is sought to be enforced. Instead, "where the conduct which is relied upon for part performance is consistent with the contract such conduct is sufficient to take the contract out of the statute of frauds even though such conduct is not inconsistent with some other dealings arguably had between the parties."[41]

JAMES G. DE JONG

CRIMINAL LAW

I. INTOXICATION AS A DEFENSE TO CRIMINAL LIABILITY

Within the space of eight weeks the Wisconsin Supreme Court gave conflicting interpretations to the meaning of "involuntarily produced" intoxication as it pertains to Wisconsin Statutes section 939.42. The statute provides:

> Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition:
>
> (1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or
>
> (2) Negatives the existence of a state of mind essential to the crime.

In *Staples v. State*[1] the defendant, whose principal defense was intoxication, was convicted by a jury of kidnapping, burglary and operating a motor vehicle without the consent of the owner. The issue on appeal was whether the trial court erred in restricting the evidence offered by the defendant in an attempt to prove his chronic alcoholism.

The court, relying upon *Roberts v. State,*[2] stated that proof of alcoholism, when "established by expert medical opinion,"[3] could be relevant. "Alcoholism, in itself, is not now and never has been a separate defense to criminal liability in this state. . . . This court has, however, recognized that proof of alcoholism may be relevant to the defense of involuntary intox-

41. 75 Wis. 2d at 670, 250 N.W.2d at 325.

1. 74 Wis. 2d 13, 245 N.W.2d 679 (1976).
2. 41 Wis. 2d 537, 164 N.W.2d 525 (1969).
3. 74 Wis. 2d at 20, 245 N.W.2d at 683.

ication raised under sec. 939.42(1)."[4] In particular, "[p]roof of alcoholism would go to prove involuntariness."[5]

In *Staples,* however, the defense failed to produce any medical experts or "proper medical proof"[6] to establish the fact of psychological or physiological dependency. Instead, defense counsel chose to rely solely upon the defendant's own testimony. In addition, the court found that the defendant also failed to prove the second element of the involuntary intoxication defense, that the defendant was "incapable of distinguishing between right and wrong in regard to the alleged criminal act."[7] For these reasons the trial court was upheld and the convictions were affirmed.

The impact of *Staples* was short lived indeed. In *Loveday v. State*[8] the court explicitly withdrew that portion of the *Staples* opinion which held that proof of alcoholism was relevant to the issue of involuntariness.

Loveday concerned a first degree murder conviction. The trial court had excluded testimony relating to the defendant's drug addiction. Unlike *Staples,* expert medical witnesses, in the form of two psychiatrists, were available to testify. The question before the court was "whether evidence that defendant was addicted to drugs is relevant to the issue of whether his drugged condition was involuntarily produced."[9]

The court noted that "[t]wo distinct views have emerged regarding the issue of addiction and involuntariness."[10] Instead of following *Roberts* and *Staples,*[11] the court in *Loveday* chose to adopt "[t]he more generally accepted rule . . . that the phrase 'involuntary intoxication or drugged condition' does not contemplate a condition which is the result of an addict's de-

4. *Id.* at 19, 245 N.W.2d at 683.

5. *Id.* at 20, 245 N.W.2d at 684.

6. *Id.*

7. WIS. STAT. § 939.42(1) (1975).

8. 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

9. *Id.* at 509, 247 N.W.2d at 120.

10. *Id.,* 247 N.W.2d at 121.

11. The court implied that the *Staples* approach was based on a misunderstanding of constitutional law. In Robinson v. California, 270 U.S. 660 (1962), the United States Supreme Court held that a statute which made it a criminal offense to be "addicted to the use of narcotics" was unconstitutional. As the Wisconsin court noted, however, *Robinson* must be read in conjunction with Powell v. Texas, 392 U.S. 514 (1968). *Powell* stated that *Robinson* "does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion'." *Id.* at 533.

pendency no matter how irresistible the compulsion may be."[12] *Loveday* announced that involuntary intoxication should refer only to a condition brought about by "force or fraud on the part of a third person or the result of mistake by the defendant, such as where he lacks knowledge of a substance's intoxicating effects."[13]

In support of the position, the court offered three "considerations." First, the legislative intent of section 939.42(1) was to provide a defense only to those who became intoxicated or drugged through no choice of their own.[14] *Loveday* assumed that nobody becomes addicted to drugs without first exercising his or her own free will to consume them. Second, due to the "considerable medical disagreement regarding the manifestations of addiction, a jury surely could not decide on any reasonable basis whether an accused was one of those so addicted that he had lost self-control in taking the drugs or alcohol."[15] Third, adequate protections have already been instituted under the voluntary intoxication defense set forth in section 939.42(2). An addict who must prove that his voluntary intoxication negated an essential state of mind, rather than showing that his involuntary intoxication precluded him from telling right from wrong, is not thereby punished for his disease.

II. THE RIGHT TO REMAIN SILENT

Reichhoff v. State[16] presented a case in which the defendant, who was accused of two murders, took the witness stand in order to deny his involvement in both offenses. In an attempt to rebut this testimony, the prosecutor asked two state witnesses a total of five questions relating to the defendant's failure to deny his guilt at the time of his arrest. The trial court overruled defense counsel's objections and permitted both witnesses to testify that the defendant remained silent during this

12. 74 Wis. 2d at 509, 247 N.W.2d at 121.

13. *Id.*

14. Sec. 939.42, Stats., was enacted as a part of the 1955 revision of the Wisconsin Criminal Code, and was first proposed as sec. 339.42 of the 1953 Draft of the Wisconsin Criminal Code. The comments of the Judiciary Committee following that section in the 1953 Draft make it clear that the term "involuntary" only contemplated intoxication through force, fraud or mistake. *Id.* at 511-12, 247 N.W.2d at 122.

15. 74 Wis. 2d at 512, 247 N.W.2d at 122.

16. 76 Wis. 2d 375, 251 N.W.2d 470 (1977).

time. In his closing argument to the jury, the prosecutor twice attacked the defendant's credibility by commenting on his failure to profess his innocence when originally apprehended. No curative instructions were given to the jury as the trial court found both the testimony and comments to be proper.

The supreme court had no difficulty in finding that constitutional errors had been commited by the lower court.[17] On appeal the state conceded as much but argued that these errors were subject to the harmless error rule and were not unduly prejudicial to the defendant. The court, by a margin of four to two,[18] disagreed. "Evidence of custodial silence in this case not only had low probative value but also had a high potential for great prejudice to a defendant."[19] The convictions were reversed and the case was remanded for a new trial.

The court listed the factors it considered in deciding that prejudicial errors had been committed. The first, and most important of these factors, was the repetitive nature of the errors. "This is not a case where the prosecutor casually asked one witness, on one occasion, whether the defendant professed innocence at the time of arrest."[20] The second factor offered by the court concerned "the nature of the state's evidence."[21] It was deemed significant that the state's case was based entirely upon circumstantial evidence. Third, the "nature of the defense"[22] was found to be a critical determination. Since Reichhoff had taken the stand to testify, his credibility as a witness was a primary issue. "The erroneously admitted evidence of the silence of the defendant — repeatedly put before the jury — was intended to, and probably did, cast doubt on the defendant's credibility."[23]

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17. The questions were manifestly designed to demonstrate a tacit admission of guilt on the part of the defendant. The purpose of the evidence was to allow the jury to draw an inference of defendant's guilt from the defendant's silence. Such an inference of guilt is a direct violation of the defendant's right to remain silent guaranteed by the state constitution and the fourteenth amendment of the federal constitution.

Id. at 378, 251 N.W.2d at 472.

18. Joining Justice Abrahamson in the majority opinion were Justices Heffernan, Robert Hansen and Day. Justices Hanley and Connor Hansen dissented. Chief Justice Beilfuss took no part in the decision.

19. 76 Wis. 2d at 382, 251 N.W.2d at 474.

20. *Id.* at 381, 251 N.W.2d at 473.

21. *Id.*

22. *Id.*

23. *Id.* at 381-82, 251 N.W.2d at 474.

In dissent, Justice Hanley would have had the majority adhere to the rule enunciated in *Woodhull v. State.*[24] "This court has held that errors occurring in the course of a trial will not serve to overturn a conviction unless it clearly appears that had they not occurred, the result would probably have been more favorable to the defendant."[25] Justice Hanley felt that the majority ignored the fact that the state's evidence, although circumstantial, was overwhelming and "sufficient, without regard to the improper testimony and prosecutorial remarks, to establish the defendant's guilt beyond a reasonable doubt."[26]

Three months after *Reichhoff,* the court came to an opposite conclusion in a similar fact situation in *Rudolph v. State.*[27] In *Rudolph* during the state's case in chief, a police lieutenant testified that the defendant, while in police custody, "didn't want to talk."[28] Defense counsel's objection was overruled by the trial court which responded, "Oh, I think the jury is entitled to the explanation, the defendant is under no obligation to talk with the officer at all. The defendant was perfectly within his rights in refusing to talk to the officer."[29] The defense did not ask that any specific curative instructions be given to the jury, and none were. The defendant was subsequently found guilty of burglary and arson.

Rudolph first came before the court in March, 1976 when, in an unpublished per curiam opinion, it affirmed the convictions.[30] The court, in May of that same year, denied a motion for rehearing.[31] In January of 1977, the United States Supreme Court vacated the Wisconsin judgment and remanded the case for "further consideration in light of *Doyle v. Ohio.*"[32]

As the Wisconsin Supreme Court noted, the ruling in *Doyle v. Ohio*[33] was restricted to impeachment situations.[34] Since the

24. 43 Wis. 2d 202, 168 N.W.2d 281 (1969).
25. 76 Wis. 2d at 384, 251 N.W.2d at 475.
26. *Id.* at 383, 251 N.W.2d at 474.
27. 78 Wis. 2d 435, 254 N.W.2d 471 (1977).
28. *Id.* at 439, 254 N.W.2d at 472.
29. *Id.,* 254 N.W.2d at 473.
30. 71 Wis. 2d 845, 240 N.W.2d 430 (1976).
31. *Id.*
32. 429 U.S. 1034 (1977).
33. 426 U.S. 610 (1976).
34. "We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.

defendant in *Rudolph* chose not to testify, the Wisconsin court found that the due process arguments put forth in *Doyle* were not applicable. "Rather, this case presents the more fundamental question of whether the prosecution may affirmatively use in its case in chief the fact that the defendant . . . claimed the privilege against self-incrimination . . . during custodial interrogation."[35] Citing *Miranda,*[36] the court readily concluded that the prosecutor may not.

Finding that error had been committed, the court cited *Reichhoff* as being "instructive for the conceptual framework it provides for harmless error analysis,"[37] yet failed thereafter to follow its schematic approach.[38]

By a margin of four to three, the trial court was affirmed based on the conclusion that the error was harmless.[39] In reaching this conclusion, the court found that *Reichhoff* was distinguishable on two grounds. First, there was the frequency of error consideration, the first factor of the *Reichhoff* test for harmless error. In *Rudolph* there had been only one reference by the prosecutor to the defendant's silence. In *Reichhoff* there was a total of seven. Secondly, the court felt that the trial judge's explanation of the defendant's constitutional rights was sufficiently curative. Previous cases[40] found that curative instructions which specifically told a jury not to draw any inferences from a defendant's exercise of his right to remain silent were adequate to eliminate any prejudice. This rule was broadened in *Rudolph* to cover curative "explanations" or "statements" which fail to include specific warnings. In *Reichhoff* there were no curative statements made by the trial court. However, this factor was never a part of the *Reichhoff* test.

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35. 78 Wis. 2d at 441, 254 N.W.2d at 474.

36. In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

37. 78 Wis. 2d at 443, 254 N.W.2d at 474.

38. In contrast, *see* Justice Day's dissent at 78 Wis. 2d at 447, 254 N.W.2d at 477.

39. The per curiam decision represented the opinions of Chief Justice Beilfuss and Justices Hanley, Connor Hansen and Robert Hansen. Joining Justice Day in dissent were Justices Heffernan and Abrahamson.

40. Buckner v. State, 56 Wis. 2d 539, 202 N.W.2d 406 (1972) and State v. Johnson, 60 Wis. 2d 334, 210 N.W.2d 735 (1973).

The second factor of the *Reichhoff* test, the nature of the state's evidence, presumably should have weighed heavily in favor of the defendant. Like *Reichhoff,* the evidence relied upon by the state in *Rudolph* was purely circumstantial. But, unlike *Reichhoff,* the state's case was apparently less than overwhelming. On appeal, the state filed for permission to confess error concluding that the properly admitted evidence against the defendant "was barely sufficient to convict."[41] In his dissent Justice Day pointed out that the trial court came close to granting the defendant's motion for dismissal because the state's case was so weak.[42] The majority, however, came to a different conclusion and determined that the evidence, "while circumstantial, was amply sufficient to support the conviction."[43]

Interestingly enough, the third element of the *Reichhoff* test, the nature of the defense, would have provided the majority with another argument for distinguishing these two cases. As was the situation in *Doyle v. Ohio,* the erroneously admitted testimony in *Reichhoff* was used for impeachment purposes. The court in *Rudolph,* however, ignored this element of *Reichhoff* completely.

Rudolph's treatment of *Reichhoff* indicated that the three part harmless error test of the latter has probably been replaced by a two part test consisting of the frequency of the error and the balancing effect of any curative statements made by the trial judge.

The issue in *Micale v. State*[44] was whether the defendant knowingly and intelligently waived his constitutional rights prior to giving an incriminating statement while in police custody.

Micale pointed out that "[t]he burden is on the state to establish beyond a reasonable doubt that the defendant was informed of his constitutional rights as set forth in *Miranda* and that he understood them and intelligently waived them."[45] In this case, the defendant upon being advised of his Miranda rights by a police officer, was asked by the officer if he under-

41. 78 Wis. 2d at 443, 254 N.W.2d at 475.
42. *Id.* at 448 n.1, 254 N.W.2d at 477 n.1.
43. *Id.* at 444, 254 N.W.2d at 475.
44. 76 Wis. 2d 370, 251 N.W.2d 458 (1977).
45. *Id.* at 371, 251 N.W.2d at 459.

stood them. The defendant nodded his head, indicating that he had understood, but said that "he couldn't afford an attorney."[46] The court held that, based on the defendant's response, he could not knowingly or understandingly have waived his right against self-incrimination. The police questioning should have stopped immediately. The defendant's conviction for burglary was reversed since "the State relied heavily on the defendant's confession."[47]

III. Prosecutor's Duty to Disclose

The issue posed in *Ruiz v. State*[48] was whether a prosecutor has the obligation to disclose to the defense, absent any request, information which is not on its face exculpatory as to guilt or relevant to punishment.

The state's key witness, who was himself facing other criminal charges in another county, feared that his testimony against the accused murderer would cost him his life if both he and the defendant were to be incarcerated together at Waupun. The district attorney in *Ruiz* promised the witness that the other prosecutor would not "push for incarceration,"[49] and that if he were imprisoned, he would be isolated from Ruiz. The defendant failed to make any demands for discovery of information in the prosecutor's files and was not made aware of this arrangement until after the trial. On appeal, the convicted defendant maintained that withholding this information, which could have been used for impeachment purposes, amounted to a denial of due process.

Relying chiefly upon *United States v. Agurs*,[50] the court ruled that "in respect to truly exculpatory evidence, there is a duty which requires a prosecutor to produce the evidence *sua sponte*."[51] The evidence in this case, however, "was not exculpatory in any sense of the word."[52] Although knowledge of the prosecutor's deal might have damaged the witness' credibility in the eyes of the jury, nothing in the record suggested that this

46. *Id.* at 373, 251 N.W.2d at 459.
47. *Id.*, 251 N.W.2d at 460.
48. 75 Wis. 2d 230, 249 N.W.2d 277 (1977).
49. *Id.* at 232, 249 N.W.2d at 279.
50. 427 U.S. 97 (1976).
51. 75 Wis. 2d at 240, 249 N.W.2d at 283.
52. *Id.*

protective agreement fostered perjured testimony.[53] This information, deemed by the court to be irrelevant to the determination of guilt, "was not the type of evidence which the prosecutor, *sua sponte*, was obliged to disclose."[54] By failing to make a specific demand for discovery, the defendant waived his right of disclosure.

IV. SURPRISE AS GROUNDS FOR A CONTINUANCE

Angus v. State[55] concerned the conviction of a father for having incestuous relations with his sixteen year old daughter. At the preliminary examination the daughter testified that she had sexual intercourse with her father in the early morning of August 3, 1974. On cross-examination she admitted that she was not certain as to the exact date of the offense, but that it was in the beginning of August. Pursuant to Wisconsin Statutes section 971.23(8),[56] the defendant filed a timely notice of alibi directed toward the late evening hours of August 2 and early morning hours of August 3. The defendant had also assembled several witnesses who were available to testify in support of this alibi. On the day of the trial the daughter notified the prosecution of a change in her testimony, that the offense actually took place on the morning of August 2 instead of August 3. Upon learning this, the defense sought a continuance from the trial court in order to investigate the evening of Au-

53. Had there been a withholding of evidence which could have established that the key witness had given perjured testimony, Giglio v. United States, 405 U.S. 150 (1972), would have been controlling. A new trial would probably have been required.

54. 75 Wis. 2d at 240, 249 N.W.2d at 283.

55. 76 Wis. 2d 191, 251 N.W.2d 28 (1977).

56. WIS. STAT. § 971.23(8) (1973) provided in pertinent part that:

> (a) If the defendant contends to rely upon an alibi as a defense, he shall give written notice thereof to the district attorney at the arraignment or at least 20 days before trial stating particularly the place where he claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known.
>
> (b) In default of such notice, no evidence of the alibi shall be received unless the court, for cause, orders otherwise.
>
> (c) The court may enlarge the time for filing a notice of alibi as provided in par. (a) for cause.
>
> (d) Within 10 days after receipt of the notice of alibi, or such other time as the court orders, the district attorney shall furnish the defendant notice in writing of the names and addresses, if known, of any witnesses whom the state proposes to offer in rebuttal to discredit the defendant's alibi.

Subsection (a) has since been amended to require the defendant to give notice of alibi to the district attorney at least within 15 days of trial instead of 20. 1975 Wis. Laws, ch. 378.

gust 1 by contacting those persons, not available in court that day, who might be able to testify as to the defendant's whereabouts that night. The trial court denied this request on the basis that the complainant's new date for the alleged offense conformed with the date given in the information, but offered to admit testimony of other alibi witnesses without requiring the usual notice of alibi. On appeal the issue was whether the trial court abused its discretion by denying the defendant's request for a continuance.

The court stated that under certain circumstances surprise at trial arising from unexpected testimony is a proper basis for a continuance. However, continuances are not granted as a matter of right. Rather, it is up to the discretion of the trial judge to decide whether or not to grant such a motion. An abuse of discretion in denying a continuance, according to *Angus,* will be found only if three qualifications are met.

First, actual surprise must have existed. The party seeking the continuance must not have reasonably anticipated the development causing the surprise.[57] Second, where surprise is caused by unexpected testimony, the party seeking the continuance must have shown that, with a reasonable time, he could have obtained impeaching evidence.[58] Finally, the denial of the continuance must have been prejudicial to the party seeking it.[59]

The majority[60] in *Angus* determined that the third element, actual prejudice to the defendant, was not present in this case. This conclusion was based on the court's assumption that the defendant had no alibi. During the two day trial, the defense made no effort to establish an alibi through the defendant's own testimony. Two days were sufficient, in the court's opinion, to contact alibi witnesses if any were available. "Thus, the record contains absolutely nothing which indicates an alibi for the evening of August 1st-2nd existed, and thus no prejudice could have resulted by the denial of time to prepare one."[61]

Justice Abrahamson, writing in dissent,[62] believed that actual prejudice is presumed whenever the defendant and the

57. 76 Wis. 2d at 196, 251 N.W.2d at 31.

58. *Id.*

59. *Id.*

60. Joining Justice Hanley in the majority were Chief Justice Beilfuss, Justices Leo Hanley, Connor Hansen and Robert Hansen.

61. 76 Wis. 2d at 198, 251 N.W.2d at 32.

62. Joining Justice Abrahamson in dissent were Justices Heffernan and Day.

state are surprised by a change in a witness' testimony. According to the dissent, the philosophy behind the Wisconsin alibi statute and the ruling of the United States Supreme Court in *Wardius v. Oregon*[63] dictated the granting of a continuance in this case:

> The only rational and fair interpretation of the alibi statute is that the defendant must advise of alibi, the state must advise the defendant of its witnesses and the state must give the defendant timely information as to any change in the time or place of the offense. If the state fails to give such timely information to the defendant, the defendant has been deprived of a fair trial. Without adequate reciprocal discovery opportunity the defendant is denied due process.[64]

V. Trial Counsel as Both Advocate and Witness

Harris v. State[65] raised the issue of whether the prosecution's calling a defense counsel to the witness stand in order to impeach a defense witness was prejudicial error.

In this case, two co-defendants were charged with abduction, two counts of sexual perversion and obstructing an officer. During a chamber conference, one of the defense lawyers asked the court for permission to have a defense witness attempt an in-court identification of the victim. The attorney revealed that he had asked this witness in the hallway outside of the courtroom if the victim, who was also in the hallway, was someone she had seen on the date of the alleged offense. The witness said yes. After the witness took the stand, she was cross-examined by the district attorney and was asked if the defense attorney had pointed the victim out to her in the hallway. The witness denied this, insisting it was she who pointed out the victim. The prosecutor then called the defense counsel to the stand to contradict her testimony.

Citing Ethical Consideration 5-9 of the Code of Professional Responsibility,[66] the *Harris* court stated that generally this practice would be unseemly and improper, since "the roles of witness and advocate are inconsistent."[67] Yet, ultimately, "[w]hether a lawyer should testify in a trial in which he is an

63. 412 U.S. 470 (1973).
64. 76 Wis. 2d at 204, 251 N.W.2d at 35.
65. 78 Wis. 2d 357, 254 N.W.2d 291 (1977).
66. *Id.* at 369, 254 N.W.2d at 297.
67. *Id.* at 368-69, 254 N.W.2d at 297.

advocate is a matter for the trial court's discretion."[68]

Harris concluded that although calling the defense attorney was improper, it was not prejudicial. It did not prevent the defendant from obtaining a fair trial. "The testimony was brief and collateral; it tended to corroborate and not to impeach the defense witness. . . ."[69]

VI. INDIGENT'S RIGHT TO COUNSEL

In *State ex rel. Winnie v. Harris,*[70] the court resolved an apparent conflict between Wisconsin and United States Supreme Court decisions dealing with an indigent's right to counsel. In *Winnie* the petitioner sought habeas corpus relief after being convicted of a misdemeanor[71] and sentenced to ninety days in jail.[72] It was undisputed that the petitioner was neither advised of his right to counsel nor told that counsel would be appointed if he was indigent. It was also undisputed that the petitioner did not waive his right to counsel.[73]

Under a prior decision, *State ex rel. Plutshack v. Department of Health & Social Services,*[74] appointment of counsel was required only when an indigent was charged with a crime carrying a maximum jail term of more than six months. However, in *Argersinger v. Hamlin*[75] the Supreme Court held that no person could be imprisoned for any length of time unless he was represented by counsel at trial. Overruling that portion of *Plutshack* dealing with the six month limitation, the court held that the rule in *Argersinger* was controlling.[76]

However, the court noted the inherent problems with the

68. 78 Wis. 2d at 369, 254 N.W.2d at 298.

69. *Id.*

70. 75 Wis. 2d 547, 249 N.W.2d 791 (1977).

71. WIS. STAT. § 936.60 (1975) defines felony and misdemeanor: "A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

72. Petitioner was convicted of operating a motor vehicle after his license had been revoked (second offense) in violation of WIS. STAT. § 343.44(1) (1975). He was sentenced under (2) of the same section which provides: "Any person violating this section . . . shall be imprisoned not less than 90 days nor more than one year in the county jail for the 2nd such violation. . . ."

73. 75 Wis. 2d at 551, 249 N.W.2d at 793.

74. 37 Wis. 2d 713, 155 N.W.2d 549, *reh. denied,* 157 N.W.2d 567 (1968).

75. 407 U.S. 25 (1972). *Argersinger* is clearly directed at right to counsel in misdemeanor and municipal ordinance prosecutions. Right to counsel in felony cases is mandated by Gideon v. Wainwright, 372 U.S. 335 (1963).

76. 75 Wis. 2d at 552-53, 249 N.W.2d at 794.

retrospective test advanced in *Argersinger.*[77] Requiring the trial judge to determine in advance if he might sentence the defendant to prison would interfere with the legislative intent that imprisonment be an alternative; the judge would be called upon to make a prediction without the benefit of facts and inferences derived from the record at trial. Therefore, under the "individualized prediction" standard the judge might have to contemplate sentencing the defendant to prison before introduction of evidence. Lastly, by making the prior determination not to appoint counsel, there is the possibility that some defendants would not be incarcerated despite the evidence later indicating the need for it.

Opting for a prospective application of the right to counsel, the court retained that aspect of *Plutshack* and required that all defendants be informed of the right to counsel if there is any possibility of their imprisonment.[78] Therefore, the court necessarily adopted the rule in *Argersinger* that the right to counsel exists if the defendant is in fact sentenced to jail. The court also adopted the reasoning of *Argersinger,* in that nonindigent persons must also be informed of their right to counsel even if they have to pay for it. The *Winnie* decision mandates that whenever a person is charged with a crime for which he can or must be imprisoned for any length of time, he must be advised of his right to counsel. Furthermore, if the defendant is indigent, he must be advised that, absent a knowing and intelligent waiver, counsel will be provided for him at public expense.

VII. SEARCH AND SEIZURE

A. Invalid Search Warrant

In *Schmidt v. State*[79] the court upheld the validity of a search conducted in execution of an invalid search warrant on the grounds that it was conducted within a reasonable time following an arrest based on probable cause. An unnamed informant called an undercover police agent with a tip that the

77. *Argersinger* requires that an accused be advised of the right to counsel and that counsel be appointed for an indigent (unless waived) only when a jail term is actually given. For criticism of the test, *see* S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD, J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN (1976). For a practical explanation of the test's consequences, *see* Chief Justice Burger's concurring opinion in *Argersinger,* 407 U.S. at 42.

78. 75 Wis. 2d at 556, 249 N.W.2d at 796.

79. 77 Wis. 2d 370, 253 N.W.2d 204 (1977).

defendant had brought drugs into the city and was about to do so again. The informant claimed that he had purchased "speed pills" from the defendant, and a field test by the police office confirmed that they were amphetamines. After being told that the defendant was expected to return in his car to the vicinity the next day with a large quantity of "speed," the police officer consulted with the district attorney who advised him that if the defendant returned on the particular day there would be probable cause to make an arrest. After a stakeout, the defendant's car was intercepted and the defendant arrested. The car was secured but not searched on that same Friday. Following the weekend, a search warrant was issued based on the affidavit of the police officer.

The affidavit stated that the unnamed informant had provided reliable information in the past, had previously purchased drugs for the police officer, and had told the police officer that the defendant was a main distributor of "speed" in the area. All the material elements of the affidavit were later admitted to be false, and the search warrant was declared invalid.[80] The court upheld the search on the grounds that it was conducted within a reasonable time following an arrest based on probable cause.

A difficult portion of *Schmidt* concerns the court's justification of the validity of the arrest based on probable cause. Applying the two prong test of *Aguilar v. Texas*,[81] the court concluded the information was reliable because the officer had been told that the informant had overheard a conversation of the defendant and because the informant had procured "speed" pills from the defendant which the officer had field tested. The court concluded that the informant was reliable because he took actions against his own penal interest in giving the pills to the police officer, and that the personal stake of the informant as to the truth of his representations was sufficient to show reliability.[82] The court ignored the fact that the officer

80. *Id.* at 377, 253 N.W.2d at 207-08.

81. 378 U.S. 108 (1964). In *Aguilar*, the court held that if probable cause is to be based solely on an informant's information, then two things must be shown: (1) that the underlying circumstances are sufficient for the officer to conclude that the manner in which the informant obtained his information is reliable; and (2) that the underlying circumstances make it reasonable for the officer to conclude that the informant himself is reliable. *Id.* at 114.

82. Although not cited by the court, United States v. Harris, 403 U.S. 573 (1971), specifically held that "[a]dmissions of crime, like admissions against proprietary

had admitted that the informant had not provided reliable information in the past.[83] Apparently the court was willing to uphold the second prong of the test solely upon a single act against penal interest rather than upon the whole of the information available. The court held the search warrant invalid because the police officer lied in his affidavit and because the underlying facts had been misrepresented. However, the court found that the same officer's testimony at trial created a reasonable inference, based upon his experiences with the informant, that both the information and the informant were reliable. Thus, the court concluded there was adequate basis for a valid warrantless arrest and a subsequent search incident to that arrest.[84]

The court cited *State v. Phelps*[85] in support of the rule that a search is not automatically invalid despite the defective warrant if the search is conducted within a reasonable time following an arrest based on probable cause. In *Phelps* the police arrested the defendant and waited three hours while a search warrant was obtained before conducting the search. Subsequently, the search warrant was held to be invalid but the court upheld the search saying that it was conducted within a reasonable time following a valid arrest.[86] In *Schmidt* the court extended the reasonable time to three days. This holding all but ignores *Day v. State*[87] wherein the court stated that a search can be considered incident to an arrest only if it bears a rela-

interests, carry their own indicia of credibility — sufficient at least to support a finding of probable cause to search." *Id.* at 583.

83. 77 Wis. 2d at 377, 253 N.W.2d at 207.

84. Regarding the reliability of an informant, and the quantum of evidence needed to support a finding of probable cause, *see generally,* State *ex rel.* Cullen v. Ceci, 45 Wis. 2d 432, 173 N.W.2d 175 (1970). *See also* Leroux v. State, 58 Wis. 2d 671, 207 N.W.2d 589 (1973). However, the manner in which probable cause is alleged may vary, depending upon the stage to which the matter has proceeded. *See* State v. Williams, 47 Wis. 2d 242, 177 N.W.2d 611 (1970).

85. 73 Wis. 2d 313, 243 N.W.2d 213 (1976).

86. In *Phelps,* an illegal search of defendant's suitcases was conducted prior to his arrest. Upon claiming his baggage, the defendant was arrested; the police then applied for a search warrant to search the suitcases. The court excluded evidence obtained in the first search of the baggage when considering whether there was probable cause to arrest the defendant. After considering other evidence the court concluded that there were sufficient facts on which to uphold the arrest. The court then held that although the search warrant was invalid due to the prior illegal search, the subsequent search after arrest was legal because the three hour wait (while the warrant was being issued) was reasonable.

87. 61 Wis. 2d 236, 212 N.W.2d 489, *cert. denied,* 417 U.S. 914 (1973).

tionship of contemporaneity to the arrest and is confined to the vicinity of the arrest. In *Day* the seizure of household goods (which were eventually determined to have been stolen) took place several hours after the arrest and several miles from the presence of the defendant, who at the time of the search was incarcerated. Under those circumstances the search of a vehicle was found not be incident to an arrest.

Lastly, in upholding the search the court failed to mention any of the cases dealing with searches of a motor vehicle.[88] It appears that *Carroll v. United States*[89] could have been mentioned in justifying the delayed search. Alternatively, because the defendant's car was impounded, an inventory search conducted pursuant to routine police procedures would have been permissible and would have provided a firmer basis for upholding the search.[90]

The court's conclusory discussion of the information which created probable cause for the warrantless arrest, and the summary fashion in which it upheld the search, are disturbing. Another unsettling portion of the *Schmidt* decision is its extension of the reasonable time in which to conduct a search incident to an arrest. The court did not indicate that the application of this rule was limited by the facts of this case. The court merely stated that "[t]he weekend delay in this case is reasonable."[91] *Schmidt* therefore does not provide any clear standard of what will be considered a reasonable time between an arrest and a search incident thereto. Unfortunately, the resolution of issues concerning this "reasonable time" in future cases must remain unpredictable.

B. The Plain View Doctrine

In *State v. Monahan*[92] the court discussed the "plain view"

88. Although the line of reasoning put forth in these cases can be avoided by asserting that the search in the instant case was made incident to an arrest, the peculiarities of the facts in *Schmidt* would seem to warrant application of these cases. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); Chimel v. California, 395 U.S. 752 (1969); Carroll v. United States, 267 U.S. 132 (1925).

89. 267 U.S. 132 (1925). In *Carroll* the court upheld a warrantless search of an automobile upon probable cause. The decision was premised upon mobility of the car, the fact that the occupants were alerted, and the possibility that the contents of the car might not have been found if there was a delay caused by requiring a warrant.

90. *See* South Dakota v. Opperman, 428 U.S. 364 (1976). *See also* State v. Stevens, 26 Wis. 2d 451, 132 N.W.2d 502 (1965).

91. 77 Wis. 2d at 378, 253 N.W.2d at 208.

92. 76 Wis. 2d 387, 251 N.W.2d 421 (1977).

exception to the fourth amendment search warrant requirement. In *Monahan* two federal narcotics agents learned from an informant that marijuana sticks could be purchased through an intermediary from the defendant, who was waiting at the intermediary's farm house but did not want to meet with anyone. Arrangements were made to purchase some marijuana, and the agents, informant, and intermediary traveled to the farmhouse. The agents were invited into the house, passed through part of the kitchen and were directed to the den. They were told not to go into the living room. The intermediary then went through the kitchen into the living room where the defendant, Monahan, was sitting. One of the agents followed the intermediary into the kitchen and observed that the intermediary removed a bag of marijuana from beneath a couch near the defendant. After the purchase was made in the den, both the intermediary and Monahan were arrested. Monahan moved to suppress the evidence on grounds that it was obtained by an illegal search and seizure. The trial court denied the motion and Monahan pleaded guilty to a charge of possession. On appeal, the court faced the issues of whether the visual surveillance of the living room (which disclosed the marijuana to the agents and allowed them to identify the defendant next to the contraband) was a search, and if so, whether it violated the protection of the fourth amendment.

Initially, the court distinguished between an invitation extended to a family member or close friend and an invitation made to a salesman to enter a particular room or area of the house. The relationship of the parties and the circumstances of the visit usually determine the extent of the invitation. If the agent had the right to be in the kitchen, then anything he saw would properly be admissible.[93] The court stated that the conduct of the intermediary and the agents demonstrated that the agents were to remain in the den; therefore, when the agent followed the intermediary into the kitchen he was on an "exploratory investigation." By looking into the living room he

93. *See* Molina v. State, 53 Wis. 2d 662, 668-69, 193 N.W.2d 874, 877, *cert. denied*, 407 U.S. 923 (1972). In Harris v. United States, 390 U.S. 234 (1968), the court stated that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *See also* Ker v. California, 374 U.S. 23 (1963); United States v. Lee, 274 U.S. 559 (1927); Hester v. United States, 265 U.S. 57 (1924).

was "prying into hidden places for that which was concealed."[94] The majority of the court concluded that a search had occurred.

The court indicated that the dwelling place is to be afforded the highest protection against intrusion,[95] but that an exception to the warrant requirement could be made if the contraband was in plain view.[96] The court noted the inherent limitations on the plain view doctrine[97] and held that, regarding what the agent saw, the evidence should have been suppressed because the agent lacked the authority to be in the kitchen and the view of the contraband being taken from beneath the couch was not inadvertent.[98] Concluding that only the fruits of the illegal search (*i.e.*, the identification of Monahan near the marijuana as it was removed) should have been suppressed, the court noted that because the marijuana had been voluntarily delivered to the agents, it had not been seized as a product of the illegal search. Therefore, the marijuana itself, as well as testimony that the agents saw the defendant in the house as they entered, were found to be properly admissible. *Monahan* upholds a high degree of protection against intrusion into the home by focusing upon the extent of an invitation into the home and its effect upon the reasonableness of a search made possible by the invitation.

VIII. Driver's License Revocation

In *State v. Collova,*[99] the defendant was required to file and maintain proof of financial responsibility because of a previous revocation of his driver's license. Collova had complied with the requirement by filing a certificate of insurance with the Department of Transportation, Division of Motor Vehicles.

94. 76 Wis. 2d at 395, 251 N.W.2d at 423.

95. *Id.*, 251 N.W.2d at 424. *See* State v. Pires, 55 Wis. 2d 597, 604, 201 N.W.2d 153, 157 (1972). *See also* Chimel v. California, 395 U.S. 752 (1969).

96. *See* note 91 *supra.*

97. The limitations placed on the plain view doctrine were enunciated at length in Coolidge v. New Hampshire, 403 U.S. 443 (1971). Generally, there must be prior justification based on either a warrant for another object, hot pursuit, search incident to a lawful arrest, or some other legitimate reason for being present, unconnected with a search directed against the accused. Furthermore, the discovery of the evidence must be inadvertent. Lastly, the object must be of an incriminating nature.

98. 76 Wis. 2d at 396-97, 251 N.W.2d at 424-25. *Compare* State v. Spraggin, 71 Wis. 2d 604, 239 N.W.2d 297 (1976) (consensual search) *with* State v. O'Brien 70 Wis. 2d 414, 234 N.W.2d 362 (1975) (search incident to a lawful arrest).

99. 79 Wis. 2d 473, 255 N.W.2d 581 (1977).

Ten days prior to the expiration of the defendant's insurance the department mailed a notice to Collova that his operating privilege would be revoked unless he filed new financial proof. Collova never received the notice and was subsequently stopped and charged with operating a motor vehicle after revocation of his operating license. The defendant pleaded not guilty and moved to dismiss the charge on the grounds that the statute under which he was charged[100] was constitutionally defective. The motion to dismiss was granted by the county court and affirmed by the circuit court, but the supreme court reversed.

The court noted that the statute had been changed to eliminate the need for giving notice by certified mail and merely required first class mailing. Collova's attempted defense of nonreceipt of the notice was held invalid because the statute clearly denied the availability of such a defense.[101]

The court then considered whether mens rea or scienter was material to the existence of an offense under the statute. The absence of express words requiring or negativing any state of mind is not determinative because criminal statutes are often silent on this matter.[102] Therefore, the judicial branch must ascertain the legislative intent from the nature of the statute.[103] However, the court did state that the element of scienter was the rule rather than the exception in criminal jurisprudence.[104] Relying on *Morissette v. United States,*[105] the court stated that

100. WIS. STAT. § 343.44 (1973) provides in part:

(1) No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any highway in this state during such suspension or revocation or thereafter before filing proof of financial responsibility or before he has obtained a new license in this state or his operating privilege has been reinstated under the laws of this state. . . .

(2) Any person violating this section may be fined not less than $100 nor more than $400 and shall be imprisoned not less than 10 days nor more than one year in the county jail. . . . Refusal to accept or failure to receive an order of revocation or suspension mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation or suspension. If such person has changed his address and fails to notify the division as required in s. 343.22 then failure to receive notice of revocation or suspension shall not be a defense to the charge of driving after revocation or suspension.

101. 79 Wis. 2d at 479, 255 N.W.2d at 584.

102. *Id.*

103. *See* Morrissette v. United States, 342 U.S. 246, 251 (1952); United States v. Balint, 258 U.S. 250, 252 (1922).

104. State v. Alfonsi, 33 Wis. 2d 469, 476, 147 N.W.2d 550, 555 (1960).

105. 342 U.S. 246 (1952).

regulatory statutes are primarily concerned with the protection of social and public interests and the prevention of direct and widespread social injury.[106] As such, the public interest warrants the imposition of an absolute standard of care so that the defendant can have no excuse for violating the law.

The court cited several facts which suggested that scienter should be disregarded, including the fact that the regulation was a motor vehicle law designed to benefit the social order, that the control of the state over those who are licensed to drive seems to correlate positively to a reduced rate of injury on the highway, and that the public would be seriously harmed by unlicensed drivers. However, the court held that despite these indicators, scienter was necessary to prove this offense because of the severe consequences attached to a violation of the statute.[107]

With the addition of scienter as an element of an offense under Wisconsin Statutes section 343.44, the state must prove that: (1) the defendant's license was revoked or suspended according to state law, (2) the Division of Motor Vehicles sent notice of revocation or suspension by first class mail to the defendant's last known address, (3) the defendant was operating a motor vehicle on a state highway during such revocation or suspension, and (4) the defendant had cause to believe that his license might have been revoked or suspended.[108] The court specified that a defendant has cause to believe that his license might be revoked or suspended when he has actual knowledge, when he receives notification, or when (under a reasonable man standard) he knows or should know of the existence of facts or circumstances which might cause the revocation or suspension. Because failure to prove financial responsibility could result in revocation or suspension of the license, the court noted that the state could prove scienter by showing that the defendant knew or had reason to know that his insurance had been terminated. Thus, the necessary scienter would be established if the defendant had been told by his insurer that his insurance had been

106. Common regulatory statutes deal with the sale of food and drugs, sale of intoxicating liquors to minors, traffic law violations, and sale of misbranded articles. *See* Morrissette v. United States, 342 U.S. 246 (1952). *See generally* LAFAVE & SCOTT, CRIMINAL LAW, § 31, at 218 (1972); Harring, *Liability Without Fault: Logic & Potential of a Developing Concept*, 1970 WIS. L. REV. 1201.

107. *See* WIS. STAT. § 343.44(2) (1973) cited note 100 *supra.*

108. 79 Wis. 2d at 488, 255 N.W.2d at 588.

terminated, or if he had violated a policy provision or had failed to pay premiums, either of which would cause termination.[109]

IX. SENTENCING

The area of sentencing has caused the court no small amount of difficulty. The court has found the statutes specifying the sentences either overly constrictive or exceedingly loose and has continually requested the legislature to clarify its poorly drafted statutes. The statute calling for the maximum permissible punishment, life imprisonment, was found to allow a stay of execution and placement on probation instead of imprisonment,[110] while a statute dealing with the motor vehicle code was found to provide for no discretionary judicial relief.[111]

The defendant in *State v. Wilson*[112] was convicted of first-degree murder, contrary to Wisconsin Statutes section 940.01(1),[113] in the shooting death of her husband. As required by the statute, the sentence of life prisonment was imposed.[114] However, execution of the sentence was stayed and the defendant was placed on probation for fifteen years. On appeal, the court affirmed the trial court's reading of the first-degree murder statute; the statute did not state that the crime "shall be punished by imprisonment" nor did it prohibit probation.[115] The court undertook a historical review of the legislative methods of designating which crimes would or would not be subject to probation. The court concluded that there were two basic means by which the legislature could accomplish this: (1) by setting forth the punishment for the crime to the exclusion of probation, or (2) by excepting the possibility of probation for certain crimes from the probation statute itself.[116] Since the legislature had done neither, the probation statute was found to apply.

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109. *Id.*

110. State v. Wilson, 77 Wis. 2d 15, 252 N.W.2d 64 (1977).

111. State v. Sittig, 75 Wis. 2d 497, 249 N.W.2d 770 (1977).

112. 77 Wis. 2d 15, 252 N.W.2d 64 (1977).

113. WIS. STAT. § 940.01(1) (1975) provides: "First-degree murder. (1) Whoever causes the death of another human being with intent to kill that person or another shall be sentenced to life imprisonment."

114. *Id.*

115. WIS. STAT. § 973.09 (1975) does not except § 940.01 from its provisions regarding discretionary probation.

116. 77 Wis. 2d at 18, 252 N.W.2d at 65-66.

Ordinarily a probation statute empowers a court to either withhold the sentence, or impose the sentence and stay its execution.[117] However, the legislature foreclosed the first option in first degree murder cases by imposing a mandatory sentence of life imprisonment. Nonetheless, the supreme court held that the second option remained open to the trial court. The court recognized that it is a legislative function to prescribe penalties, and, in light of the policy implications involved, directed the legislature's attention to the statute.

State v. Sittig[118] presented the court with the problem of the mandatory sentence requirement under Wisconsin Statutes section 343.44.[119] The defendant was found guilty on two counts of operating a motor vehicle after revocation of his license. Pursuant to the mandatory sentence provision, he was sentenced to one year in the county jail upon each count, with the sentences to run concurrently. On appeal, the defendant argued that the mandatory sentencing provision was unconstitutional because it violated the doctrine of separation of powers and constituted a denial of equal protection.[120] The defendant argued that the legislature had usurped the judicial power of imposing sentences. In refusing to recognize any inherent power of the judiciary to absolutely determine the nature of the punishment, the court held that it was within the province of the legislature to determine what punishment is to be related to a particular crime.[121] The court stated that it would be an

117. Prue v. State, 63 Wis. 2d 109, 112, 216 N.W.2d 43, 44 (1974).

118.. 75 Wis. 2d 497, 249 N.W.2d 770 (1977).

119. WIS. STAT. § 343.44(2) (1975) provides:

> (2) Any person violating this section may be fined not less than $100 nor more than $400 and shall be imprisoned not less than 10 days nor more than one year in the county jail, except that if a person violates this section after having had his operating privilege revoked because of a conviction of any of the offenses mentioned in s. 343.31, he shall be imprisoned not less than 10 days nor more than one year in the county jail for the first violation of this section and shall be imprisoned not less than 90 days nor more than one year in the county jail for the 2nd such violation and shall be imprisoned for one year in the county jail for the 3rd and each subsequent violation. . . .

In State v. Duffy, 54 Wis. 2d 61, 194 N.W.2d 624 (1972), the court held that this provision mandated a jail sentence and no probation could be allowed. The mandatory nature of this provision was dispositive of the case in State v. Collova, 79 Wis. 2d 473, 255 N.W.2d 581 (1977), where the court held that scienter is necessary to prove a violation of this statute.

120. 75 Wis. 2d at 499, 249 N.W.2d at 771.

121. *Id.* at 499, 249 N.W.2d at 772. *See also* State v. City of Monona, 63 Wis. 2d 67, 72, 216 N.W.2d 230, 232 (1974); State v. Duffy, 54 Wis. 2d 61, 66-67, 194 N.W.2d 624, 627 (1972).

abuse of discretion and a usurpation of the legislative field to refuse to impose a mandatory sentence prescribed by the legislature. It is not unconstitutional for the legislature to restrict the exercise of discretion by the courts.[122]

In response to the equal protection argument, the court held there were sufficient public policy reasons to distinguish between persons who operated vehicles after revocation and those sentenced for other misdemeanor violations.[123] The court recognized that since the statute's purpose was to decrease auto accidents and injuries by imposing a fair penalty upon those who have shown they are most likely to cause the accidents, the mandatory sentencing provision in the statute did not deny the defendant equal protection.[124]

The separation of powers argument advanced by the defendant represents an old school of thinking which has generally been unsuccessful in attacking mandatory sentencing provisions.[125] However, a possible argument against the "fair penalty" of the statute can be made based on the cruel and unusual punishment clause of the eighth amendment. This attack would be grounded on the assertion that the statute prescribes a sentence which is excessive, disproportionate, and lacking necessity.[126] Such an approach has been used successfully in attacking other statutes.[127] Given the nature of the offense, possible length of sentence, and the fact that the court has already recognized that the penalty is severe,[128] such an attack on the one year sentence might prove successful.

In *Klimas v. State*[129] the court mandated credit against a jail term for presentence confinement occasioned by indigency where less than the maximum sentence was imposed. Previously the court had declared that when the sentence imposed is the statutory maximum, and because of financial inability

122. 75 Wis. 2d at 500, 249 N.W.2d at 772.

123. *Id.* at 500-01, 249 N.W.2d at 772, *citing,* State v. Duffy, 54 Wis. 2d 61, 194 N.W.2d 624 (1972).

124. 75 Wis. 2d at 501, 249 N.W.2d at 772.

125. *See Ex Parte* United States, 242 U.S. 27 (1916). *See also* Steuart & Bro., Inc. v. Bowles, 322 U.S. 398 (1944); Comment, *The Constitutionality of Mandatory Sentence Statutes,* 29 WASH. & LEE L. REV. 164 (1972).

126. *See* Annot., 33 L. Ed. 2d 932 (1954).

127. *In re* Rodriguez, 122 Cal. Rptr. 552, 537 P.2d 384 (1975); *see* 44 FORDHAM L. REV. 637 (1975); *see also* People v. Wingo, 121 Cal. Rptr. 97, 534 P.2d 1001 (1975).

128. State v. Collova, 79 Wis. 2d 473, 485, 255 N.W.2d 581, 587 (1977).

129. 75 Wis. 2d 244, 249 N.W.2d 285 (1977).

dure has two distinct advantages — conservation of court time and a simple yet just methodology — because it treats all presentence confinement the same way, whether it results from inability to make bail, unwillingness to be released on bail, or retention in custody for the purposes of examination.

In Wisconsin, however, the trial judge must now ascertain the number of days the defendant has been in custody because of inability to make bail. In his discretion, he should sentence in gross amount for the crime for which the defendant has been convicted. Then, he should make a separate finding that the defendant has been obliged to remain in custody because of indigency; and upon such a finding, that time shall be deemed as served in partial satisfaction of the sentence and the confining authority will so credit it.[135]

This decision has had substantial impact upon parole eligibility in Wisconsin. The Division of Corrections has interpreted *Klimas* to mean that inmates sentenced to consecutive terms (on multiple charges) will be credited with double time for pretrial and presentence confinement. Thus, some indigent convicts, sentenced for consecutive terms totalling up to twenty-five years, have been considered eligible for a parole hearing even before they arrive at the reformatory.[136] Because the parole eligibility law[137] was not written with *Klimas* in mind, revision by the legislature is necessary to resolve this problem, or else expensive, inappropriate, and premature parole hearings will continue.

In two cases, *Bruneau v. State*[138] and *State v. Hungerford,*[139] the court indicated to the legislature certain difficulties with the statutes regarding concurrent and consecutive sentences which the trial courts can impose. In *Bruneau* the court again[140] indicated the anomaly of Wisconsin Statutes section 973.15(1).[141] As previously construed, the statute prohibits the imposition of consecutive sentences except where the defendant has commenced serving another sentence that has been

135. 75 Wis. 2d at 252, 249 N.W.2d at 289.

136. *See* The Milwaukee Journal, Sept. 18, 1977, at 1.

137. WIS. STAT. § 57.06 (1975).

138. 77 Wis. 2d 166, 252 N.W.2d 347 (1977).

139. 76 Wis. 2d 171, 251 N.W.2d 9 (1977).

140. *Cf.* Klimas v. State, 75 Wis. 2d 244, 249 N.W.2d 285 (1977); Drinkwater v. State, 69 Wis. 2d 60, 230 N.W.2d 126 (1975); Guyton v. State, 69 Wis. 2d 663, 230 N.W.2d 726 (1975). *See* text accompanying notes 126-32 *supra,* for a discussion of *Klimas.*

141. *See* note 132, *supra.*

previously imposed.[142]

Barbara Bruneau pleaded guilty to burglary and arson; the court sentenced her to a seven-year indeterminate sentence for burglary and a ten-year indeterminate sentence for arson. The sentences were to be served consecutively and both were to be consecutive to a manslaughter sentence that had been imposed three days earlier in another court. The defendant argued that it was beyond the sentencing authority of the court to order the terms for burglary and arson to be served consecutively to the term for manslaughter, because she had not yet commenced serving the sentence for manslaughter. The supreme court agreed, stating that the record demonstrated that Bruneau had not been transported to Taycheedah for service of her sentence, but had in fact been sitting in the county jail. Since she had not yet begun the manslaughter sentence, only a concurrent sentence could be imposed for the subsequent crimes.[143]

The state argued that acceptance of the defendant's position would cause serious equal protection problems in the future. The effect of the statute attaches controlling significance to the speed with which defendants are transported to prison; thus, consecutive or concurrent sentencing may be imposed by chance and defendants receiving originally identical sentences might eventually serve unequal amounts of time. The court appreciated the argument because it demonstrated the need for prompt and corrective legislative action. However, because the state did not have standing to represent other convicted prisoners, the court itself could not adopt the state's position.[144]

The state also argued, based on *Klimas v. State*,[145] that if the defendant received credit for presentance jail time, she would effectively be serving the first sentence. The court responded by pointing out that because Bruneau was not indigent the *Klimas* doctrine would not apply. Furthermore, the court stated that a prisoner is not "serving a sentence" under the terms of section 973.15(1) during the pretrial and presentence periods for which *Klimas* mandates credit.

142. Drinkwater v. State, 69 Wis. 2d 60, 230 N.W.2d 126 (1975); Guyton v. State, 69 Wis. 2d 663, 230 N.W.2d 726 (1975).

143. 77 Wis. 2d at 168, 252 N.W.2d at 348.

144. *Id.* at 173, 252 N.W.2d at 350-51.

145. 75 Wis. 2d 244, 249 N.W.2d 285 (1977). *See* text accompanying notes 126-32, *supra*.

The court salvaged part of the sentence imposed for burglary and arson, by holding that the trial judge had authority to make the burglary and arson sentences consecutive.[146] Therefore, the remainder of time imposed by those sentences (beyond the length of the previous sentence) effectively extended the time which the defendant would have to serve.

Throughout its discussion, as in previous cases, the court requested that the legislature address the inherent problems of section 973.15(1).

The court faced another problem with consecutive sentencing in *State v. Hungerford.*[147] The defendant had been convicted of indecent behavior with a child and was committed to Central State Hospital. He escaped from Central State but was apprehended. Subsequently, he pleaded guilty to escape and was sentenced for an indeterminate term of not more than one year; "but such sentence is to run although consecutive, it will begin as of today, because there is no determined ending of any sentence that may have been proposed or imposed."[148] The ambiguity of the sentencing language caused a dispute as to whether the sentence was to be consecutive or had already been served. As a result the trial court modified the sentence to provide for one week's probation consecutive to the defendant's commitment, because it considered the previous "sentence" completed.

In challenging this modification, the state argued that Wisconsin Statutes section 946.42(4)[149] required that the sentence for escape be served consecutively to the sex crime commitment. The court first analyzed the nature of commitment under chapter 975, the Sex Crimes Law.[150] The court held that

146. 77 Wis. 2d at 170, 252 N.W.2d at 349-50.

147. 76 Wis. 2d 171, 251 N.W.2d 9 (1977).

148. *Id.* at 174, 251 N.W.2d at 10.

149. WIS. STAT. § 946.42(4) (1975) provides: "Sentences imposed under this section shall be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he escaped."

150. WIS. STAT. § 975.06 (1975) provides in part:

> **Commitment to the department.** (1)(a) If the department recommends specialized treatment for the defendant's mental or physical aberrations, the court shall order a hearing on the issue of the need for specialized treatment unless such hearing is expressly waived by the defendant. . . .
>
> (2) If, upon completion of the hearing as required in sub. (1), it is found that the defendant is in need of specialized treatment the court shall commit the defendant to the department. The court may stay execution of the commitment and place the defendant on probation under ch. 973 with a condition of probation that the defendant receive treatment in a manner to be prescribed by the

commitment pursuant to the Law was neither civil commitment nor punishment for an offense.[151] Instead, commitment under chapter 975 is an alternative to sentencing[152] and is an independent proceeding different from penal sentencing.[153] The court recognized that although section 946.42(4) requires that later sentences be consecutive to those which have been previously imposed, commitment under chapter 975 is not a sentence. Therefore, consecutive sentencing in this type of case, while permissible, is not required by the statute. The court admitted that the legislature might have intended the consecutive sentencing rule to apply to persons who escape from custody while committed. However, it should be noted that the statute lacks language which would express this possible intent, and the court is bound to decide this issue in a manner consistent with previous holdings. In addition, the court held that since the defendant had already served the year's sentence before the modification occurred, whether the modification was in error or not involved moot issues.[154]

Problems inherent in the consecutive sentencing statutes must be resolved for the benefit of defendants, their counsel, prosecutors and the courts. Legislative intent is best provided by clear statutory language, not by judicial construction. Hopefully, the legislature will soon accept the court's frequent requests for assistance in this area, and resolve the problems of consecutive sentencing law.

THOMAS E. DUGAN
STEPHEN PAUL FORREST

INSURANCE

During the recent term, the Wisconsin Supreme Court was again called upon to decide a wide variety of insurance cases.

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court. If the defendant is not placed on probation, the court shall order the defendant conveyed by the proper county authorities, at county expense, to the sex crimes law facility designated by the department.

151. 76 Wis. 2d at 176, 251 N.W.2d at 11, *citing*, State *ex rel.* Farrell v. Stovall, 59 Wis. 2d 148, 167, 207 N.W.2d 809 (1973).

152. 76 Wis. 2d at 177, 251 N.W.2d at 11, *citing*, State v. Neutz, 69 Wis. 2d 292, 295, 230 N.W.2d 806 (1975).

153. 76 Wis. 2d at 176, 251 N.W.2d at 11, *citing*, Huebner v. State, 33 Wis. 2d 505, 526, 147 N.W.2d 646 (1967).

154. 76 Wis. 2d at 178, 251 N.W.2d at 12.