The Court of Appeals upheld the use of videotaped depositions of child witnesses in a criminal trial. According to the court, "A video-taped deposition under Sec. 967.04(7), Stat., is the functional equivalent of in-court testimony, with the exceptions that the jury is viewing taped testimony rather than live testimony and the defendant is confronting the witnesses prior to trial rather than at trial."

The Court of Appeals also held that it was permissible for the state to use a screen to keep the child witnesses outside the Defendant's view, but within sight of the defendant's attorney, because there was uncontradicted evidence that the children would be traumatized by testifying face-to-face with Street.

State v. Tarantino, 157 Wis. 2d 199, 458 N.W. 2d 582 (Ct.App. 1990)

COMMENT: Applies §908.08 as to videotaped statements of children. (Section 908.08(1) is expressly applicable to parole and probation revocation hearings.)

State v. Thomas, 144 Wis. 2d 876, 425 N.W. 2d 641 (1988)

COMMENT: The trial court did not violate the defendant's Sixth Amendment right to confrontation when it allowed the State to submit the videotaped deposition of a Child Sexual Assault Victim. Nor, did the trial court violate the client's right to confrontation by requiring the defendant to sit behind screen so neither he nor the child could directly view one another.

The Court reasoned: (1) The defendant and his attorney were present at the deposition, and were given an opportunity to ask the child questions; (2) the child was unable to give effective testimony in the presence of the defendant, which was demonstrated at the preliminary hearing; (3) the child was very young – eight years old; and (4) the State has a compelling interest in preventing further traumatization of the child by the legal process.

Note: The court did state that it is preferable to have face-to-face confrontation between the defendant and accuser, but this preference must be balanced against what is in the best interest of the child. Decisions to take testimony outside the immediate presence of the defendant must be made on a case-by-case basis.

State v. Thomas, 150 Wis. 2d 374, 442 N.W. 2d 374 (1989)

COMMENT: A child's videotape deposition under *Wis. Stat., §967.04(7)* is the functional equivalent of live testimony, so all the essential protections of the confrontation clause – cross-examination, observation of witness demeanor, testimony under oath – were provided.

The United States Supreme Court decision in *Coy v. Iowa*, 108 S.Ct. 2798 (1988), recognizes that there "may be exceptions to 'face-to-face' confrontation" with a child

witness “when exceptions are found to be necessary to protect child witnesses from the trauma of usual courtroom testimony.”

State v. Wachsmuth, 166 Wis. 2d 1014, 480 N.W. 2d 842 (Ct.App. 1992)

COMMENT: The trial court did not violate Andrew Wachsmuth’s Sixth Amendment right to confrontation by allowing the videotaped deposition of the five-year-old victim to be used at trial.

The Court of Appeals reasoned: (1) The young age of the child; (2) the child had testified in previous court proceedings – it would pose an unreasonable hardship upon the child to testify again; (3) the child had testified in the trial of a co-defendant, Donald Wachsmuth; (4) the defendant and victim were face-to-face during the deposition; (5) defense counsel was able to ask the child questions during the deposition; and (6) the jury was able to view and judge the child’s demeanor on the video tape.

CONSECUTIVE PROBATION

Grobarchik v. State, 102 Wis. 2d 461, 307 N.W. 2d 170 (Wis. 1981)

COMMENT: When probation is made consecutive to a prison sentence, the probation period starts when the prison sentence is discharged. This may include a period in which the person is on parole supervision for that sentence. Upon ordering probation consecutive to a prison sentence, a court does not have the authority to order that the probation period commence upon parole release, because the parolee continues to serve the prison sentence while on parole.

COUNSEL

Effective Assistance

State v. Neave, 117 Wis. 2d 359, 344 N.W. 2d 181 (1984)

COMMENT: Fairness requires that a **criminal** defendant have an interpreter where needed in order to communicate with counsel, cross-examine witnesses, and make the entire proceeding comprehensible. Although this is a **criminal** matter, revocation hearings should require no less.

Right To

State ex rel. Cresci v. Schmidt, 62 Wis. 2d 400, 215 N.W. 2d 361 (1974)

COMMENT: In this case a hearing examiner did not permit an attorney, retained by the probationer, to assist the probationer at the final revocation hearing. The Supreme Court stated that parolees and probationers do not have an unqualified *constitutional* right to counsel. A determination as to whether the State is required to provide counsel should be made by an examiner on a case-by-case basis, taking into consideration the complexity of the case and the parolee/probationer’s ability to speak for himself.

If a request for counsel is made, Due Process requires the state to honor the request for counsel under the following circumstances: (1) The parolee/probationer denies committing the violation, or (2) if the violation is a matter of public record or is uncontested, there are substantial reasons, which justified or mitigated the violation, and the reasons are complex or otherwise difficult to develop or present.

If a request for counsel is denied, the reasons for the denial should be stated in the record.

Note: **HA 2.05(3)** creates an unqualified right to counsel at a revocation hearing. This does not, however, require the State provide counsel in every case.

The Department is required under *Wis. Stat. §304.06 et. Seq.*, to refer persons who appear to be indigent to the public defender under Wis. Stat. Chapter 977.

See also *Gagnon v. Scarpelli*, 411 U.S. 778, S.Ct. 1756 (1973).

Substitution Of

Phifer v. State, 64 Wis. 2d 24, 218 N.W. 2d 354 (1974)

COMMENT: In a criminal proceedings, the court set forth criteria for justifiable delay when substituting attorneys.

See, *State v. Robinson*, 145 Wis. 2d 273, 278, 426 N.W. 2d 606 (1988) (mere disagreement over trial strategy does not constitute good cause to allow appointed counsel to withdraw; “In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict.”).

State ex rel. Johnson v. Cady, 50 Wis. 2d 540, 185 N.W. 2d 306 (1971)

COMMENT:

- (1) Due process requires a limited hearing to allow probationers and parolees to be confronted with their revocation and to be heard. It must be a factual hearing relating to the grounds for revocation. The hearing need not be a formal, “trial-type” hearing and the technical rules of evidence need not be observed. *Note:* The court did not enumerate any specific procedural requirements.
- (2) The right to review of a revocation hearing is by *certiorari* directed to the court of conviction. The scope of review is limited to whether the division’s action was arbitrary and capricious. And represented its will and not its judgment. The probationer/parolee has the burden of proof, which is by a preponderance of the evidence.
- (3) A statute that authorized disparate procedural treatment between probationers in counties with populations greater than 500,000 and those in counties with populations less than 500,000 did not violate Equal Protection because the classifications were not irrational or arbitrary. Differences in procedures based on geographic areas are not *per se* unconstitutional.

- (4) There is no constitutional right to counsel. *Note:* Later cases contain further discussion regarding conditions under which counsel is required. Wis. Admin. Code HA2.05(3) creates an unqualified right to counsel at revocation hearings.

State ex rel. Leroy v. H&SS Department, 110 Wis. 2d 291, 329 N.W. 2d 229 (Ct.App. 1982)

COMMENT: The Department sought revocation of Leroy's parole, asserting that he stabbed Sharon Reed on October 9, 1980. On March 18, 1981, the Department issued a final decision affirming a hearing examiner's decision to not revoke Leroy's parole. Leroy later obtained a criminal conviction, based upon the stabbing of Ms. Reed. The Department commenced a new revocation proceeding, reasserting Ms. Reed's stabbing as the basis for revocation.

- (1) A second hearing may not be commenced merely for the purpose of "shoring up" the record with additional evidence. However, a second hearing may be held on the basis of newly discovered evidence without violating the concept of due process. The judgment of conviction was new evidence that entitled the Department to commence a second revocation hearing.
- (2) For the same reasons, the Department was not collaterally estopped from commencing a second revocation proceeding. "The matters raised in the second hearing were not identical to those raised at the first hearing. The evidence of Leroy's conviction was a new relevant fact to be considered by the examiner. Here, the controlling fact and applicable legal rules have not remained unchanged."
- (3) The hearing examiner's decision to commence without counsel did not violate due process because, a) Leroy was appointed counsel, but the attorney failed to appear, and b) the matters before the hearing examiner were not complicated. The Court cited Leroy as saying, "What type of defense can I put up against a conviction? I was found guilty by a jury and was sentenced by a judge."

State ex rel. Mentek v. Schwarz, 2000 WI App 96, 235 Wis. 2d 143, 612 N.W. 2d 746 (Ct.App. 2000)

COMMENT: On administrative appeal, a probationer may be assisted by counsel, but there is no due process right or conditional right to appointed counsel or effective assistance of counsel. The established case law only provides a conditional guarantee of counsel at hearing (the court ultimately found Mentek's claim moot because he failed to exhaust the available administrative remedies).

- (1) Wisconsin and federal constitutional law do not recognize a right to appointed counsel, nor by extension a right to effective assistance of counsel, on an administrative appeal of a probation revocation decision.
- (2) Wis. Admin. Code HA2.05(3)(f) creates a right to counsel at hearing, but does not provide a concomitant right to counsel on administrative appeal.

State ex rel. Mentek v. Schwarz,), 2001 WI 32, 242 Wis. 2d 94, 624 N.W. 2d 150 (2001)

COMMENT: The Supreme Court reversed and remanded *State ex rel. Mentek v. Schwarz*, 2000 WI App 96, stating Wis. Stat. §801.02(7) does not apply to a petition for a writ of certiorari seeking judicial review of a revocation of supervision. The Supreme Court also held that a probationer/parolee is not required to exhaust all administrative remedies before seeking circuit court review of a decision to revoke supervision.

Note: The Supreme Court **did not** reverse the findings of the Court of Appeals regarding the absence of the right to counsel pending an administrative appeal. However, Justice Abrahamson stated in her concurring opinion that the right to counsel extended to the administrative appeal process.

CREDIBILITY OF WITNESS

State v. Haseltine, 120 Wis. 2d 92, 352 N.W. 2d 673 (Ct.App. 1984)

COMMENT: Defendant charged with sexual assault of teenage daughter claimed protection of rape shield law and argued that psychiatrist's expert testimony that the victim-witness was telling the truth should not have been admitted.

The rape shield law serves to exclude evidence regarding the past sexual acts of victims, not defendants. Evidence of the defendant's other acts of sexual assault against family members was properly admitted.

The victim-witness was competent to testify. No witness, expert or other, should ever give testimony that another competent witness is telling the truth. That is for the jury to decide. The psychiatrist said there was "no doubt whatsoever" the girl was a victim of incest. That evidence should not have been admitted and to admit it was not harmless error because the victim-witness's credibility was so important in the case.

State v. Hollingsworth, 160 Wis. 2d 883, 467 N.W. 2d 555 (Ct.App. 1991)

COMMENT: At a child abuse trial the court rejected the testimony of the expert witness, the investigating social worker. The social worker was qualified by years of relevant experience, rather than by formal education, to give an opinion about the mother's parenting skills and intelligence. There was no factual basis for excluding the opinion, but the error was harmless.

See *State v. Sorenson*, 143 Wis. 2d 228 (1988).

Co-Actor

State ex rel. Evanow v. Seraphim, 40 Wis. 2d 223, 228 (1968), 161 N.W. 2d 369 (1968)

COMMENT: When a participant in a crime admits his own participation and implicates another, an inference may be reasonably drawn that he is telling the truth, even if the participant has a long criminal history.

CUSTODY

State v. Zimmerman, 248 Wis. 2d 370, 635 N.W. 2d 864 (2001)

COMMENT: The defendant, Zimmerman, was taken into custody by a probation/parole agent. Mid-transport, Zimmerman ran away. The Court of Appeals held that, "the escape statute unambiguously excludes from the definition of 'actual custody' the physical custody of probation and parole officers." Therefore, Zimmerman could not be charged with criminal escape.

DEPARTMENT OF CORRECTIONS

Records

State ex rel. Prellwitz v. Schmidt, 73 Wis. 2d 35, 242 N.W. 2d 227 (1976)

COMMENT: Held that the Bureau of Community Corrections records are "public records and reports" under provision of Wis. Stat. §908.03(8), and are, therefore, admissible at revocation hearings. This case made its way into the federal court system and emerged therefrom as *Prellwitz v. Berg*, 578 F.2d 190 (7th Cir. 1978). The Federal District Court affirmed the holdings of the Wisconsin Supreme Court.

DISCHARGE

State ex rel. Rodriguez v. DH&SS, 133 Wis.2d 47, 393 N.W.2d 105 (Ct.App.,1986)

COMMENT: Rodriguez was convicted of child abuse and battery on April 22, 1981. The court imposed and stayed a four-year sentence and placed Rodriguez on probation for two years. The court ordered the probationary period to run consecutively to a sentence Rodriguez was serving on an unrelated offense. Rodriguez's sentence on the unrelated offense discharged on April 6, 1985. At that time, Rodriguez's agent was

unaware of the consecutive probationary period imposed for child abuse/battery conviction and he told Rodriguez that he had been discharged from supervision. The agent did not discover his error until May 20, 1985. The agent contacted Rodriguez, informed him of the error, and ordered Rodriguez to return to the probation/parole office. Rodriguez did not report and subsequently battered Alice Gonzalez. The Department revoked Rodriguez's probation.

- (1) The court stated that Rodriguez could not claim that he was unaware of his probationary term because the judgment of conviction clearly stated that the probationary term was to be served consecutively to the sentence imposed in the unrelated case. Further, Rodriguez did not receive a discharge certificate for the child abuse/battery conviction. Therefore, the Department retained jurisdiction over Rodriguez.
- (2) A probationer cannot be bound by specifically tailored rules that are unsigned. However, unsigned rules did not preclude revocation in this case because:
 - (a) Wis. Stat. §973.10(1), placed a probationer under the control of the department "under conditions set by the court and rules and regulations established by the department." Thus, even without signed rules, Rodriguez still had to abide, as a matter of law, with departmental regulations prohibiting conduct which is in violation of state statute.
 - (b) Some conditions of probation are so essential that they automatically inhere to the concept of probation. Adherence to criminal laws is such a condition. Citing *Wagner v. State*, 89 Wis.2d 70 (1979).

See *In re G.G.D. v. State*, 97 Wis.2d 1 (1980), for a discussion relating to juvenile probation, the rules of supervision and revocation.

DIVISION'S AUTHORITY TO CONDUCT FINAL HEARING

State ex rel. Bisser v. Percy, 97 Wis. 2d 702, 295 N.W. 2d 179 (Ct.App. 1980)

COMMENT: (1) Revocation of Parole does not constitute double jeopardy because it is a continuing consequence of the original conviction for which parole was granted; (2) extension of a parolee's discharge date/forfeiture of good time does not violate the separation of powers doctrine. Specifically, the Department, an executive agency, does not usurp judicial authority by ordering the forfeiture of good time when a parolee's supervision is revoked. Once a defendant is sentenced, the judicial process terminates, and executive authority is exercised through administrative agencies.

State v. Burchfield, 230 Wis. 2d 348, 602 N.W. 2d 154 (Ct.App. 1999)

COMMENT: The sentencing court revoked Burchfield's probation and ordered him to commence serving a sentence that had previously been imposed and stayed. Citing *State v. Horn*, 226 Wis. 2d 637 (1999), the court of appeals held that the sentencing court does not have the authority to revoke probation.

State v. Horn, 226 Wis. 2d 637, 594 N.W. 2d 772 (1999)

COMMENT: Horn argued that Wis. Stat. §973.10(2), which grants administrative authority to revoke probation/parole, was unconstitutional because it violated the separation of powers doctrine. The Court held that, "...administrative revocation of probation, as provided in Wis. Stat. §973.10(2), falls within an area of shared powers. Horn has failed to show beyond a reasonable doubt that the legislative delegation of probation revocation to the executive branch unduly burdens or substantially interferes with the judiciary's constitutional function to impose criminal penalties. The judiciary retains authority to impose a sentence on the convicted defendant or to impose probation and withhold or stay a sentence. Therefore, Sec. 973.10(2) is constitutional."

The circuit court does not have the statutory authority to revoke probation.

DUE PROCESS

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973)

COMMENT: The due process standards applicable to parole revocations established in *Morrissey v. Brewer*, 408 U.S. 471 (1972) apply also to probation revocation hearings.

As to the right to counsel in revocation hearings, the Court held that in some circumstances the right to counsel may be required by due process, and in others not required, and that the determination may be made on a case by case basis. The Court predicted that "the presence and participation of counsel will probably be both undesirable and unnecessary in most revocation hearings." Note: Under Wis. Admin. Code §HA 2.05(3)(f) probationers and parolees have the right to assistance of counsel at revocation hearings.

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972)

COMMENT: This is the seminal parole revocation case. The U.S. Supreme Court declared the minimum due process standards for parole revocation hearings as follows:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of the evidence to be used against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the fact finders as to evidence relied on and reasons for revoking. 408 U.S. at 789, 92 S.Ct. at 2609.

See *Gagnon v. Scarpelli*, 411 U.S. 778, *supra.*, for application of the same standards to probation revocation hearings.

State ex rel. Johnson v. Cady, 50 Wis. 2d 540, 185 N.W. 2d 306 (1971)

COMMENT:

- (1) Due process requires a limited hearing to allow probationers and parolees to be confronted with their revocation and to be heard. It must be a factual hearing relating to the grounds for revocation. The hearing need not be a formal, “trial-type” hearing and the technical rules of evidence need not be observed. *Note:* The court did not enumerate any specific procedural requirements.
- (2) The right to review of a revocation hearing is by *certiorari* directed to the court of conviction. The scope of review is limited to whether the division’s action was arbitrary and capricious. And represented its will and not its judgment. The probationer/parolee has the burden of proof, which is by a preponderance of the evidence.
- (3) A statute that authorized disparate procedural treatment between probationers in counties with populations greater than 500,000 and those in counties with populations less than 500,000 did not violate Equal Protection because the classifications were not irrational or arbitrary. Differences in procedures based on geographic areas are not *per se* unconstitutional.
- (4) There is no constitutional right to counsel. *Note:* Later cases contain further discussion regarding conditions under which counsel is required. Wis. Admin. Code HA2.05(3) creates an unqualified right to counsel at revocation hearings.

State ex rel. Leroy v. H&SS Department, 110 Wis. 2d 291, 329 N.W. 2d 229 (Ct.App. 1982)

COMMENT: The Department sought revocation of Leroy’s parole, asserting that he stabbed Sharon Reed on October 9, 1980. On March 18, 1981, the Department issued a final decision affirming a hearing examiner’s decision to not revoke Leroy’s parole. Leroy later obtained a criminal conviction, based upon the stabbing of Ms. Reed. The Department commenced a new revocation proceeding, reasserting Ms. Reed’s stabbing as the basis for revocation.

- (1) A second hearing may not be commenced merely for the purpose of “shoring up” the record with additional evidence. However, a second hearing may be held on the basis of newly discovered evidence without violating the concept of due process. The judgment of conviction was new evidence that entitled the Department to commence a second revocation hearing.
- (2) For the same reasons, the Department was not collaterally estopped from commencing a second revocation proceeding. “The matters raised in the second hearing were not identical to those raised at the first hearing. The evidence of Leroy’s conviction was a new relevant fact to be considered by the examiner. Here, the controlling fact and applicable legal rules have not remained unchanged.”
- (3) The hearing examiner’s decision to commence without counsel did not violate due process because, a) Leroy was appointed counsel, but the attorney failed to appear, and b) the matters before the hearing examiner were not complicated. The Court cited Leroy as saying, “What type of defense can I put up against a conviction? I was found guilty by a jury and was sentenced by a judge.”

State ex rel. R.R. v. Schmidt, 63 Wis. 2d 82, 216 N.W. 2d 18. (1974)

COMMENT:

- (1) There is no difference between parole revocation and the revocation of juvenile aftercare with regard to due process requirements. Therefore, a juvenile should be

afforded a copy of the hearing examiner's report and an opportunity to object in an administrative appeal.

- (2) A juvenile has no statutory or constitutional right to oral argument in an administrative appeal. The Wisconsin Administrative Procedure Act does not provide such a right.
- (3) Wis. Stat. §48.78 cannot be used to prevent a juvenile's access to a hearing examiner's report. As stated above, due process requires the juvenile to be given a copy of the hearing examiner's report and recommendations that are filed subsequent to an administrative aftercare revocation hearing.

State v. McKinney, 168 Wis. 2d 349, 483 N.W. 2d 595 (Ct.App. 1992)

COMMENT: The constitutional and statutory right to a prompt court appearance after a warrantless arrest *does not* apply to probation holds, even if the hold is based on allegations of criminal conduct and a criminal complaint is subsequently filed.

Notice

In re Commitment of Keith Alan Van Bronkhorst, 2001 WI App 190, 247 Wis. 2d 247, 633 N.W. 2d 236 (Ct.App. 2001)

COMMENT: This case deals with a revocation of supervision under Chapter 980. However, the court applied the due process standards used in probation/parole revocation cases to Chapter 980 revocation proceedings. Citing *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580 (1982), the court stated that a revocation of supervision *cannot* be based upon a violation that is not alleged in the petition (Notice of Violation). To do so would be a violation of due process, because the offender would not have sufficient notice to prepare his/her defense.

State ex rel. Flowers v. H&SS Department, 81 Wis. 2d 376, 260 N.W. 2d 727. (1978)

COMMENT:

- (1) The Department did not violate the double jeopardy clause by commencing a revocation action that alleged conduct for which the defendant was acquitted in an earlier criminal proceeding because revocation hearings are civil matters, not criminal matters.
- (2) The Department is not collaterally estopped from commencing a revocation action alleging conduct for which a defendant was acquitted in a criminal proceeding because there is a higher burden of proof in criminal proceedings.
- (3) A second preliminary hearing is not required for allegations added to an amended notice of violation when a prior preliminary hearing has established probable cause for the allegations enumerated on the original notice of violation. Preliminary hearings are not required when grounds for detention are established in some other manner, *i.e.* a conviction or guilty plea. The test is whether a parolee received adequate and proper notice of the additional charges prior to the holding of the revocation hearing.
- (4) The Department is not collaterally estopped from pursuing an allegation it could not establish at the preliminary hearing. The Court of Appeals implied that there were circumstances when the Department could be collaterally estopped, but it did not

establish the parameters of when the Department is precluded from reinstating a charge that it could not prove at a preliminary hearing.

- (5) Receipt of the notice of violation three days before the final revocation hearing did not prejudice the client when the charges were given at the preliminary hearing.
- (6) A two-month delay in conducting the final revocation hearing was not unreasonable given the specific facts of this case. The delay was due to pending criminal charges.

State ex rel. Thompson v. Riveland, 109 Wis. 2d 580, 326 N.W. 2d 768 (1982)

COMMENT:

- (1) This case clarified *State ex rel. Henschel v. H&SS Department*, 91 Wis. 2d 268 (Ct.App. 1979), by stating that a violation cannot be proven with hearsay alone, unless the hearsay is reliable. Hearsay does not have to be corroborated to be reliable.
- (2) The defense of Self Defense is available to probationers.
- (3) The court found that the record supported Thompson's claim of self-defense where there was no evidence to refute the claim of self-defense. The only witness who appeared on behalf of the Department was an agent who had no personal knowledge of the incident and who had not supervised Thompson.

EQUAL PROTECTION

State v. Aderhold, 91 Wis. 2d 306, 284 N.W. 2d 108 (Ct.App. 1979)

COMMENT: The defendant challenged laws that permit old law parolees to receive credit for "street time," but prohibit probationers from earning credit for "street time." The court said that Equal Protection does not require probationers and parolees to be treated the same in all circumstances, because the sanctions available upon revocation of parole and probation are significantly different.

EXTENSION

Bartus v. Department of Health and Social Services, Division of Corrections, 176 Wis. 2d 1063, 501 N.W. 2d 419 (1993)

COMMENT: DHA and DOC are expected to exercise their discretionary authority in revocation proceedings according to the same standards for the exercise of judicial discretion in sentencing proceedings.

The court sustained the ALJ's exercise of discretion in revoking probation for failure to make restitution. The evidence supported the ALJ's conclusion that the probationer's failure to pay was not the result of an inability to pay, but instead showed willful refusal to pay.

The ALJ properly refused to consider the probationer's contention that a facially valid order of the circuit court was void. The Division of Hearings and Appeals has no authority to void or reverse circuit court judgments.

Section 973.09(3)(b), which requires the DOC to inform the court 90 days before the expiration of probation of any unpaid restitution, does not require the DOC to inform the court when the Department decides to initiate revocation proceedings for the failure to pay restitution, rather than request the court extend probation to allow additional time for the probationer to complete his restitution obligation.

Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978)

COMMENT: "If a probationer lacks the capacity to pay and has demonstrated a good faith effort during probation, failure to make restitution cannot be 'cause' for extending probation."

See also *State v. Davis*, 127 Wis. 2d 486, 381 N.W. 2d 333 (1986) (a court may not extend probation for the sole purpose of compelling a probationer to pay a civil debt by way of restitution, where probationer had been making good faith effort to complete restitution during probation).

State v. Olsen, 222 Wis. 2d 283, 588 N.W. 2d 256 (Ct.App. 1998)

COMMENT: Section 973.09(3)(b) states that the Department of Corrections "shall" notify the sentencing court of the status of a probationer's restitution payments at least 90 days before the probationary period expires. The DOC failed to meet this deadline, and the defendant challenged the trial court's subsequent extension of his probation.

Statutory requirement that 90 days prior to the end of probationary period, DOC notify the circuit court of status of probationer's restitution payments is directory only, not mandatory. Thus, DOC's late notification does not deprive the trial court of the authority to extend probation.

The standard a court must apply to extend probation is as follows: "A sentencing court's decision to extend probation is discretionary, but the extension must be warranted under a case's circumstances. A sentencing court exercises the appropriate discretion when it

examines the relevant facts, applies a proper standard of law, uses a demonstrative rational process, and reaches a conclusion that a reasonable judge could reach.”

Here, the trial court inappropriately extended the period of probation because the defendant had been faithfully paying restitution of \$100 per month throughout the 10 years of his supervision as required by the DOC. The sole purpose of extending probation was merely to collect a debt, not to serve either rehabilitation or community interests, so the court inappropriately extended probation under §973.09(3)(b).

FOREIGN JURISDICTIONS

Delay In Hearing

State ex rel. Alvarez v. Lotter, 91 Wis. 2d 329, 283 N.W. 2d 408 (1979)

COMMENT: Delay in holding final revocation hearing because the probationer was imprisoned in Florida awaiting trial on other charges was not a denial of his due process right to a prompt revocation hearing, because the Wisconsin revocation proceedings did not cause the loss of liberty in Florida.

Moody v. Daggett, 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976)

COMMENT: Federal parolee, imprisoned for federal crimes committed while on parole and clearly constituting parole violations, is not constitutionally entitled to an immediate parole revocation hearing, where a parole violator warrant was issued and lodged with the institution of his confinement but was not executed.

Effect On Wisconsin Sentence Credit

State v. Rohl, 160 Wis. 2d 325, 466 N.W. 2d 208 (Ct.App. 1991)

COMMENT: Rohl was paroled from a Wisconsin sentence and went to California. He committed a new crime in California and served a prison sentence before his parole was revoked. The court held that the California sentence was an intervening sentence, not a concurrent sentence, because Rohl was still on parole and he was not serving the Wisconsin sentence while he was in the California prison. He is not entitled to sentence credit for this intervening sentence.

Place Of Hearing

State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W. 2d 890 (1975)

COMMENT: Harris was being supervised in Tennessee, under the provision of the Uniform Act for Out-of-State Parolee Supervision; State Compacts. He violated the terms of his probation by sexually assaulting his five-year-old stepson. Harris was returned to Wisconsin where his preliminary hearing and final revocation hearing were held. The child did not testify at the hearing, but his statements were brought into evidence through his mother’s testimony. The court ruled as follows:

- (1) Failure to hold preliminary and final revocation hearing in the state where the violation was committed violated due process *in this case* because witnesses who could provide exculpatory testimony were all located in Tennessee. Without these witnesses, Harris had only his word upon which to rely. Therefore, live testimony from those exculpatory witnesses was necessary.
 - If a witness's testimony is cumulative or merely provides character evidence, their live testimony is not required and the hearings need not be held in the state where the violation took place.
- (2) The admissibility of polygraphs is subject to the discretion of the hearing examiner. In order for polygraphs to be admitted, defense counsel or the probationer/parolee must give written consent to the polygraph's admission. The opposing party has the right to cross-examine the person who administered the polygraph test about their experience and the conditions under which the test was given. The court cited *State v. Stanislavski*, 62 Wis. 2d 730 (1974).

Note: In *State ex rel. Ramy*, the court of Appeals stated polygraph results may not be used.

- (3) One may apply a more liberal interpretation of what constitutes an excited utterance when the victim of a sexual assault is a young child. Given the nature of the charge and the young age of the child, the Court considered the non-production of the boy to be reasonable. In this case, the child's well being constituted good cause for non-production and superceded the probationer's right to confrontation.

For more information on hearsay, see *Gagnon v. Scarpelli*, 411 U.S. 776, 93 S.Ct. 1756 (1973), *Egerstaffer v. Israel*, 756 F.2d 1231 (7th Cir. 1978).

GOOD TIME FORFEITURE (OLD LAW)

“Good time” is time that is deducted from an inmate's prison stay and spent on parole. It is earned through good behavior. “Good time” is a concept that no longer exists in the statutes, as it was abolished by Wis. Stat. §302.11. However, “good time” still exists for persons serving sentences for crimes committed before June 1, 1984, or who are revoked and returned to prison to serve all or part of the previously earned good time on a sentence relating to a crime committed before June 1, 1984. (Some revoked parolees still have an option to be subject to the new law relating to mandatory release.) The rules governing “good time” are embodied in pre-1984 Wis. Stat. §53.11.

Putnam v. McCauley, 70 Wis. 2d 256, 234 N.W. 2d 75 (1975)

COMMENT: A mandatory release parolee is entitled to due process relating to the forfeiture of his good time. This case predates the current *Wis. Stat. §302.11*, and applies to a person who committed a crime before June 1, 1984. “Good time” is a concept that no longer exists in the statutes. (See *Wis. Stat. §302.11*) “Good time” still exists for persons serving sentences for crimes committed before June 1, 1984, or who are revoked and returned to prison to serve all or a part of their previously earned good time on a sentence relating to a crime committed before June 1, 1984. (Some revoked parolees still have an option to be subject to the new law relating to mandatory release. See legislative history of the new statute.)

State ex rel. Eder v. Matthews, 115 Wis. 2d 129, 340 N.W. 2d 66 (Ct.App. 1983)

COMMENT: Eder was a mandatory release parolee. On August 26, 1981, a hearing examiner ordered the revocation of Eder’s parole and reincarcerated Eder for two years. The order also stated that Eder should earn good time on those two years. On February 11, 1982, the Department issued a memo containing a new formula for computing good time credits for mandatory release violators who were returned to prison. The new formula effectively reduced Eder’s good time by nine months. The Court of Appeals stated that in Eder’s case, the Department’s application of the new formula constituted an *ex post facto* application of the law because the new formula was issued and applied six months after Eder’s parole was revoked and it increased the amount of time Eder would be reincarcerated.

State ex rel. Hauser v. Carballo, 82 Wis. 2d 51, 261 N.W. 2d 133. (1978)

COMMENT:

- (1) Both mandatory release parole violators and discretionary parole violators must be given a hearing to determine whether good time should be forfeited, and if it should, how much good time is to be forfeited. Cites *Putnam v. McCauley*, 70 Wis. 2d 256 (1975).
- (2) Section 53.11(2a) does not give the Department the authority to institute an administrative policy that automatically credits a discretionary parole violator with all his good time credits. Section 53.11 requires the Department to exercise its discretion and make individualized determinations about how much good time credit is to be given to the discretionary parole violator.
- (3) The fact that a mandatory release parolee may lose sentence credit for successfully served parole time, while a discretionary parolee is assured of receiving sentence credit for successfully served good time DOES NOT violate the Equal Protection Clause because the time spent on parole by a discretionary parolee has nothing to do with good time. This parole time is served in lieu of prison time. A mandatory release parolee’s time on parole is a matter of right, subject to withdrawal.

For further case law dealing with the calculation of “good time” see *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668 (1994).

GRANTING PROBATION

Bastian v. State, 54 Wis. 2d 240, 194 N.W. 2d 687 (1972)

COMMENT: In this case the Supreme Court adopted the 1970 ABA *Standards Relating to Probation*, s.1.3 Criteria for Granting Probation by the Court, which provided that the court should order probation unless it determines that (1) confinement is necessary to protect the public from further criminal activity by the offender, (2) the offender is in need of correctional treatment which can most effectively be provided if he is confined, or (3) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

State v. Olson, 226 Wis. 2d 457, 462, 595 N.W. 2d 460 (Ct.App. 1999)

COMMENT: “Generally, probation is not a sentence but an alternative to a sentence.”

HEARSAY

Egerstaffer v. Israel, 726 F.2d 1231 (7th Cir. 1984)

COMMENT: The court held that a hearing officer may rely on hearsay evidence that would not be admissible under “standard hearsay exceptions” if the evidence otherwise “bears substantial indicia of trustworthiness” or “reliability.” Evidence with such indicia of reliability or trustworthiness may be relied upon without a showing of “good cause” for relief from the general due process right to confront and cross examine witnesses imposed by *Morrissey v. Brewer*. The court cautioned that its ruling does not permit a hearing officer to rely upon “unsubstantiated or unreliable hearsay as substantive evidence at revocation hearings” – to do so “would certainly eviscerate the safeguards guaranteed probationers by *Morrissey* and *Gagnon*.” 726 F.2d at 1235.

Prellwitz v. Berg, 578 F.2d 190 (7th Cir.1978)

COMMENT: The admissibility of hearsay evidence is not tied to statutory hearsay exception, *e.g. Wis. Stat. §908.03*.

State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis.2d 214, 640 N.W.2d 527, (Ct.App. 2001)

COMMENT: Simpson, a sex offender, violated the rules of his probation by having sexual contact with a six-year-old girl. The victim was not called as a witness at the final revocation hearing. Instead, the department presented evidence of the victim's hearsay statements to her mother and the police. The ALJ found that the hearsay statements were reliable and used those statements as the basis for a finding that Simpson violated the rules of his probation.

The Court of Appeals held that it was reversible error for the ALJ to receive evidence of the victim's hearsay statements without finding, in the words of *Morrissey v. Brewer*, that there was “good cause for not allowing confrontation.”

In other words, hearsay evidence is generally inadmissible at a final revocation hearing because it deprives an offender of the opportunity to challenge the reliability of the evidence by shielding its source from cross-examination. *Inadmissible hearsay* can be converted to *admissible hearsay* by a finding that there is good cause for not allowing cross-examination. A finding of good cause can be based on a determination that the

evidence qualifies for admission under one or more of 24 exceptions to the hearsay rule. *See* Wis. Stats. §908.03. It can also be based upon a determination that there is good cause to dispense with cross-examination. The latter requires the ALJ to weigh three factors, the relevance of the evidence to a material issue in the case, the reliability of the evidence, and any burdens associated with the production of the witness, including (but not limited to) physical, psychological, and financial burdens.

The ALJ must balance the reliability of the evidence against the burden of producing the source for cross-examination. At a minimum, there must be a determination that the evidence is reliable and the proponent has some reasonable explanation for not calling the source as a witness. As the reliability of the hearsay increases, the need to justify the source's absence decreases but never to the point where no justification is required. Beyond this, the Court's opinion offers little guidance on what combination of circumstances would warrant a determination that there is good cause to dispense with cross-examination if the proffered testimony does not fall within one of the exceptions to the hearsay rule (including the residual exception) enumerated in Wis. Stats. §908.03

An ALJ has two options when confronted with hearsay evidence that is inadmissible under this decision. The ALJ may exclude the evidence or give the offender an opportunity for cross-examination at an adjourned hearing.

State ex rel. Henschel v. H&SS Department, 91 Wis. 2d 268, 282 N.W. 2d 618 (Ct.App. 1979)

COMMENT:

- (1) An examiner cannot base a finding based solely upon unsubstantiated hearsay evidence. The Supreme Court clarified this in *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580 (1982), stating that a finding cannot be based solely upon hearsay evidence, unless the hearsay evidence is reliable. Hearsay need not be corroborated to be deemed reliable.
- (2) The probationer/parolee suffered no prejudice from being denied a preliminary hearing and no preliminary hearing was required because the probationer/parolee was properly arrested for the same conduct underlying the petition to revoke; defense counsel requested a delay in order to obtain a competency evaluation, and the probationer/parolee had been convicted of the same offense, pending the final revocation hearing.

State ex rel. Thompson v. Riveland, 109 Wis. 2d 580, 326 N.W. 2d 768 (1982)

COMMENT:

- (1) This case clarified *State ex rel. Henschel v. H&SS Department*, 91 Wis. 2d 268 (Ct.App. 1979), by stating that a violation cannot be proven with hearsay alone, unless the hearsay is reliable. Hearsay does not have to be corroborated to be reliable.
- (2) The defense of Self Defense is available to probationers.
- (3) The court found that the record supported Thompson's claim of self-defense where there was no evidence to refute the claim of self-defense. The only witness who appeared on behalf of the Department was an agent who had no personal knowledge of the incident and who had not supervised Thompson.

State v. Ballos, 230 Wis. 2d 495, 620 N.W. 2d 177 (1999)

COMMENT: “Generally, when evidence is admissible under a firmly rooted hearsay exception, the Confrontation Clause has been satisfied, and no further showing of particularized guarantees of trustworthiness is required. Such evidence may be excluded, however, ‘if there are unusual circumstances warranting its exclusion.’”

State v. Higginbotham, 110 Wis. 2d 393, 329 N.W. 2d 250 (Ct.App. 1982)

COMMENT: Out of court statement by parole agent was admitted in sex crimes recommitment hearing under Wis. Stat. §975.09.

Hearings under Wis. Stat. §975.09 involve liberty interests comparable to those at stake in parole revocation hearings. Agent’s testimony was admissible in as much as it was corroborated by hospital records, PSI and the court’s confidence in the agent’s veracity. Hearsay evidence is admissible if it is substantiated, which didn’t require much in this case.

State v. Jackson, 187 Wis. 2d 431, 523 N.W. 2d 126 (Ct.App. 1994)

COMMENT: “[A] statement passes constitutional muster without a showing of particularized guarantees of the statement’s trustworthiness as long as the hearsay exception is ‘firmly rooted.’ *White v. Illinois*, 112 S.Ct. 736, 742 n.8 (1992). It is only where the exception is not ‘firmly rooted’ that one must examine the particularized guarantees of the statement’s trustworthiness. *Idaho v. Wright*, 497 U.S. 805, 816-17 (1990). The state of mind exception is ‘firmly rooted.’”

INTERSTATE COMPACT

State ex rel. Forte v. Ferris, 79 Wis. 2d 501, 255 N.W. 2d 594. (1977)

COMMENT: The parolee, Forte, was in Illinois awaiting acceptance of approval to be supervised in Illinois under the Uniform Act for Out-of-State Parolee Supervision, State Compacts. Charles May was being tried in Dane County for murder and wanted Forte to testify on his behalf. Forte was returned to Wisconsin under the provision of Wis. Stat. §976.02, Uniform Act Extradition of Witnesses in Criminal Actions, for the purpose of testifying for May. The Department then placed a custodial hold upon Forte. The court stated that the Department does not have the authority to place probationers and parolees in custodial/departmental holds when they are brought to the state of Wisconsin under Wis. Stat. §976.02. The custodial hold is tantamount to an arrest and **Wis. Stat. §976.02(4)**, exempts individuals brought to Wisconsin under §976.02 from arrest and service of process.

State ex rel. Hanson v. H&SS Dept., 64 Wis. 2d 367, 219 N.W. 2d 267. (1974)

COMMENT: Clarifies *State ex rel. H&SS v. Circuit Court*, 57 Wis. 329 (1973). The principles of the Uniform Extradition Act, Wis. Stat. §976.03(29), apply to revocation hearings. Therefore, the Department may seek revocation based upon grounds that are different from the grounds used to extradite a parolee being supervised in a different state under an interstate compact agreement. The court reasserted its holding that revocation proceedings are not criminal matters.

See Wis. Stat. §304.13 – formerly §57.13.

State ex rel. Niederer v. Cady, 72 Wis. 2d 311, 240 N.W. 2d 626. (1976)

COMMENT:

- (1) Under the Uniform Act for Out-of-State Parolee Supervision; State Compacts (Wis. Stat. §304.13), an individual who is under supervision in another state may be brought back to Wisconsin, or returned to the sending state without the benefit of an extradition hearing. Such provisions in the Act do not violate due process because extradition is a right of the state, not the individual. Further, the rights afforded to fugitives under the Uniform Criminal Extradition Act are not mandated by the constitution.
- (2) The State Compacts statute does not deny equal protection to the probationers and parolees transferred under its provisions because, “there is a legally recognizable difference between the status of a parolee who leaves the state with permission, and one who absconds from the state.”
- (3) No preliminary hearing is necessary where, in a criminal proceeding dealing with the same conduct for which revocation is sought, a probationer/parolee enters a guilty plea that is accepted by a court of competent jurisdiction. Probable cause is established by the guilty plea.

JUDGMENT OF CONVICTION

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972)

COMMENT: This is the seminal parole revocation case. The U.S. Supreme Court declared the minimum due process standards for parole revocation hearings as follows:

- (1) written notice of the claimed violations of parole;
- (2) disclosure to the parolee of the evidence to be used against him;
- (3) opportunity to be heard in person and to present witnesses and documentary evidence;
- (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (5) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (6) a written statement by the fact finders as to evidence relied on and reasons for revoking. 408 U.S. at 789, 92 S.Ct. at 2609.

See *Gagnon v. Scarpelli*, 411 U.S. 778, *supra.*, for application of the same standards to probation revocation hearings.

State ex rel. Flowers v. H&SS Department, 81 Wis. 2d 376, 260 N.W. 2d 727. (1978)

COMMENT:

- (1) The Department did not violate the double jeopardy clause by commencing a revocation action that alleged conduct for which the defendant was acquitted in an earlier criminal proceeding because revocation hearings are civil matters, not criminal matters.

- (2) The Department is not collaterally estopped from commencing a revocation action alleging conduct for which a defendant was acquitted in a criminal proceeding because there is a higher burden of proof in criminal proceedings.
- (3) A second preliminary hearing is not required for allegations added to an amended notice of violation when a prior preliminary hearing has established probable cause for the allegations enumerated on the original notice of violation. Preliminary hearings are not required when grounds for detention are established in some other manner, *i.e.* a conviction or guilty plea. The test is whether a parolee received adequate and proper notice of the additional charges prior to the holding of the revocation hearing.
- (4) The Department is not collaterally estopped from pursuing an allegation it could not establish at the preliminary hearing. The Court of Appeals implied that there were circumstances when the Department could be collaterally estopped, but it did not establish the parameters of when the Department is precluded from reinstating a charge that it could not prove at a preliminary hearing.
- (5) Receipt of the notice of violation three days before the final revocation hearing did not prejudice the client when the charges were given at the preliminary hearing.
- (6) A two-month delay in conducting the final revocation hearing was not unreasonable given the specific facts of this case. The delay was due to pending criminal charges.

“Read-Ins” As Proof

Austin v. State, 49 Wis. 2d 727, 183 N.W. 2d 56 (1971)

COMMENT: “Read-in” offenses constitute admissions by the defendant to those charges (as explained in *State v. Cleaves*, 181 Wis. 2d 73, 78, 510 N.W. 2d 143 (Ct.App. 1993)).

JURISDICTION

State ex rel. Woods v. Morgan, 224 Wis. 2d 534 (Ct.App. 1999), 591 N.W. 2d 922 (Ct.App. 1999)

COMMENT: Woods reached his mandatory release date and was placed at Marshall E. Sherrer Correctional Center on September 9, 1997. On September 13, 1997, Woods made a sexual overture toward another inmate. Consequently, the Department placed a parole hold upon Woods and his “parole” was subsequently revoked.

The Court of Appeals held that, although the Department treated Woods as a parolee, he *was not* on parole. While Woods was at Sherrer, he was a prisoner because he was deprived of his liberty and held in custody. There is no indication that he was granted the conditional liberty of a parolee. Because Wood was an inmate of a prison, rather than a parolee at the time of the underlying rule violation, the parole revocation was in error.

JUVENILE AFTERCARE

In re G.G.D. v. State, 97 Wis. 2d 1, 292 N.W. 2d 853 (1980)

COMMENT: “There is no essential constitutional difference between a parole of an adult and ‘liberty under supervision’ of a juvenile... nor are there sufficient constitutional differences between the revocation of a juvenile’s ‘supervision’ and the

revocation of an adult's probation to warrant divergent standards regarding notice." Juveniles must receive notice of conditions of supervision, the breach of which may be the basis of revocation. "[C]ertain conditions of probation are so basic that knowledge of them will be imputed to the probationer. Knowledge of criminal law is one such condition. Probation may be revoked for violation of a condition that was not "formally given," but it must be shown that "adequate notice [of the condition] was given to constitute fair warning."

In the Interest of R.W.S. v. State, 162 Wis. 2d 862, 471 N.W. 2d 16 (1991)

COMMENT: In juvenile proceeding for delinquency, court may order juvenile to pay restitution for petitions that have been "dismissed and read-in." Court may also order restitution be paid directly to an insurance company that has already compensated the victim for the loss.

See *Huggett v. State*, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978) (adult restitution standards).

See *State ex rel. Lyons v. H&SS Dept.*, 105 Wis. 2d 146 (Ct.App.1981).

State ex rel. Bernal v. Hershman, 54 Wis. 2d 626, 196 N.W. 2d 721 (1972)

COMMENT: There is no practical difference between probation, parole, and aftercare supervision. As such, a child, whose supervision the Department seeks to revoke, is entitled to the same procedural due process rights afforded to probationers and parolees, including a revocation hearing.

State ex rel. R.R. v. Schmidt, 63 Wis. 2d 82, 216 N.W. 2d 18. (1974)

COMMENT: The constitutionally required procedural rights of adult probationer/parolees in revocation proceedings must also be afforded to juveniles. Procedures specified in Wisconsin Administrative Procedures Act, Chapter 227, are not applicable to revocation proceedings.

State v. Thompson, 225 Wis. 2d 578 (Ct.App. 1999), 593 N.W. 2d 875 (Ct.App. 1999)

COMMENT: Citing *State v. Baker*, 179 Wis. 2d 655 (Ct.App. 1993), the court held that Thompson was entitled to custody credit for time spent at Ethan Allen School for Boys.

MENTAL HEALTH OF OFFENDER

Competency To Proceed

State ex rel. Vanderbeke v. Endicott, 210 Wis. 2d 502, 563 N.W. 2d 883 (1997)

COMMENT: Where an Administrative Law Judge (ALJ) has reason to doubt the competence of a probation/parolee at a revocation hearing, the revocation proceeding must be stayed until a determination of competency is made. Reason to doubt that a probationer is competent may arise at any time during the revocation proceeding and may be raised by a probationer, the probationer's counsel, the DOC, or the ALJ. The ALJ

must refer the offender to the sentencing court with a written request for a competency determination. Revocation of probation/parole may be reviewed by habeas corpus where review by writ of certiorari is not available.

Not A Defense

State ex rel. Lyons v. H&SS Dept., 105 Wis. 2d 146, 312 N.W. 2d 868 (Ct.App. 1981)

COMMENT:

- (1) Citing *State ex rel. Flowers v. DH&SS*, 81 Wis. 2d 376 (1978), the Court of Appeals held that because revocation proceedings are civil and, therefore, distinct creatures from criminal proceedings, “the nature of probation revocation hearings does not allow a defense of not guilty by reason of mental disease or defect.”
- (2) “[T]he nature of probation revocation hearings does not allow a defense of not guilty by reason of mental disease or defect. Probation revocation for certain misconduct cannot be avoided on the ground that the State has failed to prove all the elements of a criminal charge which may arise out of the same misconduct.”
- (3) Department was not collaterally estopped from relying on Lyons’s criminal conduct as a basis for revocation, even though Lyons was found not guilty of that criminal conduct because matters raised in revocation proceedings are not identical to matters raised in criminal proceedings. Revocation proceedings require consideration of factors that are irrelevant to criminal proceedings.

Limits On Duration Of Commitment

State ex rel. Deisinger v. Treffert, 85 Wis. 2d 257 (1978), 270 N.W. 2d 402 (Wis. 1978)

COMMENT: This is a mental commitment case. The court held that the committed individual may not be held in custody longer than the period for which the individual could have been sentenced, if he or she had been convicted of the crime with which he or she had been charged. If the state wishes to detain an individual for a period of time greater than the maximum sentence allowed for the crime with which the individual was charged, the state must commence and obtain a Chapter 51 commitment.

OFFENDER'S STATEMENT

Minnesota v. Murphy, 645 U.S. 420, 104 S.Ct. 1136, 79 L.Ed. 2d 409 (1984)

COMMENT: "Miranda" warnings not required to be given by probation agent before questioning probationer about criminal activity because the probationer is not deemed "in custody" during questioning so his admissions to criminal activity are admissible in a subsequent criminal prosecution. However, if the probationer's responses were compelled, the probationer's responses regarding criminal activity may not be admissible in a subsequent criminal prosecution. The responses would be deemed compelled if the probationer stood to be penalized with revocation of probation supervision if he were to exercise the privilege against self-incrimination, thus attaching an impermissible penalty to the exercise of the privilege.

State ex rel. Struzik v. H&SS Dept., 77 Wis. 2d 216, 252, 252 N.W. 2d 660. (1977)

COMMENT:

- (1) Because a revocation hearing is significantly different from, and therefore, not an adversarial criminal proceeding, the Fifth Amendment's own, self-contained exclusionary rule is inapplicable in the revocation context. Consequently, self-incriminating statements are admissible, even if an officer fails to read Miranda warnings to a probationer/parolee.
- (2) Statements made to parole/probation agents are somewhat coerced, in that probationers/parolees are required to truthfully account for their whereabouts and activities as a condition of supervision. However, this does not violate due process. "...A parolee's responsibility to answer his agent's questions or face possible revocation if he does not is a price society has a right to exact for the privilege of conditional liberty."

See *State v. Evans*, 77 Wis. 2d 225 (1977) and *State v. Thompson*, 142 Wis. 2d 821 (Ct.App. 1987).

State v. Evans, 77 Wis. 2d 225, 252 N.W. 2d 664. (1977)

COMMENT: Statements made by a probationer/parolee to an agent cannot be used to incriminate the client in a criminal proceeding. This case requires agents to warn the client that the client is required by the rules to provide, on demand, either verbally or in writing, an accounting of the client's activities and whereabouts; that failing to provide the agent with an accounting of whereabouts and activities is a violation of supervision

for which the client can be revoked; and that nothing said by the client can be used against the client in a criminal proceeding. (This is known as the “Evans Warning.”)

Note: The court in *Evans*, stated that the client’s admission to his agent could be used for impeachment purposes only. However, the Court of Appeals in *State v. Thompson*, 142 Wis. 2d 821 (Ct.App. 1987), held that a client’s admissions to his agent could not be used for ANY purpose in a criminal proceeding, including impeachment.

State v. Thompson, 142 Wis. 2d 821, 419 N.W. 2d 564 (Ct.App. 1987)

COMMENT: Modifies *State v. Evans*, 77 Wis. 2d 225 (1977) by holding that under the Fifth Amendment, statements made by probationers/parolees to agents may not be used in criminal proceedings for any purpose, including impeachment.

Does not overrule the requirement by *Evans* that agents read an “Evans Warning” to probationers/parolees before taking the probationers’/parolees’ statements.

Confessions

State ex rel. Washington v. Schwarz, 2000 WI App 235, 239 Wis. 2d 443, 620 N.W. 2d 414 (Ct.App. 2000)

COMMENT: The court declined to extend to revocation hearings the “confession corroboration” requirement utilized in criminal proceedings. However, a confession must bear a sufficient indicia of reliability if an Administrative Law Judge is to rely upon it to support the conclusion that revocation is appropriate and necessary.

PAROLE RESCISSION

Parole rescission is the revocation of parole already granted, but not yet executed. (In other words, it is revocation where the inmate has been granted parole but has not yet been released from prison.)

State ex rel. Klinke v. H&SS Department, 87 Wis. 2d 110, 273 N.W. 2d 379 (Ct.App. 1978)

COMMENT: Parole rescission is tantamount to a revocation of parole since they deprive the same liberty. Therefore, before parole may be rescinded, an inmate must be afforded due process as described in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *i.e.* written notice of the claimed infraction, disclosure of the evidence against the inmate, opportunity to be heard in person, and to present witnesses, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and the written statement of the evidence relied upon and the reasons for the rescission of parole. The court does not explicitly state that the inmate has a qualified right to counsel, but it is implied in its citation of *Wolff v. McDonnell*, 418 U.S. 539 (1974).

POLYGRAPH

State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W. 2d 890 (1975)

COMMENT: Harris was being supervised in Tennessee, under the provision of the Uniform Act for Out-of-State parolee Supervision; State Compacts. He violated the terms of his probation by sexually assaulting his five-year-old stepson. Harris was returned to Wisconsin where his preliminary hearing and final revocation hearing were held. The child did not testify at the hearing, but his statements were brought into evidence through his mother's testimony. The court ruled as follows:

- (1) Failure to hold preliminary and final revocation hearing in the state where the violation was committed violated due process *in this case* because witnesses who could provide exculpatory testimony were all located in Tennessee. Without these witnesses, Harris had only his word upon which to rely. Therefore, live testimony from those exculpatory witnesses was necessary.
 - If a witness's testimony is cumulative or merely provides character evidence, their live testimony is not required and the hearings need not be held in the state where the violation took place.
- (2) The admissibility of polygraphs is subject to the discretion of the hearing examiner. In order for polygraphs to be admitted, defense counsel or the probationer/parolee must give written consent to the polygraph's admission. The opposing party has the right to cross-examine the person who administered the polygraph test about their experience and the conditions under which the test was given. The court cited *State v. Stanislavski*, 62 Wis. 2d 730 (1974).

Note: In *State ex rel. Ramy*, the court of Appeals stated polygraph results may not be used.

- (3) One may apply a more liberal interpretation of what constitutes an excited utterance when the victim of a sexual assault is a young child. Given the nature of the charge and the young age of the child, the Court considered the non-production of the boy to be reasonable. In this case, the child's well being constituted good cause for non-production and superceded the probationer's right to confrontation.

For more information on hearsay, see *Gagnon v. Scarpelli*, 411 U.S. 776, 93 S.Ct. 1756 (1973), *Egerstaffer v. Israel*, 756 F.2d 1231 (7th Cir. 1978).

State v. Dean, 103 Wis. 2d 228, 307 N.W. 2d 628 (1981)

COMMENT: Although the Court refused to make a definitive statement regarding the reliability of polygraphs, the court held that the criteria for admissibility set forth in *State v. Stanislawski*, 62 Wis. 2d 730 (1974), could not sufficiently ensure the reliability of polygraphs. As a result, the court stated that polygraphs cannot be admitted in a *criminal* proceeding.

Note: Polygraph “results” are considered the hearsay statements of the polygrapher regarding the truthfulness of the defendant’s answers to questions posed during the examination. The “results” are the polygrapher’s interpretations of the readings/measurements of the polygraph.

State v. Ramey, 121 Wis. 2d 177, 359 N.W. 2d 402 (Ct.App. 1984)

COMMENT: Results of a polygraph are not admissible in a probation/parole revocation hearing.

Whether the probationer/parolee had adequate legal representation at the revocation hearing is not an issue that may be reviewed by *Writ of Certiorari*. This issue must be reviewed by *Writ of Habeas Corpus*.

See *State v. Dean*, 103 Wis. 2d 228 (1981) for case relating to the admission of polygraph results in criminal proceedings.

PRELIMINARY HEARING

State ex rel. Brown v. Artison, 138 Wis. 2d 350, 405 N.W. 2d 797 (Ct.App. 1987)

COMMENT: The Court of Appeals upheld as constitutional the exceptions to the preliminary hearing requirement that were enumerated in former HSS 31.04. (The administrative rule is now Wis. Admin. Code DOC 331.04). A preliminary hearing is not required if grounds/probable cause for detention have been established in some other manner.

State ex rel. Flowers v. H&SS Department, 81 Wis. 2d 376, 260 N.W. 2d 727. (1978)

COMMENT:

- (1) The Department did not violate the double jeopardy clause by commencing a revocation action that alleged conduct for which the defendant was acquitted in an earlier criminal proceeding because revocation hearings are civil matters, not criminal matters.
- (2) The Department is not collaterally estopped from commencing a revocation action alleging conduct for which a defendant was acquitted in a criminal proceeding because there is a higher burden of proof in criminal proceedings.
- (3) A second preliminary hearing is not required for allegations added to an amended notice of violation when a prior preliminary hearing has established probable cause for the allegations enumerated on the original notice of violation. Preliminary hearings are not required when grounds for detention are established in some other manner, *i.e.* a conviction or guilty plea. The test is whether a parolee received

adequate and proper notice of the additional charges prior to the holding of the revocation hearing.

- (4) The Department is not collaterally estopped from pursuing an allegation it could not establish at the preliminary hearing. The Court of Appeals implied that there were circumstances when the Department could be collaterally estopped, but it did not establish the parameters of when the Department is precluded from reinstating a charge that it could not prove at a preliminary hearing.
- (5) Receipt of the notice of violation three days before the final revocation hearing did not prejudice the client when the charges were given at the preliminary hearing.
- (6) A two-month delay in conducting the final revocation hearing was not unreasonable given the specific facts of this case. The delay was due to pending criminal charges.

State ex rel. Niederer v. Cady, 72 Wis. 2d 311, 240 N.W. 2d 626. (1976)

COMMENT:

- (1) Under the Uniform Act for Out-of-State Parolee Supervision; State Compacts (Wis. Stat. §304.13), an individual who is under supervision in another state may be brought back to Wisconsin, or returned to the sending state without the benefit of an extradition hearing. Such provisions in the Act do not violate due process because extradition is a right of the state, not the individual. Further, the rights afforded to fugitives under the Uniform Criminal Extradition Act are not mandated by the constitution.
- (2) The State Compacts statute does not deny equal protection to the probationers and parolees transferred under its provisions because, “there is a legally recognizable difference between the status of a parolee who leaves the state with permission, and one who absconds from the state.”
- (3) No preliminary hearing is necessary where, in a criminal proceeding dealing with the same conduct for which revocation is sought, a probationer/parolee enters a guilty plea that is accepted by a court of competent jurisdiction. Probable cause is established by the guilty plea.

PRESENTENCE INVESTIGATION

Wis. Stat. §972.15 does not explicitly permit the use of PSIs at revocation hearings. Therefore, as a general rule, PSIs are not admissible at revocation hearings and must be kept confidential.

State v. Farr, 119 Wis. 2d 651, 350 N.W. 2d 640 (1984)

COMMENT: In order to be considered reliable evidence, as an official report of a government agency, a PSI must contain relevant information. In the context of this case, the PSI needed to contain the dates of conviction to serve as evidence of prior convictions, if the court intended to rely upon the PSI to impose an enhanced sentence upon the defendant.

Use Outside Of Court

State ex rel. Hill v. Zimmerman, 196 Wis. 2d 419, 538 N.W. 2d 608 (Ct.App. 1995)

COMMENT: Hill, after his conviction, requested a copy of his pre-sentence report claiming he was entitled to the report under Wis. Stat. §972.15(5), which permits the Department to make the report “available to other agencies or persons to use for purposes related to correctional programming, parole consideration, care and treatment, or research.” The Court of Appeals stated that Hill was not entitled to a copy of the pre-sentence report for the following reasons: (1) Wis. Stat. §972.15(4) states that, after sentencing, the report shall be kept confidential and shall not be made available to any person without prior authorization from the court, (2) section 972.15(5) is not mandatory. It gives the Department the discretion to make the report available to agencies or other persons, and (3) Hill is not an “other person” within the meaning of §972.15(5). Subsection 2 and 4 cover the circumstances under which a defendant may obtain access to the report.

Hill also argued that he should not be required to pre-pay for the copies of his file. The court stated that the pre-payment requirement was reasonable pursuant to Wis. Stat. §19.35(3)(f).

PRISONER LITIGATION REFORM ACT

State ex rel. Cramer v. Schwarz, 2000 WI 86. 236 Wis. 2d 473, 613 N.W. 2d 591 (Wis. 2000)

COMMENT: A petitioner who pursues relief from a decision to revoke probation is a prisoner subject to the Prisoner Litigation Reform Act (PLRA). Therefore, a *writ of certiorari* must be filed within 45 days pursuant to Wis. Stat. §893.735(2).

The PLRA supercedes the common law requirement that probationers/parolees file writs of certiorari within six months of a final decision.

State ex rel. Frohwirth v. Wisconsin Parole Commission, 2001 WI App 139, 237 Wis. 2d 627, 614 N.W. 2d 541 (Ct.App. 2000)

COMMENT: The 45-day time limit to file a *writ of certiorari* does not apply to prisoners who are housed out-of-state. However, in this case, because Frohwirth was still in Wisconsin for 45 days before being sent out-of-state, he was obligated to abide by the 45-day time limit imposed under Wis. Stat. §893.735(2).

State ex rel. Saffold v. Schwarz, 2001 WI App 56, 241 Wis. 2d 253, 625 N.W. 2d 333 (Ct.App. 2001)

COMMENT: Saffold argues that the PLRA violated the equal protection clause of the Constitution because it subjects in-state prisoners to a 45-day time limit to file a *writ of certiorari* appealing a revocation decision, while out-of-state prisoners are not required to file a *writ of certiorari* within 45 days. The Supreme Court held that out-of-state prisoners do not have access to the legal resources available to Wisconsin inmates. Therefore, a rational basis exists to create two classes of prisoner, in-state and out-of-state. “Thus, the shorter filing deadline for prisoners in Wisconsin challenging parole

revocation has a rational relationship to the legitimate governmental interest of the PLRA ‘to restrict frivolous lawsuits’ and to ‘limit broadly prisoner litigation at taxpayers’ expense.’” Citing *State ex rel. Cramer*, 2000 WI 86 at ¶ 40. Accordingly, the PLRA does not violate the principles of equal protection.

The PLRA supercedes the common law requirement that probationers/parolees file writs of certiorari within six months of a final decision.

REINCARCERATION

Ashford v. Division of Hearings and Appeals, 177 Wis. 2d 34, 501 N.W. 2d 34 (Ct.App. 1993)

COMMENT: A person on parole in two cases in which the sentences are consecutive is subject to parole revocation and reimprisonment for the remainder of *both* sentences even if he or she commits a violation before the discharge of the first sentence. Wis. Stat. §302.11(3) provides that in the mandatory parole context, “All consecutive sentences shall be computed as one continuous sentence.” Under §302.11(7)(a), DHA is authorized to return a parolee to prison “for a period up to the remainder of the sentence.” The “remainder of the sentence” is the aggregate of the consecutive sentences. Similarly, “once consecutive sentences are aggregated and a mandatory release date is set, parole is aggregated into a single term.” 177 Wis. 2d at 43.

George v. Schwarz, 2000 WI App 72, 242 Wis. 2d 450, 626 N.W. 2d 57 (Ct.App. 2001)

COMMENT: The Division of Hearings and Appeals **IS NOT** a part of the Department of Corrections. The Legislature has not granted the Department any authority to bind the Division to Department rules. Therefore, the Department cannot promulgate and enforce rules that bind the Division of Hearings and Appeals.

Because the Division is independent of the Department, the Administrative Law Judge (ALJ) does not need to follow the guidelines established in the DOC Operations Manual regarding recommended periods of reincarceration. ALJs are not to blindly accept or adopt sentencing or reincarceration recommendations from any particular source.

The court clearly stated that Due Process requires the Division of Hearings and Appeals to be and remain independent of the Department of Corrections.

RESTITUTION

Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978)

COMMENT: “If a probationer lacks the capacity to pay and has demonstrated a good faith effort during probation, failure to make restitution cannot be ‘cause’ for extending probation.”

See also *State v. Davis*, 127 Wis. 2d 486, 381 N.W. 2d 333 (1986) (a court may not extend probation for the sole purpose of compelling a probationer to pay a civil debt by way of restitution, where probationer had been making good faith effort to complete restitution during probation).

In the Interest of R.W.S. v. State, 162 Wis. 2d 862, 471 N.W. 2d 16 (1991)

COMMENT: In juvenile proceeding for delinquency, court may order juvenile to pay restitution for petitions that have been “dismissed and read-in.” Court may also order restitution be paid directly to an insurance company that has already compensated the victim for the loss.

See *Huggett v. State*, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978) (adult restitution standards).

See *State ex rel. Lyons v. H&SS Dept.*, 105 Wis. 2d 146 (Ct.App.1981).

Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)

COMMENT: State court restitution order entered as a condition of probation is not dischargeable in Chapter 7 bankruptcy proceedings.

Olson v. Kaprellian, 202 Wis. 2d 377, 550 N.W. 2d 712 (Ct.App. 1996)

COMMENT:

- (1) Held that restitution may not be paid to victim out of separate criminal bond posted by defendant in unrelated proceeding.
- (2) Also, the settlement of a civil action between the defendant and the victim is not conclusive on the matter of restitution. The procedures for establishing a “set-off” set forth in §973.20(8) must be followed for the result in a civil action to affect the recovery of restitution.

State v. Cleaves, 181 Wis. 2d 73, 510 N.W. 2d 143 (Ct.App. 1993)

COMMENT: Defendant convicted of operating a motor vehicle ordered to pay \$305 restitution for two charges dismissed and read in. He did not, at sentencing or at any other time, personally admit committing the read-in crimes. He disputed the restitution order based on lack of admission. The court made it clear that the dismissed charges were being read-in for purposes of ordering restitution and the defendant did not object.

Personal admission is not required under Wisconsin’s read-in procedure, in absence of any objection to crimes being read-in, court may assume that defendant admits them for

purposes of being considered at sentencing. This is based not on statute but on common law, from which read-in procedures are derived.

State v. Gerard, 57 Wis. 2d 611, 205 N.W. 2d 374. (1973)

COMMENT: Defendant plead guilty to two counts of forgery (uttering) and asked that twenty uncharged offenses be read in, based on the District Attorney's agreement not to prosecute the read-ins. In the uncharged crimes about \$30,000 worth of goods were burglarized. Court considered read-ins and sentenced defendant to the maximum on both counts, stayed, and ordered restitution for all the crimes, including the uncharged offenses. He was revoked for an overall failure to comply with anything. He paid no restitution at all.

Restitution order was valid, under *Wis. Stats. §973.09(1)*. It was acceptable to hold offender responsible for entire property value, regardless of who else participated in crimes or how much he received. After two years on probation and then revocation, offender claimed an inability to pay restitution. Court was required to and did, at sentencing, determine ability to pay restitution, based on offender's assurances. The court determined that the issue regarding the offender's inability to pay was raised prematurely, because he was incarcerated. However, when the offender was on probation again, he could ask for modification of conditions based on inability to pay.

This case predated *Huggett v. State*, 83 Wis. 2d 790 (1978).

State v. Handley, 173 Wis. 2d 838, 496 N.W. 2d 725 (Ct.App. 1993)

COMMENT: Trial court ordered as condition of probation that offender put \$2000 in an account to cover future counseling needs of 15- and 16-year-old sexual assault victims, to be returned with interest if not used. Victims and mom said at sentencing they didn't need counseling and didn't anticipate needing it. There was no evidence at sentencing that the victims needed psychological treatment; order was based recommendation in presentence investigation only.

Court has broad discretion to impose conditions of probation but exercise of that discretion requires reasoning based on facts in or inferred from the record. The condition was invalid because there were no facts in the record or inferences to support the imposition of the condition. Victims could have later requested modification of conditions if injuries manifested themselves. Didn't reach question of whether condition was restitution and subject to *Wis. Stat. §§973.09(1)(b)* and *973.20*. *Dissent:* Majority wrongly assumes condition is restitution. Condition was reasonable under *§973.09(1)(a)*.

See *State v. Stowers*, 177 Wis. 2d 798 (Ct.App. 1993).

State v. Heyn, 155 Wis. 2d 621, 456 N.W. 2d 157 (1990)

COMMENT: Heyn was convicted of burglary and placed on probation. The trial court ordered, as a condition of probation, that he pay the victim \$4000 as reimbursement for the cost of a burglar alarm. Heyn appealed. He argued that the restitution statute, Wis. Stats. §973.09(1)(b), does not allow the court to order restitution for a burglar alarm. The Supreme Court agreed with Heyn but nevertheless upheld the order as a reasonable and appropriate condition of probation under Wis. Stats. §973.09(1)(a). Financial obligations may be imposed as a general condition of probation so long as those obligations are not in conflict with statutes governing the same subject matter. In *State v. Amato*, 126 Wis. 2d 212 (Ct.App. 1985), the court held that an offender cannot be ordered to pay the cost of prosecution as a condition of probation. In *State v. Torpen*, 248 Wis. 2d 951 (Ct.App. 2001), the court held that an offender cannot be ordered to pay restitution on unrelated cases. In both these cases, the appellate court found that the conditions of probation were contrary to statutes that govern the same types of financial obligations.

Note: Issues regarding the rules of supervision should be addressed in the manner prescribed by law. Court-imposed rules and conditions must be challenged in court. Rules promulgated by the department should be challenged using the complaint process described in DOC 328.11.

Follows *State v. Connelly*, 143 Wis. 2d 500 (Ct.App. 1988).

See, *In the Interest of R.W.S. v. State*, 162 Wis. 2d 862 (1991), for a case involving a juvenile who is ordered to make restitution to an insurance carrier.

State v. Hufford, 186 Wis. 2d 461, 522 N.W. 2d 26 (Ct.App. 1994)

COMMENT: Interest on restitution is not allowable, based on legislative history.

State v. Jackson, 128 Wis. 2d 356, 382 N.W. 2d 429 (1986)

COMMENT: Offender convicted of failure to report income while receiving AFDC. After five years, \$3180 not paid back to welfare department, so court extended probation for one year, then two more years. The two years were imposed time against the recommendation of the agent who was satisfied with offender's negligible but regular payments and with her rehabilitation in general. Offender's only income until the end was AFDC.

Hugget v. State, 83 Wis. 2d 790 (1978) said court may extend probation for restitution if additional restitution will serve the objectives of probation **and** the offender is able to pay. In this case, court made no determination of offender's ability to pay. Department led offender to believe she would discharge as scheduled if she generally complied with her rules. Agent's actions reinforced offender's belief that she was complying, by not stressing employment or restitution as goals of supervision. Extension of probation was without cause and an abuse of discretion.

See *Bartus v. Department of Health and Social Services, Division of Corrections*, 176 Wis. 2d 1063 (1993).

See *State v. Davis*, 127 Wis. 2d 486 (1986).

State v. Kennedy, 190 Wis. 2d 252 (Ct.App. 1995), 528 N.W. 2d 9 (Ct.App. 1994)

COMMENT: Offender stole a 1972 AMC Javelin for parts. Convicted in Kenosha County of several crimes including theft as PTAC. Jury found car to be worth less than \$2500. State asked for \$5309 in restitution, which was ordered. On remand, court came to same conclusion regarding amount, based on Wis. Stat. §973.20(13)(a).

Restitution is not limited by a jury's determination of the value of the stolen property for purposes of the criminal charge. Burden of proof is different and definition of value was different in this case. Fair market value is only one of several choices available under Wis. Stat. §973.20 to the judge determining the restitution amount. Court found that the reasonable cost of returning car to pre-theft condition was appropriate in this case for determining restitution amount. The trial court did not abuse its discretion when it imposed restitution for repair costs of an automobile that were impracticable and for a total amount greater than the value of the vehicle as determined by the jury.

State v. Mattes, 175 Wis. 2d 572, 499 N.W. 2d 711 (Ct.App. 1993)

COMMENT: The court held that the word "victim" in the restitution statute, Wis. Stat. §973.20(1), is limited to individuals who suffered a loss as a direct result of a charged offense. The court may order restitution on charges that are read-in at sentencing, *State v. Szarkowitz*, 157 Wis. 2d 740 (Ct.App. 1990), but it has no authority to order restitution for uncharged misconduct.

State v. Monosso, 103 Wis. 2d 368, 308 N.W. 2d 891 (Ct.App. 1981)

COMMENT: The court affirmed a restitution order that required an unemployed defendant to pay \$44,426.40 for restitution during a five-year probation term. The restitution order was reasonable in light of the defendant's assets and earning capacity.

State v. Peterson, 163 Wis. 2d 800, 472 N.W. 2d 571 (Ct.App. 1991)

COMMENT: *Wis. Stat. §973.06* specifies certain "court costs" that may be taxed to a criminal defendant. It does not include the general cost of the investigation, so those costs may not be assessed as "court costs" or imposed upon the defendant as a condition of his probation.

See, *Hughey v. U.S.*, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990) and *State v. Heyn*, 155 Wis. 2d 621 (1990).

State v. Rodriguez, 205 Wis. 2d 613, 556 N.W. 2d 425 (Ct.App. 1996)

COMMENT: The court held that a defendant convicted of leaving the scene of a fatal accident could be ordered to pay restitution for burial expenses, even though it had not been shown that the victim died as a direct result of the crime committed by the defendant.

State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77 (1960)

COMMENT: In this theft case, the court held that the jurisdictional allegations in the Information did not limit the amount of restitution the court could order, but restitution could not be ordered for thefts committed outside the period alleged in the Information.

State v. Schmaling, 198 Wis. 2d 757, 543 N.W. 2d 555 (Ct.App. 1995)

COMMENT: Held that lower court could not require defendant to pay the county for the cost of fighting a fire since the county was not a “victim” of the crime and only victims are entitled to restitution.

See also, *State v. Mattes*, 175 Wis. 2d 572 (Ct.App. 1993), and *State v. Evans*, 181 Wis. 2d 978 (Ct.App. 1994).

State v. Stowers, 177 Wis. 2d 798, 503 N.W. 2d 8 (Ct.App. 1993)

COMMENT: The trial court may not order restitution for “general damages,” as opposed to the “out-of-pocket,” financial losses, known as “special damages.” In this sexual assault case, the trial court may order restitution for the cost of counseling but it could not order restitution as monetary compensation for the emotional harm caused by the defendant’s conduct.

See *Hugget v. State*, 83 Wis. 2d 790 (1978).

State v. Sweat, 208 Wis. 2d 409, 561 N.W. 2d 695 (1997)

Reversed State v. Sweat, 202 Wis. 2d 366 (Ct.App. 1996).

COMMENT: Expiration of civil statutes of limitation do not relieve an individual of his/her obligation to pay restitution.

Thieme v. State, 96 Wis. 2d 98, 291 N.W. 2d 474 (1980)

COMMENT: The court ordered Thieme to pay restitution, but had not yet made a determination as to the amount before Thieme’s probation was revoked. Thieme made restitution payments during his supervision even though an amount had not been fixed.

- (1) A failure to fix the amount of restitution does not render a restitution order invalid.
- (2) An order requiring the payment of restitution authorizes the collection of funds from a probationer even if the amount of restitution hasn’t been determined.

Note: This ruling DOES NOT hold that the amount never has to be determined, only that money may be collected by the Department between the date restitution is ordered and the date in which the amount of restitution is determined.

REVIEW OF ALJ'S DECISION

Drow v. Schwarz, 225 Wis. 2d 362, 592 N.W. 2d 623 (1999)

COMMENT: Clarifies the Court of Appeals holding in *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540 (1971). Reversed *Drow v. Schwarz*, 220 Wis. 2d 415 (Ct.App. 1998).

A *certiorari* proceeding to review a probation revocation need not be heard by the same branch of the circuit court in which the probationer was convicted of the offense for which he was on probation. A *certiorari* proceeding to review a probation revocation may be heard in *any* branch of the circuit court in the county in which the probationer was last convicted of an offense for which he or she was placed on probation.

See Wis. Stat. §801.50(5).

Snajder v. State, 74 Wis. 2d 303, 246 N.W. 2d 665 (1976)

COMMENT: A remand which directs or permits the Department to supplement the record by additional evidence violates Due Process. Such a second hearing is analogous to allowing a second trial to “shore up” the record to support the judgment. *Note:* *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580 (1982), permits the Department to commence *new* proceedings.

The court also provided for the following standards to be used by reviewing courts: (1) Whether the division kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

The court also noted that, “every violation of probation or parole does not result in automatic revocation.”

State ex rel. Echmann v. DHSS, 114 Wis. 2d 35, 337 N.W. 2d 840 (Ct.App. 1983)

COMMENT: The standard of review on an administrative appeal is *de novo*. The Administrator may make credibility determinations but is not required to consult the administrative law judge about witness demeanor or other intangibles that may affect credibility determinations. The Court of Appeals cited *Ramaker v. State*, 73 Wis. 2d 563 (1976). The Court of Appeals stated that it believed the administrator should consult administrative law judges on issues dealing with credibility, but did not require such consultation based upon prior case law.

State ex rel. Mentek v. Schwarz, 2000 WI App 96, 235 Wis. 2d 143, 612 N.W. 2d 746 (Ct.App. 2000)

COMMENT: On administrative appeal, a probationer may be assisted by counsel, but there is no due process right or unconditional right to appointed counsel or effective assistance of counsel. The established case law only provides a conditional guarantee of counsel at hearing (the court ultimately found Mentek's claim moot because he failed to exhaust the available administrative remedies).

- (1) Wisconsin and federal constitutional law do not recognize a right to appointed counsel, nor by extension a right to effective assistance of counsel, on an administrative appeal of a probation revocation decision.
- (2) Wis. Admin. Code HA2.05(3)(f) creates a right to counsel at hearing, but does not provide a concomitant right to counsel on administrative appeal.

State ex rel. Mentek v. Schwarz, 2001 WI 32, 242 Wis. 2d 94, 624 N.W. 2d 150 (Wis. 2001)

COMMENT: The Supreme Court reversed and remanded *State ex rel. Mentek v. Schwarz*, 2000 WI App 96, stating Wis. Stat. §801.02(7) does not apply to a petition for a writ of certiorari seeking judicial review of a revocation of supervision. The Supreme Court also held that a probationer/parolee is not required to exhaust all administrative remedies before seeking circuit court review of a decision to revoke supervision.

Note: The Supreme Court **did not** reverse the findings of the Court of Appeals regarding the absence of the right to counsel pending an administrative appeal. However, Justice Abrahamson stated in her concurring opinion that the right to counsel extended to the administrative appeal process.

Tobler v. Door County, 158 Wis. 2d 19, 461 N.W. 2d 775 (1990)

COMMENT: Pursuant to Wis. Stat. §801.02(5), certiorari review may be commenced by three methods: (1) use of a summons and complaint; (2) service of an appropriate original writ; (3) filing a complaint, if service of the complaint and of an order is made upon the defendant [in this case, the Division of Hearings & Appeals].

Writ Of Certiorari

Bartus v. Department of Health and Social Services, Division of Corrections, 176 Wis. 2d 1063, 501 N.W. 2d 419 (1993)

COMMENT: DHA and DOC are expected to exercise their discretionary authority in revocation proceedings according to the same standards for the exercise of judicial discretion in sentencing proceedings.

The court sustained the ALJ's exercise of discretion in revoking probation for failure to make restitution. The evidence supported the ALJ's conclusion that the probationer's failure to pay was not the result of an inability to pay, but instead showed willful refusal to pay.

The ALJ properly refused to consider the probationer's contention that a facially valid order of the circuit court was void. The Division of Hearings and Appeals has no authority to void or reverse circuit court judgments.

Section 973.09(3)(b), which requires the DOC to inform the court 90 days before the expiration of probation of any unpaid restitution, does not require the DOC to inform the court when the Department decides to initiate revocation proceedings for the failure to pay restitution, rather than request the court extend probation to allow additional time for the probationer to complete his restitution obligation.

State ex rel. Johnson v. Cady, 50 Wis. 2d 540, 185 N.W. 2d 306 (1971)

COMMENT:

- (1) Due process requires a limited hearing to allow probationers and parolees to be confronted with their revocation and to be heard. It must be a factual hearing relating to the grounds for revocation. The hearing need not be a formal, “trial-type” hearing and the technical rules of evidence need not be observed. *Note:* The court did not enumerate any specific procedural requirements.
- (2) The right to review of a revocation hearing is by *certiorari* directed to the court of conviction. The scope of review is limited to whether the division’s action was arbitrary and capricious. And represented its will and not its judgment. The probationer/parolee has the burden of proof, which is by a preponderance of the evidence.
- (3) A statute that authorized disparate procedural treatment between probationers in counties with populations greater than 500,000 and those in counties with populations less than 500,000 did not violate Equal Protection because the classifications were not irrational or arbitrary. Differences in procedures based on geographic areas are not *per se* unconstitutional.
- (4) There is no constitutional right to counsel. *Note:* Later cases contain further discussion regarding conditions under which counsel is required. Wis. Admin. Code HA2.05(3) creates an unqualified right to counsel at revocation hearings.

State ex rel. Reddin v. Galster, 215 Wis. 2d 179, 572 N.W. 2d 505 (Ct.App. 1997)

COMMENT: “A person aggrieved by an administrative decision and order to revoke his or her probation may have the revocation proceedings reviewed upon a timely petition to the circuit court for a writ of certiorari. Thus, an adequate remedy exists to address alleged defects in probation revocation proceedings, and relief under habeas corpus will not be granted.”

Sufficiency Of The Record

State v. Goulette, 65 Wis. 2d 207, 222 N.W. 2d 622 (1974)

COMMENT: Parolee's supervision was revoked and he was reincarcerated. Parole board refused to grant parole. Court reviewing on *Writ of Certiorari* found hearing record inadequate and ordered a new hearing to be conducted according to specific guidelines stated by the court, to afford offender minimal due process and specifically to assure a record for review.

See *State ex rel. Klinke v. H&SS Department*, a parole rescission case.

RULES/LACK OF RULES

State ex rel. Rodriguez v. DH&SS, 133 Wis.2d 47, 393 N.W.2d 105 (Ct.App. 1986)

COMMENT: Rodriguez was convicted of child abuse and battery on April 22, 1981. The court imposed and stayed a four-year sentence and placed Rodriguez on probation for two years. The court ordered the probationary period to run consecutively to a sentence Rodriguez was serving on an unrelated offense. Rodriguez's sentence on the unrelated offense discharged on April 6, 1985. At that time, Rodriguez's agent was unaware of the consecutive probationary period imposed for child abuse/battery conviction and he told Rodriguez that he had been discharged from supervision. The agent did not discover his error until May 20, 1985. The agent contacted Rodriguez, informed him of the error, and ordered Rodriguez to return to the probation/parole office. Rodriguez did not report and subsequently battered Alice Gonzalez. The Department revoked Rodriguez's probation.

- (1) The court stated that Rodriguez could not claim that he was unaware of his probationary term because the judgment of conviction clearly stated that the probationary term was to be served consecutively to the sentence imposed in the unrelated case. Further, Rodriguez did not receive a discharge certificate for the child abuse/battery conviction. Therefore, the Department retained jurisdiction over Rodriguez.
- (2) A probationer cannot be bound by specifically tailored rules that are unsigned. However, unsigned rules did not preclude revocation in this case because:
 - (a) Wis. Stat. §973.10(1), placed a probationer under the control of the department "under conditions set by the court and rules and regulations established by the department." Thus, even without signed rules, Rodriguez still had to abide, as a matter of law, with departmental regulations prohibiting conduct which is in violation of state statute.
 - (b) Some conditions of probation are so essential that they automatically inhere to the concept of probation. Adherence to criminal laws is such a condition. Citing *Wagner v. State*, 89 Wis.2d 70 (1979).

See *In re G.G.D. v. State*, 97 Wis.2d 1 (1980), for a discussion relating to juvenile probation, the rules of supervision and revocation.

SEARCH AND SEIZURE

Exclusionary Rule

Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998)

Writing for the majority in a five-four decision of the United States Supreme Court, Justice Thomas states:

This case presents the question whether the exclusionary rule, which generally prohibits the introduction at criminal trial of evidence obtained in violation of the defendant's Fourth Amendment rights, applies in parole revocation hearings. We hold that it does not.

The Court examined the social cost and efficacy of applying the exclusionary rule at revocation hearings. The majority emphasized the differences in the investigation and prosecution of parole violations and criminal cases. The dissent focused on the similarities.

COMMENT: It is unlikely that the Court will create any exceptions to the rule of inapplicability. In fact, it overruled such an exception in this case. Under Pennsylvania law, the exclusionary rule does not apply to parole revocation cases, but the lower court recognized an exception to that general rule when the search is undertaken to secure evidence of a parole violation. This case dispatched that exception and probably all others.

Note: HA 2.05(6)(c) allows illegally obtained evidence to be accepted into the record.

SELF DEFENSE

State ex rel. Thompson v. Riveland, 109 Wis. 2d 580, 326 N.W. 2d 768 (1982)

COMMENT:

- (1) This case clarified *State ex rel. Henschel v. H&SS Department*, 91 Wis. 2d 268 (Ct.App. 1979), by stating that a violation cannot be proven with hearsay alone, unless the hearsay is reliable. Hearsay does not have to be corroborated to be reliable.
- (2) The defense of Self Defense is available to probationers.
- (3) The court found that the record supported Thompson's claim of self-defense where there was no evidence to refute the claim of self-defense. The only witness who appeared on behalf of the Department was an agent who had no personal knowledge of the incident and who had not supervised Thompson.

SENTENCE CREDIT

Ashford v. Division of Hearings and Appeals, 177 Wis. 2d 34, 501 N.W. 2d 34 (Ct.App. 1993)

COMMENT: A person on parole in two cases in which the sentences are consecutive is subject to parole revocation and reimprisonment for the remainder of *both* sentences even if he or she commits a violation before the discharge of the first sentence. Wis. Stat. §302.11(3) provides that in the mandatory parole context, “All consecutive sentences shall be computed as one continuous sentence.” Under §302.11(7)(a), DHA is authorized to return a parolee to prison “for a period up to the remainder of the sentence.” The “remainder of the sentence” is the aggregate of the consecutive sentences. Similarly, “once consecutive sentences are aggregated and a mandatory release date is set, parole is aggregated into a single term.” 177 Wis. 2d at 43.

Klimas v. State, 75 Wis. 2d 244, 249 N.W. 2d 285 (1977)

COMMENT: Defendant who lacks sufficient funds to post bail pending trial is entitled to pretrial sentence credit by the equal protection clause of the fourteenth amendment. (This case predates §973.155 *Sentence credit* statute.)

State ex rel. Ludtke v. Dept. of Corrections, 215 Wis. 2d 1, 572 N.W. 2d 864 (Ct.App. 1997)

COMMENT:

- (1) If parole is revoked, a parolee is not entitled, as a matter of right, to custody credit for time successfully served on parole. See Wis. Stat. §302.11(7)(a).
- (2) Because the parolee is provided with a hearing to determine credit for time served on parole, there is no violation of due process when an Administrative Law Judge denies credit for time successfully served on probation.
- (3) Denial of such credit does not violate the Double Jeopardy Clause because parole is not considered punishment, it is instituted for the purposes of rehabilitation. Further, parole revocation is a continuing consequence of the original conviction and, as such, cannot form the basis for a claim of double jeopardy.

State v. Abbott, 207 Wis. 2d 621, 558 N.W. 2d 687 (Ct.App. 1996)

- Overruled by *State v. Magnuson*.

State v. Amos, 153 Wis. 2d 257, 450 N.W. 2d 503 (Ct.App. 1989)

COMMENT: The defendant was originally convicted of Burglary (Burglary A). He escaped and committed a second burglary (Burglary B). The defendant asserted that he was improperly denied pre-sentence credit toward his sentence on Burglary B, claiming that he should have received custody credit from the date of his arrest for Burglary B. The court stated that the client was entitled to pre-sentence credit from the date of conviction for Burglary B until sentencing in Burglary B. The court considered the time between the client’s arrest and conviction in Burglary B to be time served toward the sentence imposed in Burglary A.

State v. Aytch, 154 Wis. 2d 508, 453 N.W. 2d 906 (Ct.App. 1990)

COMMENT: The client was sentenced to prison and concurrent probation with a withheld sentence. The Department released the client to parole supervision. The client's probation and parole were subsequently revoked. When the client was returned to court for sentencing, the court ordered the new sentence to run consecutively to the previously imposed sentence. The Court stated that the client was entitled to custody credit against the first sentence only, citing *Solie v. Schmidt*, 73 Wis. 2d 76 (1976).

State v. Cobb, 135 Wis. 2d 181, 400 N.W. 2d 9 (Ct.App. 1986)

COMMENT: As a condition of probation, the defendant completed a drug abuse program at a treatment center. Upon probation revocation, the court held that sentence credit was not available for the time spent at the treatment center. The defendant was not physically detained at an institution, so was not "in custody" during that time.

State v. Cole, 2000 WI App 52, 233 Wis. 2d 577, 608 N.W. 2d 432 (Ct.App. 2000)

COMMENT: The circuit court has the authority to order a sentence to run consecutively to a sentence being served by a parolee whose parole has not yet been revoked. "While on parole, a person is constructively in the custody of the State and is serving a sentence of imprisonment until discharged."

State v. Collette, 207 Wis. 2d 319, 558 N.W. 2d 642 (Ct.App. 1996)

COMMENT: Overruled by *State v. Magnuson*.

State v. Dentici 2002 WI app 77, 251 Wis. 2d 436, 643 N.W. 2d 180 (Ct.App. 2002)

COMMENT: The Court of Appeals held that a defendant is entitled to custody credit for an administrative furlough granted by the Sheriff to relieve jail overcrowding. Dentici was ordered to serve 60 days in jail as a condition of probation. The conditional jail term was to commence on February 3, 1997, the day Dentici was sentenced, and the court ordered the Sheriff to take him into custody and transport him to Milwaukee House of Corrections. Upon arrival, the jailer told Dentici that there was no room for him at the House of Corrections and he should return on February 28, 1997. Dentici returned on February 28, 1997 and served his 60-day jail term. Dentici's probation was subsequently revoked and he applied to the court for an additional 25 days of sentence credit, i.e. February 3, 1997 to February 28, 1997. The court denied Dentici's request for custody credit and he appealed. The issue is whether Dentici was in "custody" during his administrative furlough from the House of Corrections.

The Court of Appeals had to reconcile one of its own decisions with a subsequent decision of the Wisconsin Supreme Court. In *State v. Riske*, a 1989 case, the Court of Appeals held that an offender who reports to jail and is turned away because of overcrowding is entitled to custody credit from the date he reported to jail. In *State v. Magnuson*, a 2000 case, the Wisconsin Supreme Court held that an offender is not entitled to custody credit unless violating the terms and conditions of the status for which credit is claimed could result in a conviction for escape under Wis. Stats. § 936.42. The question, therefore, is whether Dentici was subject to any restrictions between February 3, 1997 and February 28, 1997 that might give rise to an escape conviction. The Court of Appeals found two restrictions. First, Dentici was required to return to jail on February 28, 1997. In *Riske*, the Court of Appeals balked at the suggestion that Riske

could be convicted of escape for failing to return to jail as directed. In this case, the same court said that Dentici would have been guilty of escape if he had failed to return to jail on February 28, 1997. "Custody," as defined in the escape statute, includes people who are "temporarily outside the institution whether for the purpose of work, school, medical care, a *leave granted under s. 303.068*, a temporary leave or furlough granted to a juvenile or *otherwise*. Wis. Stats. § 946.42 (1) (a). Dentici, the court concluded, was temporarily outside the House of Corrections as an "*otherwise*." Second, the court said that Dentici's movements were restricted to Wisconsin under Wis. Stats. § 303.068 (4). That section reads, "an inmate granted a leave under this section shall be restricted to the confines of this State." The court did not explain how Dentici, who had not been granted a leave granted under s. 303.068, was subject to the terms of that statute. Finally, in a footnote, the Court of Appeals states that there may be exceptions to *Magnuson's* bright-line rule.

In summary, Dentici was entitled to custody credit from February 3, 1997 to February 28, 1997 – the period from his original report date to the date he was ordered to return to the House of Corrections.

State v. Fearing, 2000 WI App 229, 239 Wis. 2d 105, 619 N.W. 2d 115 (Ct.App. 2000)

COMMENT:

- (1) Offender may NOT earn good time for jail confinement imposed as a condition of probation. The court relies on *Prue v. State*, 63 Wis. 2d 109 (1974).
- (2) The circuit court does not have the statutory authority to authorize the probation agent to impose the stayed conditional jail time at the agent's discretion (i.e., often judges would impose conditional jail time to be used at the discretion of the supervising agent as punishment for violations). Further, there is no statutory scheme that gives DOC the authority to impose or modify a condition of probation, nor is DOC given the authority to decide to impose jail confinement as a condition of probation or the length of that confinement. If the Department wants to impose condition time, it must petition the circuit court for such an order.

State v. Holliman, 180 Wis. 2d 348, 509 N.W. 2d 73 (Ct.App. 1993)

COMMENT: Intensive sanctions offender cut off electronic monitoring bracelet and left home for two months.

Intensive sanctions program is considered a correctional institution pursuant to statute and as such, when the offender cut off the bracelet and left the residence where he had been confined he violated the statute forbidding escape from custody. Therefore, Holliman was entitled to custody credit for the two months he was on EMP in the Intensive Sanctions program. See Wis. Stat. §§301.048(4)(b), and 946.42(3)(a).

See *State v. Miller*, 180 Wis. 2d 320 (Ct.App. 1993).

State v. Hungerford, 76 Wis. 2d 171, 251 N.W. 2d 9 (1977)

COMMENT: Offender was convicted of sex crime and, based on sex crimes law, Wis. Stat. §975.06, committed to Central State Hospital, a maximum security facility. He escaped, was caught and brought back. On escape conviction sentenced to one year in prison, consecutive to commitment but to begin immediately. Inconsistency in

sentencing language led to later question about whether sentence was served. At that time the trial judge amended sentence to one week probation, consecutive to commitment.

Commitment under Wis. Stat. Ch. 975 sex crimes law, does not constitute sentencing, so there was nothing to which the escape sentence could run consecutively. One year escape sentence was served at CHS during commitment. Imposition of one week probation void.

State v. Magnuson, 233 Wis. 2d 40, 606 N.W. 2d 536 (2000), 2000 WI 19

COMMENT: The Court rejected the case-by-case method of determining whether an individual is in custody for the purposes of sentence credit that was utilized by the Court of Appeals in *State v. Collette*, 207 Wis. 2d 319 (Ct.App. 1996).

The Court established a bright line rule: for sentence credit purposes, an offender's status constitutes custody whenever the offender is subject to an escape charge under Wis. Stat. §946.42 for leaving that status.

Offenders are entitled to sentence credit for time served in the Intensive Sanctions Program.

State v. Moore, 167 Wis. 2d 491, 481 N.W. 2d 633 (1992)

COMMENT: Under *Wis. Stat. §971.14(5)(a)*, an incompetent defendant may be committed for treatment "for a period of time not to exceed 18 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." In this case, the court holds that "maximum sentence" means the maximum period of confinement *less good time* earned under *Wis. Stat. §973.155(4)*.

State v. Morricks, 147 Wis. 2d 185, 432 N.W. 2d 654 (Ct.App. 1988)

COMMENT: Morricks had two sentences for "the same course of conduct." The first sentence was completed before the second sentence was imposed, so the sentences were not "concurrent" or "consecutive." The court held that confinement credited against the first sentence could not be credited against the second. Double credit is only allowed on concurrent sentences. Nonconsecutive sentences are not necessarily "concurrent."

State v. Sevelin, 204 Wis. 2d 127, 554 N.W. 2d 521 (Ct.App. 1996)

COMMENT: Court held that since defendant was in constructive "custody" of sheriff, and subject to a charge of escape under *Wis. Stat. §946.42(1)(a)* if he left the inpatient treatment facility without permission, he was entitled to a sentence credit for the period of time he spent in the inpatient treatment facility.

State v. Swadley, 190 Wis.2d 139, 526 N.W.2d 778 (Ct.App., 1994)

COMMENT: This case was *implicitly* overruled by the Wisconsin Supreme Court in *State v. Magnuson*. The Court of Appeals held that the defendant was not entitled to credit for time spent in home detention under *Wis. Stat. §302.425(6)* because the defendant was not in custody as described in *Wis. Stat. §946.42(1)(a)*.

However, the Court in *State v. Magnuson* held that if a person could be charged with escape for leaving the place in which they are being detained, that person is in custody and therefore, entitled to sentence credit. A person who leaves home detention is subject to the criminal escape statute. Therefore, under *Magnuson*, an individual is entitled to custody credit for time spent in home detention.

State v. Ward, 153 Wis. 2d 743, 452 N.W. 2d 158 (Ct.App. 1989)

COMMENT: When a defendant is granted sentence credit, it applies to **all** concurrent sentences.

Condition Time

Prue v. State, 63 Wis. 2d 109, 216 N.W. 2d 43. (1974)

COMMENT: No right to “good time” credit for time spent in custody as a condition of probation. A court may, however, grant the good time otherwise cumulative against a sentence to the county jail as a condition of probation. If the court order is silent on the accumulation of good time against confinement as a condition of probation, no good time is accumulated as against a sentence to the county jail.

State v. Gilbert, 115 Wis. 2d 371, 340 N.W. 2d 511 (983)

COMMENT: Two offenders with stayed sentences and probation with condition time appealed when they were denied custody credit for condition time.

Defendant was entitled to credit for each day in custody toward the service of his/her sentence including days spent in custody as a condition of probation. See *Wis. Stat. §973.155*. See also, *State v. Wills*, 69 Wis. 2d 489 (1975).

State v. Riley, 175 Wis. 2d 214, 495 N.W. 2d 669 (Ct.App. 1993)

COMMENT: The defendant escaped from a conditional jail term, committed a new offense, and was returned to jail to complete his conditional jail term while being detained in lieu of cash bail on the new charge. The court held that the defendant was not entitled to sentence credit toward the new charges for the time he served as a condition of probation, even though his bail on the new case may have resulted in the loss of release privileges on probationary jail term.

State v. Stefanovic, 215 Wis. 2d 310, 572 N.W. 2d 140 (Ct.App. 1997)

COMMENT: The circuit court does not have jurisdiction to order a probationer to serve a stayed period of conditional jail time when the probationer has been formally discharged from probation, i.e. issued a certificate of discharge.

Good Time Computations

State ex rel. Grant v. Department of Corrections, 192 Wis. 2d 298 (Ct.App. 1995), 531 N.W. 2d 367 (Ct.App. 1995)

COMMENT: Clerical errors in the computation of good time do not constitute a violation of Due Process when no prejudice is shown.

Deference is to be given to the Department of Corrections interpretation of their administrative rules if the interpretation is reasonable and consistent with the regulation's purpose.

Juvenile Facility

State v. Baker, 179 Wis. 2d 655, 508 N.W. 2d 40 (Ct.App. 1993)

COMMENT: The Court of Appeals held that the defendant was entitled to sentence credit for 39 days spent in secure detention pending waiver into adult court, because the waived defendant was being incarcerated for the waived offense, not a juvenile court matter.

State v. Thompson, 225 Wis. 2d 578, 593 N.W. 2d 875 (Ct.App. 1999)

COMMENT: Citing *State v. Baker*, 179 Wis. 2d 655 (Ct.App. 1993), the court held that Thompson was entitled to custody credit for time spent at Ethan Allen School for Boys.

In the Interest of Reginald D., 193 Wis. 2d 299, 533 N.W. 2d 181 (1995)

COMMENT: Time served in a secure detention facility prior to being adjudicated a delinquent is NOT creditable to the commitment of the juvenile.

SENTENCING

Some cases regarding sentencing have been included because the criteria for determining periods of reincarceration in parole cases is similar to determining the length of prison sentences.

Grant v. State, 73 Wis. 2d 441, 243 N.W. 2d 186 (1976)

COMMENT: Agreements by police or prosecutors not to reveal relevant and pertinent information are unenforceable as being against public policy.

Handel v. State, 74 Wis. 2d 699, 247 N.W. 2d 711 (1976)

COMMENT: In sentencing the defendant, the court took into consideration the fact that the defendant faced a criminal prosecution of carrying a concealed weapon. The Supreme Court held that such action by the sentencing court was reasonable even though this charge was not “dismissed and read in” so that the defendant remained exposed to conviction and sentence on the pending charge. The court relied upon *Brozovich v. State*, 69 Wis. 2d 653, 661, 230 N.W. 2d 639 (1975), which held that a prosecuting attorney “...may properly use information relating to complaints of other offenses in his argument on sentence [because] [t]hese complaints are evidence of a pattern of behavior which, in turn, is an index of the defendant’s character, a critical factor in sentencing.” Consideration of such a charged offense is similar to the permissible practice of the court considering uncharged criminal conduct in arriving at an appropriate sentence.

McCleary v. State, 49 Wis. 2d 263, 182 N.W. 2d 512 (1971)

COMMENT: This case includes a very comprehensive discussion of sentencing and appellate review of sentencing. The Supreme Court in this case adopts the ABA *Standards Relating to Appellate Review of Sentences*.

In the review of a court’s sentence, “there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale rounded on proper legal standards.” 49 Wis. 2d at 277.

Neely v. State, 47 Wis. 2d 330, 177 N.W. 2d 79 (1970)

COMMENT: The court quoted with approval ABA *Standards Relating to Sentencing Alternatives and Procedures*. American Bar Association Project on Minimum Standards for Criminal Justice, approved 1968 draft sec. 2.2: “The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.”

State v. Cleaves, 181 Wis. 2d 73, 510 N.W. 2d 143 (Ct.App. 1993)

COMMENT: Defendant convicted of operating a motor vehicle ordered to pay \$305 restitution for two charges dismissed and read in. He did not, at sentencing or at any other time, personally admit committing the read-in crimes. He disputed the restitution order based on lack of admission. The court made it clear that the dismissed charges were being read-in for purposes of ordering restitution and the defendant did not object.

Personal admission is not required under Wisconsin's read-in procedure, in absence of any objection to crimes being read-in, court may assume that defendant admits them for purposes of being considered at sentencing. This is based not on statute but on common law, from which read-in procedures are derived.

State v. Gereaux, 114 Wis. 2d 110, 338 N.W. 2d 118 (Ct.App. 1983)

COMMENT: Offender convicted on two counts, sentence withheld and two consecutive terms of probation ordered.

Consecutive probation terms are not authorized under the sentencing statutes. Previously, statutes had explicitly allowed imposition of consecutive terms of probation. Statutes current at the time (Wis. Stat. §973.09) omitted reference to consecutive probation and stated that probation could be made consecutive to another sentence. "Sentence" is a legal term that does not include the term "probation."

State v. McClinton, 195 Wis. 2d 344, 536 N.W. 2d 413 (Ct.App. 1995)

COMMENT: Some statutes create minimum mandatory periods of confinement and state that the offender is entitled to earn good time. Defendant's sentenced under these statutes *must* be allowed to earn good time, even if they are serving their jail term as a condition of probation.

State v. McCready, 2000 WI App 68, 234 Wis. 2d 110, 608 N.W. 2d 762 (Ct.App. 2000)

COMMENT: McCready petitioned the court to terminate his probation after serving one year. The circuit court granted McCready's request and sentenced him to five years imprisonment. McCready appealed arguing that the circuit court did not have the authority to terminate his probation.

The Court of Appeals stated probationer has the right to refuse or request the termination of his probation if he finds the conditions of probation more onerous than the sentence that would have been imposed. Therefore, it would have been error for the circuit court to refuse McCready's request. Further, a probationer's rejection of probation is not the same as a probation revocation. The court cited *State v. Migliorino*, 150 Wis. 2d 513 (1989).

State v. North, 91 Wis. 2d 507, 283 N.W. 2d 457 (Ct.App. 1979)

COMMENT: The trial judge mistakenly sentenced the defendant to serve 2 ½ years on the misdemeanor count and 6 months on the felony count. The Court of Appeals held that the trial court must reduce the misdemeanor sentence without increasing the felony sentence. Increasing the felony sentence would violate the double jeopardy clause.

State v. Pierce, 117 Wis. 2d 83, 342 N.W. 2d 776 (Ct.App. 1983)

COMMENT: A court may not impose consecutive probation terms. See also *State v. Gereaux*, 114 Wis. 2d 110 (Ct.App. 1983). Resentencing is the proper method to correct a void sentence.

State v. Sepulveda, 119 Wis. 2d 546, 350 N.W. 2d 96 (1984)

COMMENT: The trial court sentenced the defendant to six years in prison, stayed the sentence, and placed him on probation for three years. As a condition of probation, the defendant was required to admit himself to a psychiatric hospital. The hospital rejected the defendant as untreatable. After a hearing examiner refused to revoke the defendant's probation, the defendant was taken before the court for a review of his sentence. The court then modified the defendant's sentence so he was required to serve three years in prison. The Wisconsin Supreme Court held that the three-year prison term was a "modification" of the defendant's probation. The court noted that the trial court had no authority to revoke probation.

See *State v. Ralph*, 156 Wis. 2d 433 (Ct.App. 1990).

Mental Commitment

State ex rel. Deisinger v. Treffert, 85 Wis. 2d 257, 270 N.W. 2d 402 (1978)

COMMENT: This is a mental commitment case. The court held that the committed individual may not be held in custody longer than the period for which the individual could have been sentenced, if he or she had been convicted of the crime with which he or she had been charged. If the state wishes to detain an individual for a period of time greater than the maximum sentence allowed for the crime with which the individual was charged, the state must commence and obtain a Chapter 51 commitment.

TIME LIMITS

Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972)

COMMENT: The constitutional right to a speedy trial is determined on an *ad hoc* balancing basis, in which the conduct of the prosecution and that of the defendant are weighed. Some of the factors to be weighed are: (1) length of delay; (2) reason for the delay; (3) the defendant's assertion of his right; and, (4) the prejudice to the defendant.

Moody v. Daggett, 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976)

COMMENT: Federal parolee, imprisoned for federal crimes committed while on parole and clearly constituting parole violations, is not constitutionally entitled to an immediate parole revocation hearing, where a parole violator warrant was issued and lodged with the institution of his confinement but was not executed.

State ex rel. Avery v. Percy, 99 Wis. 2d 459, 299 N.W. 2d 886 (Ct.App. 1980)

COMMENT: Due process does not require a final revocation hearing to be held prior to a parolee's discharge date. Precluding such a hearing would run contrary to public policy because the Department would have no recourse for violations occurring at the end of an individual's supervision.

However, due process still demands that a final revocation hearing be held in a timely fashion. The Court of Appeals remanded the case with directions to the circuit court to determine whether holding a hearing seven months after the initiation of proceedings, and four months after the expiration of the parolee's sentence was reasonable and in accordance with due process standards.

State ex rel. Jones v. Div. of Hearings & Appeals, 195 Wis. 2d 669, 536 N.W. 2d 213 (Ct.App. 1995)

COMMENT:

- (1) Section 302.335 regulates the length of time persons are held in custody pending revocation hearings by giving the Sheriff the discretion to release an inmate after 50 days. Section 302.335 does *not* regulate the authority of the Division of Hearings and Appeals to hold revocation hearings. Therefore, a failure to hold a hearing within 50 days of initial detention does not result in the Division's loss of jurisdiction to hold revocation hearings.
- (2) Beginning a revocation hearing 54 days after detention was not unreasonable and did not violate Due Process.

State v. Robinson, 145 Wis. 2d 273 (Ct.App. 1988), 426 N.W. 2d 606 (Ct.App. 1988)

COMMENT: A balancing test is appropriate to determine whether a trial court has properly exercised its discretion. Arguably, similar standards should be applied to requests for continuances of administrative proceedings.

Proper exercise of this discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice. On the one hand, the court may not insist upon expeditiousness for its own sake, but, on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is a reasonable delay varies depending upon all the surrounding facts and circumstances.

See, *Phifer v. State*, 64 Wis. 2d 24 (1974) and *State v. Wedgeworth*, 100 Wis. 2d 514 (1981).

The Court also set forth the criteria for granting a delay with the proper use of discretion. Quoting *Giacalone v. Lucas*, 445 F.2d 1238, 1240 [6th Cir.1971], *cert. denied*, 405 U.S. 922 S.Ct. 960 (1972), the court said the factors appropriate for this balancing test are (1) the length of the delay, (2) whether the defendant's counsel has associates ready to try the

case, (3) whether there have been other continuances requested and received by the defendant, (4) the inconvenience of those involved, (5) whether the delay is for legitimate reasons or is dilatory and (6) other relevant factors.

See, also, *State v. Wedgeworth*, 100 Wis. 2d 514 (1981).

TOLLING TIME

State ex rel. Beougher v. Lotter, 91 Wis. 2d 321, 283 N.W. 2d 588 (Ct.App. 1979)

COMMENT: Where parolee signed a Request for Reinstatement, in which he admits absconding from supervision, no hearing is required to toll the parolee's time. The admission is a concession that the parolee violated his supervision. As such, the reinstatement order issued by the Department was tantamount to a finding by the Department that the parolee violated the rules of supervision and that the violation would otherwise warrant revocation.

Note: This case was decided under former Wis. Stat. §57.072.

State ex rel. Cox v. H&SS Department, 105 Wis. 2d 378, 314 N.W. 2d 148 (Ct.App. 1981)

COMMENT:

(1) Issuance of a warrant during a probationary term tolls the running of the term; (2) a warrant does not require a written request.

TREATMENT

State ex rel. Tate v. Schwarz, 2001 WI App 131, 246 Wis. 2d 293, 630 N.W. 2d 761 (Ct.App. 2001)

COMMENT: If an offender has a direct appeal of his/her conviction pending, the offender cannot be required to make an admission to the underlying sexual assault as part of sex offender treatment. The Court of Appeals held that such admissions cannot be compelled without violating the offender's Fifth Amendment privileges.

Petition for review granted September 21, 2001.

State ex rel. Warren v. Schwarz, 211 Wis. 2d 710, 566 N.W. 2d 173 (Ct.App. 1997)

COMMENT: Warren entered an Alford no-contest plea to a charge of first-degree sexual assault. The court entered a judgment of conviction and placed Warren on probation for eight years. As a condition of probation, the court ordered Warren to enter into and complete sex offender treatment. Warren attended and participated in treatment but denied any culpability for the sexual assault. After thrice attempting to successfully complete sex offender treatment, Warren's probation was revoked. Warren contended that it was a violation of his right to due process to require him to admit to the sexual assault, given that he made no admission of guilt when he entered his Alford plea. Warren also argued that the DOC was obligated to investigate and attempt alternatives to revocation. The court ruled as follows:

- (1) An Alford plea does not grant or imply an assurance that the defendant will not have to admit his guilt during conviction or punishment.
- (2) Requiring Warren to admit some culpability in sex offender treatment did not violate his constitutional privilege to not incriminate himself, nor did it constitute entrapment.
- (3) The trial court's acceptance of Warren's Alford plea does not limit the requirements DOC may otherwise lawfully impose on Warren.
- (4) Neither the Division nor DOC is obligated to try alternatives to revocation. They are only obligated to consider alternatives to revocation.

See *State v. Carrizales*, 191 Wis. 2d 85 (Ct.App. 1995), and *Van Ermen v. H&SS Department*, 84 Wis. 2d 78 (1978).

For additional discussion about Alford pleas, see *State ex rel. Warren v. Schwarz*, Wis. 2d 615 (1998).

State v. Carrizales, 191 Wis. 2d 85, 528 N.W. 2d 29 (Ct.App. 1995)

COMMENT: Carrizales, plead “no contest” and was convicted of sexual assault. The court placed Carrizales on probation. Carrizales filed a motion to modify the conditions of his probation to exclude sex offender treatment. During the pendency of this motion, the Department sought to revoke Carrizales's probation because he would not admit to the underlying sexual assault. Carrizales claimed that under the Fifth Amendment, the Department could not compel him to admit to the sexual assault.

The Court of Appeals held that Fifth Amendment protections did not apply in this case because: (1) The threat of incrimination passed – Carrizales had already been convicted of the sexual assault. Therefore, his admission could only be used for rehabilitation purposes; (2) there is an overriding governmental interest in protecting the public that supports the requirement of convicted sex offenders to complete and comply with sex offender treatment.

Von Arx V. Schwarz, 185 Wis. 2d 645, 517 N.W. 2d 540 (Ct.App. 1994)

COMMENT: Von Arx's probation was revoked because he failed to successfully complete sex offender treatment. Von Arx appealed claiming that the rule requiring his attendance at sex offender treatment violated his constitutional right to religious freedom. The Court of Appeals disagreed.

- (1) Based upon *Van Ermen v. DHSS*, 84 Wis. 2d 57 (1978), Court of Appeals assumed that the Department's obligation to consider feasible alternatives involved the obligation to reasonably accommodate a probationer's religious beliefs.

This obligation was met in this case because the Department offered Von Arx three different treatment groups, one of which was run by a Christian based organization and did not involve therapeutic techniques that Von Arx claimed violated his new found religious principles. The Department also expressed a willingness to consider a fourth attempt at treatment if Von Arx could find a viable, scientifically approved alternative treatment that would not violate his religious principles.

- (2) A probationer/parolee's constitutional rights, including the right to religious freedom, may be impinged as long as the conditions of supervision are not overly broad and are reasonably related to the person's rehabilitation.

In this case, the rule requiring Von Arx to attend sex offender treatment was reasonably related to his rehabilitation given the apparent danger he posed while untreated and it was narrowly applied as evidenced by the Department's attempt to accommodate Von Arx's religious principles.

WARRANTS

State ex rel. Cox v. H&SS Department, 105 Wis. 2d 378 (, 314 N.W. 2d 148 (Ct.App. 1981)

COMMENT:

- (1) Issuance of a warrant during a probationary term tolls the running of the term; (2) a warrant does not require a written request.

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