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only for the purpose of disproving the contract's existence. When the true nature of admissibility is recognized, its characterization as an exception appears inappropriate, because the evidence is intended to prove that the rule never applied in the first instance. Because the language does little to "liberate thought,"[77] it might well be discarded.

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CRIMINAL JUSTICE

The recently-completed term of the Wisconsin Supreme Court reflected no slackening of the growth of appeals in the criminal justice system.[1] As could be expected, many cases lent themselves to *per curiam* disposition under court rule 251.93, while still others sought decisions on narrow factual questions. There were, however, a sufficient number of cases of significant precedential import to keep the criminal law field in its normal state of flux.

I. SEARCH AND SEIZURE

Certainly the turmoil of the criminal law is no better exemplified than in the rules governing the investigative frontier of the justice system. In this area, the court found the opportunity to implement full searches of the person without a warrant whenever a valid custodial arrest is made, even if for traffic offenses. This ruling in *State v. Mabra*,[2] while apparently having the potential to ease the constitutionally serious decisions police must make before embarking on searches, might cause increased battles in two other areas: the grounds for arrest and the ultimate scope of the search.

Mabra is remarkable initially in that the broad rule of search after arrest was dicta. The defendant objected to the evidential admissibility of the alleged fruits of an armed robbery on the grounds of an illegal search and seizure. The items were found on his wife, with whom he was arrested, during a search at the police station. Ruling that there was probable cause to arrest both par-

77. Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

1. *A Tribute to Wisconsin's Fiftieth Justice—Remarks of Justice Horace W. Wilkie*, 47 WIS. BAR BUL. 20, 21-22 (Oct. 1974).

2. 61 Wis. 2d 613, 213 N.W.2d 545 (1974).

ties,[3] and that Mabra had the standing to object to his wife's search,[4] the court upheld the search as part of the valid booking procedure

> . . . for the security of the police, of Mrs. Mabra, the safekeeping of her personal articles and the security of fellow prisoners.[5]

The court did not stop there. Noting a similarity of this custodial search to the searches upheld in the United States Supreme Court cases of *United States v. Robinson*[6] and *Gustafson v. Florida*,[7] the court withdrew the requirement that an arrest search be directed mainly to the object or purpose of the arrest.

Both *Robinson* and *Gustafson* involved defendants ostensibly stopped and arrested for traffic violations. In the course of such arrest, the parties were subjected to the typical "pat-down" for weapons. The searches went beyond the normal scope when bulges, acknowledged by the arresting officers as not raising suspicion of weapons, were removed from the clothing of the defendants and inspected. Illegally-possessed narcotics were thus discovered and ultimately used as evidence in criminal prosecutions. Neither case presented an initial violation where evidence was likely to exist, especially in the possession of the defendant.

Since the validity of station house searches has already been established and was noted by the court,[8] the propriety of adopting the expanded rule without particular discussion[9] is questionable. Certainly *Robinson* is now the constitutional minimum under the Fourth Amendment, but it does not necessarily stand as an adequate exposition to be unquestioningly followed.[10] The Wisconsin

3. *Id.* at 626, 213 N.W.2d at 551-552.

4. *Id.* at 618-623, 213 N.W.2d at 547-550.

5. *Id.* at 623, 213 N.W.2d at 550.

6. 414 U.S. 218 (1973).

7. 414 U.S. 260 (1973).

8. State v. Stevens, 26 Wis. 2d 451, 132 N.W.2d 502 (1965) and Warrix v. State, 50 Wis. 2d 368, 184 N.W.2d 189 (1971), both cited in 61 Wis. 2d at 623, 213 N.W.2d at 550.

9. *See* Appellant's and Respondent's briefs, State v. Mabra, case no. 92 (1974).

10. The dissent in Robinson found "disquieting" the majority's admission that only dicta supported its theory of unqualified authority to search after any arrest and its "selective" use of common law decisions. 414 U.S. at 247 & n.2. The majority based much of its "full search" decision on the necessity of a weapons search, with which type of frisk-style search the lower court and minority did not disagree. 414 U.S. at 250. The majority and lower court also substantially agreed on searches after an arrest where the crime would conceivably involve evidence. 414 U.S. at 233-234 & n.4. Yet the majority used such factors to support its view of any arrest allowing full search for weapons even though the existence

court has frequently stated its power under the state constitution to offer higher levels of individual protection than are afforded by interpretations of the national constitution,[11] and at least one other state's judiciary has so responded when confronted with a *Robinson*-based argument.[12] In not doing so, the court had to retract a prior decision[13] and ignore the specific language of the "search incident to arrest" section of the criminal statutes.[14]

Whatever disagreement may be had with the method of adopting *Robinson* and its philosophy, *Mabra* may be viewed as a necessary step in eliminating some of the confusion and vexatious litigation in the search area. *Robinson* at least admits of such purpose.[15] There may, however, be some disappointment if this was expected.

For example, neither *Mabra* nor its parent *Robinson* discussed searches of the defendant's vehicles, though both *Robinson* and *Gustafson* involved traffic arrests. The normal scope of a search incident to arrest was set forth in *Chimel v. California*,[16] as being

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of them is not indicated under the circumstances of the arrest. The dissent would allow "frisks" in all instances and full searches after arrest if weapons or evidence connected with the crime is likely to exist under the circumstances. As a sample of the criticism of the majority view, see Note, 25 MERCER L. REV. 943 (1974) and Note, *Search and Seizure Incident to a Traffic Offense*, 4 MEMPHIS ST. L. REV. 530 (1974).

11. State v. Taylor, 60 Wis. 2d 506, 522-523, 210 N.W.2d 873, 882 (1973).

12. People v. Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 229 (1974).

13. Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964), cited in the Robinson dissent, 414 U.S. at 244-245. It rejected the contention "that any search of the person of one lawfully arrested is a valid search." Barnes v. State, supra at 126, 130 N.W.2d at 269, where the defendant was arrested for a brake light violation and had his pockets viewed via flashlight. For a recent application of Barnes, see Soehle v. State, 60 Wis. 2d 72, 77, 208 N.W.2d 341, 344 (1973). Also, Recent Decision, 48 MARQ. L. REV. 610 (1965).

14. WIS. STAT. § 968.11 (1971):

> **Scope of search incident to lawful arrest:** When a lawful arrest is made, a law enforcement officer may *reasonably* search the person arrested and an area within such person's immediate presence for the purpose of:
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> (1) Protecting the officer from attack;
>
> (2) Preventing the person from escaping.
>
> (3) Discovering and seizing the fruits of *the* crime; or
>
> (4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, *the* offense. (Emphasis added.)

15. 414 U.S. at 235:

> But quite apart from these distinctions, our more fundamental disagreement with the court of appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide. . . .

16. 395 U.S. 752 (1969). Chimel has been discussed in Wisconsin only peripherally. *See* Soehle v. State, 60 Wis. 2d 72, 78 & n. 8, 208 N.W.2d 341, 345 (1973).

limited to the person and the immediate "areas from which the person arrested might obtain weapons or evidentiary items."[17] Since in the U.S. Supreme Court cases the cars were no longer in defendants' reach, it may be argued that an arrest search cannot extend to the vehicle when the occupant alights. The Wisconsin court has so held previously, when a "driving without a license" arrest provided no basis for an entry into defendant's locked vehicle, whether denominated a search or mere entry to "secure" it.[18] On the other hand, many vehicle searches have been conducted on the basis of occupants' arrests for crimes likely to involve weapons or fruits of the offense, whether or not the parties had alighted.[19]

An automobile search often occurs under the *Chimel* "within access" doctrine, and there seems to be no reason for chastising searches within such scope when traffic violations not obviously evincing weapons or illegal items are involved, since such crimes did not persuade the *Robinson* court to deny search of the person.[20] Given the arrest, if the vehicle is within access, the full search of "accessible areas" could be allowed. *Mabra* and *Robinson* merely expand the occasions for a search incident to arrest, and probably should not be read to affect the *Chimel* scope. More thorough (*i.e.*, in areas not readily accessible) vehicle searches can be justified only where there is a warrant, or a showing of sufficient, separate, probable cause under current automobile search doctrines,[21] or as custodial inventory.[22] *Chimel*-based arguments will undoubtedly be relied on to limit the scope of searches when

17. 395 U.S. at 763.

18. Soehle v. State, 60 Wis. 2d at 76-80, 208 N.W.2d at 344-346.

19. State v. Russell, 60 Wis. 2d 712, 717-719, 211 N.W.2d 637, 640-641 (1973), where a car search was justified under Chambers v. Maroney, 399 U.S. 42 (1970), and as incident to a valid arrest. Chambers allows warrantless searches where there is probable cause to believe the vehicle contains items offensive to the law, when the occupants are arrested and the car is towed into custody.

20. Although noting that the issue is unresolved, at least one commentator feels that *Robinson* and *Gustafson* include searches of the area of immediate control of the arrestee. Berner, *Search and Seizure: Status and Methodology*, 8 VALPARAISO L. REV. 471, 541-542 (1974). *See* note 23 *infra*.

21. *Id.* at 525-533.

22. Cady v. Dombrowski, 413 U.S. 433 (1973); Cooper v. California, 386 U.S. 58 (1967). Often a traffic arrest will result in leaving the vehicle driverless, for which an inventory may be necessary, or valuables might be impounded for safekeeping. The vehicle may be taken to the station for impoundment, and a search there may be justified as similar to the search of the person in the booking procedure, such as was given to the Mabras. The imminence of such a likely search was stressed by the *Robinson* respondents as an alternative grounds for allowing the early search of the defendant. 414 U.S. at 258, n. 7 (Marshall's dissent).

the application of *Mabra* to the vehicle is definitively raised.[23]

It appears that *Mabra* and *Robinson* are in part attempts to eliminate litigation on searches and seizures. The attempt may prove to be unsuccessful, because a possible result of the decisions will be merely to shift litigation to related areas of the criminal law. Now exposed to more search opportunities, defendants may more often and more vigorously dispute "probable cause" for their investigatory stoppings and arrests.[24] An arrest may be challenged as pretextual for the search, and disputes may arise as to the timeliness of a search vis-a-vis its justifying arrest.[25]

Also in the search and seizure area, the viability of the "open fields" doctrine was raised in *Conrad v. State*.[26] The defendant was under suspicion for murder after the prolonged absence of his wife. While he was away from his farm, the sheriff toured the premises and secured earth-moving equipment to further investigate. Various outbuildings were removed and excavated, while other holes were dug at random. The wife's body was finally uncovered beneath a rock pile.

Both the trial court and the supreme court rejected Conrad's contention that the search was a violation of his "reasonable expectation" of privacy.[27] In so doing, the supreme court relied on *Hester v. United States*.[28] That case reiterated the common law

23. Later applications of *Robinson* establish that it is not to be limited merely to the person of the arrestee. In United States v. Edwards, 415 U.S. 800 (1974), the defendant's clothes were removed and searched after ten hours of incarceration following his arrest for attempted burglary. The Supreme Court upheld the lower court decision that

> . . . both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place.

415 U.S. at 803. The apparent basis for this rule was that such property was available for search at the time of arrest via *Robinson*, and such availability is not limited to the time of arrest, according to Abel v. United States, 362 U.S. 217 (1960).

A lower federal court has used such "beyond the person" theories in upholding search and seizure of a suitcase, United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir. 1974), citing *Robinson*, and allowing search of an automobile "incident to arrest," United States v. Roe, 495 F.2d 600 (10th Cir. 1974), citing Edwards.

24. *See, e.g.*, United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2nd Cir. 1974) and United States v. Carter, 369 F. Supp. 26 (8th Cir. 1974).

25. Robinson, 414 U.S. 221, n. 1 and 266-267.

26. 63 Wis. 2d 616, 218 N.W.2d 252 (1974).

27. An argument based on Katz v. United States, 389 U.S. 347 (1967), which case stresses the activity of the person and not primarily the characteristics of the place determine whether an intrusion is illegal. When a person exercises his subjective desire for privacy, absent objective signals to the contrary or factors precluding such exercise, his decision raises his privileges under the Fourth Amendment.

28. 265 U.S. 57 (1924).

view that one's house and immediately adjacent area are considered to be areas of privacy, but that the "open fields" are unprivileged and fair game for law enforcement investigations. As such, the Fourth Amendment did not apply.[29]

The court also took the opportunity to rediscuss the "curtilage" aspect of realty searches. The area immediately adjacent to the dwelling was afforded the same protections under the Fourth Amendment as was the dwelling.[30] With the advent of the *Katz* "reasonable expectation of privacy" test,[31] such automatic inclusion was questionable. Previous cases had acknowledged this development,[32] and in *Conrad* the court clarified its position:

> Where there is demonstrated a reasonable expectation of privacy, there can be no search in the curtilage except upon warrant . . . only were the evidence in plain sight within the curtilage or were there some subjective showing of waiver would the necessity for a warrant be obviated.[33]

Thus when it is determined that an area is "curtilage,"[34] the defendant has the burden of showing his reasonable expectation of privacy. A warrantless search of the curtilage will be upheld if there was a valid "plain view," express waiver, or now, "subjective showing of waiver." This latter exception is the effect of *Katz*, and will apply in the curtilage areas normally accessible to the public.[35]

One final notable aspect of *Conrad* was the majority's dicta criticism of the exclusionary rule for products of illegal searches and seizures.[36] The failure of this rule to prevent illegal searches of both the innocent and guilty, and its concomitant effect of impairing prosecution of the guilty, certainly raises doubt as to its validity. If deterrence of official illegality is its only goal, perhaps augmenting the rule or scrapping it completely in favor of civil sanctions against its offenders might be the most realistic ap-

29. Conrad, 63 Wis. 2d at 628, 218 N.W.2d at 258.

30. Ball v. State, 57 Wis. 2d 653, 660 & n. 1, 205 N.W.2d 353, 356 (1973).

31. Note 27, *supra.*

32. Ball v. State, 57 Wis. 2d at 660-664, 205 N.W.2d at 356-358; Watkins v. State, 59 Wis. 2d 514, 208 N.W.2d 449 (1973); See United States ex rel. Saiken v. Bensinger, 489 F.2d 865, 867 (7th Cir. 1973).

33. 63 Wis. 2d at 634, 218 N.W.2d at 261.

34. A question of fact. Ball v. State, 57 Wis. 2d at 661, 205 N.W.2d at 356.

35. Conrad v. State, 63 Wis. 2d at 629-634, 218 N.W.2d at 259-261. The access to curtilage areas given to tradesmen and refuse collectors may bolster a demonstration of waiver of privacy expectations. Presence in such areas may legitimatize a "plain view." *Id.* at 632, 205 N.W.2d at 260-261.

36. Conrad v. State, 63 Wis. 2d at 634-640, 218 N.W.2d at 261-264.

proach. In any event, the court has indicated its willingness to change, should the requirements of *Mapp v. Ohio*[37] be withdrawn.

II. TRIAL CONSIDERATIONS

Another recognition of federally-pronounced criminal justice decisions[38] was made by the Wisconsin Supreme Court in *Day v. State*.[39] The balancing test for determining the occasion of a denial of the right to a speedy trial, set forth in *Barker v. Wingo*,[40] received judicial approval.

The elements to be balanced include: " . . . the length of the delay, the reason for the delay, the defendant's assertion of the right and the prejudice to the defendant."[41] A major modification occured in transit, however, as the Wisconsin court acknowledged but declined the *Barker* court's intention that a specific period be established as "presumptively prejudicial."[42] Use of such a period notifies all parties of the time when the denial of speedy trial may appropriately be challenged. Logically this would eliminate premature and time-consuming examinations of the requisite elements announced in *Day*.

Unless the Wisconsin Legislature statutorily intervenes, all four factors need be considered in every speedy trial denial claim, no matter how untimely. Furthermore, the court withdrew its previous absolute requirement of a speedy trial request.[42] It takes its place merely as an element to be considered by the court.

Adoption of this test did not afford relief to Day, however; the delay occasioned by state crime laboratory tests, courthouse remodeling, judge recusing and the concomitant incarceration for seven months were found not to be a denial of a speedy trial.

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37. 367 U.S. 643 (1961).

38. Along with the adoption of *Robinson* by *Mabra*, *see* note 6 and accompanying text, *supra*, the Wisconsin Supreme Court adopted the Kirby v. Illinois, 406 U.S. 682 (1972), limitation on right to counsel for indigents involved in lineup procedures. State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). Since the rationales of United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), both limited by Kirby, were adopted only reluctantly in Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970), this was not a surprising adherence to the new development. A further lineup decision, governing challenges to lineups as involving prejudicial factors, was Neil v. Biggers, 409 U.S. 188 (1972), adopted in Jones v. State, 63 Wis. 2d 97, 216 N.W.2d 94 (1974). Also, see note 86, *infra*, and accompanying text.

39. 61 Wis. 2d 236, 212 N.W.2d 489 (1973).

40. 407 U.S. 514 (1972).

41. 61 Wis. 2d at 244, 212 N.W.2d at 493.

42. *Id.* at 245, 212 N.W.2d at 493-494.

Perhaps *Day* can be categorized as a restatement of the factors normally considered by the magistrate, and as a call for the legislature to analyze the system and set the "presumptively prejudicial" period. By failing to set such a period on its own initiative, the court has possibly missed an opportunity to reduce the motions and appeals in this area. Worthy of praise is that the opportunity was forsaken for a practice that will recognize the individually valid claims of accused citizens.

Another factor to be considered in the decision for trial is the extent of matter discoverable. Wisconsin Statute section 971.23 (1971) provides a means for the disclosure of evidentiary matter. The court had the opportunity this term to discuss one of the sections of this statute, and to review a non-statutory discovery method.

In *Irby v. State*,[44] the section concerning exchange of witness lists[45] was considered. The appellant objected to the prosecution's list of ninety-seven names. On review of the trial court's refusal to act on a request for more specificity, the supreme court found that the length of the list did not sufficiently conform to a realistic appraisal of witnesses to be called. Such occasions may require the trial court to conduct a hearing to determine who will, in good faith, be taking the stand.[46]

The dissent aptly noted that the difficulty inherent in trial planning precludes specificity. The suggested hearing would do well to recognize this aspect and avoid an opposite extreme that might produce trial delays and confusion due to witness unavailability. Since the defense is expected to produce its witness list for an exchange with the state,[47] defense counsel also would seem subject to the *Irby* requirement.

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43. *Id.* at 246, 212 N.W.2d at 494.

44. 60 Wis. 2d 311, 210 N.W.2d 755 (1973).

45. WIS. STAT. § 971.23(3) (1971):

(3) LIST OF WITNESSES. (a) A defendant may, not less than 15 days nor more than 30 days before trial, serve upon the district attorney an offer in writing to furnish the state a list of all witnesses the defendant intends to call at the trial, whereupon within 5 days after the receipt of such offer, the district attorney shall furnish the defendant a list of all witnesses and their addresses whom he intends to call at the trial. Within 5 days after the district attorney furnishes such list, the defendant shall furnish the district attorney a list of all witnesses and their addresses whom the defendant intends to call at the trial. This section shall not apply to rebuttal witnesses or those called for impeachment only.

(b) No comment or instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such comment or instruction is the fact the name of the witness appears upon a list furnished pursuant to this section.

46. 60 Wis. 2d at 321, 210 N.W.2d at 761.

47. Note 45, *supra*.

Another vital area of discovery, in which the failure of the state to conform will open opportunities for a retrial, is the duty to disclose exculpatory evidence. The duty is one constitutionally mandated and already a recognized part of Wisconsin criminal practice,[48] but the court found occasion to review its position.

In one of the last cases of the term, *Dumer v. State*,[49] the necessity of a demand as a condition precedent to the right of access to exculpatory evidence was reaffirmed. The court reiterated the statements made in *Nelson v. State*[50] that signified this state's adherence to the constitutional due process minimum:

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."[51]

The retention of such a demand requirement imposes no great hardship on defendants. Such request was not made either in *Dumer* or its precursor, *Nelson*, thus precluding access to potentially helpful matter,[52] or at least to a new trial for noncompliance with disclosure requests. The potential usefulness of this right, with no prejudice to the defendant, should cast it as a demand of automatic submission in every case.

This is no better demonstrated than in *State v. Stanislawski*,[53] a prime case of nonresponsiveness to the duty to disclose exculpatory evidence. The defendant was accused of a particularly aggravated sexual assault, involving repeated intercourse and acts of sexual perversion. A new trial was based on three omissions by the prosecution. The first instance involved defense counsel's discovery, during the complainant's testimony, that incomplete copies of her statements had been furnished to him. The missing areas contained items unfavorable to the state.[54] A tender of a full copy

48. Brady v. Maryland, 373 U.S. 83 (1963); see also Giles v. Maryland, 386 U.S. 66 (1967).

49. 64 Wis. 2d 590, 219 N.W.2d 592 (1974).

50. 59 Wis. 2d 474, 208 N.W.2d 410 (1973). Also, Lampkins v. State, 51 Wis. 2d 564, 187 N.W.2d 164 (1971).

51. Nelson v. State, 59 Wis. 2d at 485, 208 N.W.2d at 415.

52. *See, e.g., id.* at 480, 208 N.W.2d at 412.

53. 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

54. *Id.* at 746, 216 N.W.2d at 16.

was held by the supreme court not to cure the possible inadequate preparation and possible prejudice that had occurred.

The second and third omissions involved scientific reports and expert testimony. Although fingerprint tests were run on an item allegedly touched by the attacker and appeared not to implicate the defendant, no report was issued. Also, analysis of pubic hairs found on complainant's mittens and vaginal area revealed that they were not traceable to either her, the defendant, or her boyfriend. The results of this test were accidently discovered by defense counsel and explored at trial. Nevertheless, the untimely manner of discovery in one instance and the inability to obtain in the other precluded effective trial defense.

Since failure to conform to this disclosure duty can result in extensive burdens on the state, prosecuting attorneys must be on their guard when demands for disclosure are made.[55] The first task the prosecutor must undertake is to review all matter pertaining to the crime. The duty to disclose would include statements or items of physical evidence in the state's possession, and also extend to information generally which meets the exculpatory test of "tending to negate guilt."[56] The former items are already accessible under Wisconsin Statute sections 971.23(1), (3), (4), and (5) and 971.24 (1971), but the affirmative duty might compel revelation in some cases, even without statutory request. With the duty based on constitutional interpretations, it would seem to override the discretionary elements built into the discovery statutes,[57] and jus-

55. Discovery of unrevealed exculpatory evidence after trial, given a prior request, could produce a mistrial. This would arguably be a more successful avenue for a new trial than the route of newly discovered evidence, *see* Dumer v. State, 64 Wis. 2d at 603-605, 219 N.W.2d at 600-601, although the requirement that such evidence must be likely to affect the judgement still remains. Nelson v. State, 59 Wis. 2d at 486, 208 N.W.2d at 415. Discovery during trial may justify mistrial or a delay for the defense to assimilate the exculpatory matter.

56. Nelson v. State, 59 Wis. 2d at 482, n. 9, 208 N.W.2d at 413, quoting THE AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL, § 2.1(c). Also see ABA CANONS OF PROFESSIONAL ETHICS, Disciplinary Rule 7-103(B).

57. WIS. STAT. § 971.23:

(4)INSPECTION OF PHYSICAL EVIDENCE. On motion of a party subject to s. 971.31(5), all parties shall produce at a reasonable time and place designated by the court all physical evidence which each party intends to introduce in evidence. Thereupon, any party *shall* be permitted to inspect or copy such physical evidence in the presence of a person designated by the court. The order shall specify the time, place and manner of making the inspection, copies or photographs and may prescribe such terms and conditions as are just.

(5) SCIENTIFIC TESTING. On motion of a party subject to s. 971.31(5), the court

tify disclosure of matters not within state control but within its knowledge. This in turn would seem to embrace matters known by state agents involved in the investigation and prosecution, but the United States Supreme Court has intimated that state's counsel is not always responsible for police investigatory work.[58] Limiting the duty thus to the extent of the prosecutor's file could cut the heart out of the disclosure rule, especially if the information in the file may not reflect all the information known by the police investigating the case. Potentially exculpatory evidence may not travel beyond them. This risk may be relatively slight when the alternative is considered; the district attorney would be further burdened with an extensive review of the law enforcement investigation activity or run the risk of seeing his efforts nullified.

The identification of matter as exculpatory is a further problem. A determination that certain evidence or lines of investigation will not be pursued at trial by the state cannot avoid the problem any more than a prosecutor's determination that the potentially exculpatory matter is highly unreliable.[59] Although any given information, if relevant under the Wisconsin Rules of Evidence,[60] could arguably assist a theory of defense, it is obvious that the entire work product of the prosecutor is not fair game.[61] The criteria is:

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may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes. The court *may* also order the production of reports or results of any scientific tests or experiments made by any party relating to evidence intended to be introduced at the trial. (Emphasis added.)

WIS. STAT. § 971.24:

(1) At the trial before a witness other than the defendant testifies, written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury. For cause, the court may order the production of such statements prior to trial.

(2) Either party may move for an in camera inspection by the court of the documents referred to in sub. (1) for the purpose of masking or deleting any material which is not relevant to the case being tried. The court shall mask or delete any irrelevant material.

58. *See* Moore v. Illinois, 408 U.S. 786 (1972). *Cf.* Marshall's dissent, 408 U.S. at 800. United States v. Eley, 335 F. Supp. 353 (D.C. Ga. 1972). United States v. Bundy, 472 F.2d 1266 (D.C. Cir. 1972). State prosecutors seem willing to meet the more extensive duty. Milwaukee Journal, Nov. 18, 1974, at 6 col. 2. The Moore case also demonstrates the difficulty in designating matter as materially exculpatory. *See* ABA STANDARDS, *supra* note 56, § 2.1, Comment C and § 2.1(d) for discussion of duty.

59. Nelson v. State, 59 Wis. 2d at 484, 208 N.W.2d at 414. The demand for specific exculpatory items should increase the state's duty to review its agents' work for such item or knowledge of it.

60. WISCONSIN RULES OF EVIDENCE, 59 Wis. 2d R67 § 904.01.

61. Britton v. State, 44 Wis. 2d 109, 116-118, 170 N.W.2d 785, 788-790 (1970).

> material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefore.[62]

This seems to be a standard of direct relevancy, *i.e.*, proving or disproving the elements of a crime or a common defense, including matter affecting the credibility of a material witness.[63] Negative inference also might imbue certain information with an exculpatory character.[64]

The excluded matter in *Stanislawski* was most strongly exculpatory in a negative manner and the case impliedly establishes the vitality of such negative inferences as defining "exculpatory." *Stanislawski* is also of interest as it points out the aforementioned peculiar interaction between *Brady*-type disclosures and the Wisconsin discovery statutes. Certain matters, especially physical evidence and experts' reports, are accessible under the statutory discovery procedure, but normally can be obtained with any additional matters under the general "exculpatory evidence" request, even without specific identification of them.

Stanislawski made one other important change in the area of trial tactics. Under limited conditions, the results of polygraph testing may be introduced as evidence. The question arose because the defendant took separate polygraph tests given by two different operators, who concurred on the truthful nature of his response denying the crime. One of the operators also administered two tests to the complaining witness at the instance of the prosecutor, and his opinion indicated untruthful responses in regards to her statements of sexual relations with the defendant and no one else on the date of the incident.[65] None of the expert operator testimony was admitted, due to the bar of *State v. Bohner*.[66]

The *Bohner* case was reflective of the uncertainty involved in the operation and interpretation of results of early polygraph testing. Last term's opinion on the polygraph was replete, however, with citations to scholarly commentary on the application and statistical efficiency of the device.[67] Such data persuaded the court

62. Note 56, *supra*.

63. Nelson v. State, 59 Wis. 2d at 481, 208 N.W.2d at 413.

64. *See* State v. Cole, 50 Wis. 2d 449, 184 N.W.2d 75 (1971) and Respondent's brief, pp. 19-22.

65. 62 Wis. 2d at 734-735, 216 N.W.2d at 9-10.

66. 210 Wis. 651, 246 N.W. 314 (1933).

67. 62 Wis. 2d at 738 & n. 12, 216 N.W.2d at 12.

to admit the polygraph results of witnesses and the accused as follows:

> (1) That the district attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs, and the examiner's opinion thereon on behalf of either defendant or the state.
> (2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial court, *i.e.*, if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
> (3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
> (a) the examiner's qualifications and training;
> (b) the conditions under which the test was administered;
> (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and
> (d) at the discretion of the trial court, any other matters deemed pertinent to the inquiry.
> (4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate whether at the time of the examination defendant was telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.[68]

These qualifications to admission were borrowed from an Arizona Supreme Court decision which, ironically enough, discussed the Wisconsin history of polygraph inadmissibility.[69] An unwillingness by the Wisconsin court to deviate from these procedures has already been evidenced.[70]

Although the results of the lie detector are now admissible, the use of such a device seems mainly limited to those instances where the accused or a witness will take the stand. In *State v. Nemoir*, the court noted:

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68. *Id.* at 742-743, 216 N.W.2d at 14, quoting from State v. Valdez, 91 Ariz. 274, 283-284, 371 P.2d 894, 900-901 (1962).

69. 91 Ariz. at ____, 371 P.2d at 896, 898-890.

70. Gaddis v. State, 63 Wis. 2d 120, 124-127, 216 N.W.2d at 527, 529-531 (1974).

> Whatever breaches may come in the wall of resistance to the introduction of polygraph test results into evidence, we doubt that they will be suggested or be accepted as surrogate testimony.[71]

This decision, predating *Stanislawski* but within close temporal proximity, inferentially bolsters use strictly for corroboration or impeachment of court testimony. The *Stanislawski* court confirmed this but added that the defendant's test results are admissible "to corroborate other evidence of a defendant's participation in the crime charged."[71.1] Sections of the examination and their result, as long as relevant to the crime alleged, would similarly seem to be admissible in their own right. This would be logical, for allowing admissibility only upon defendant's taking the stand would leave an unwarranted escape power for those who do not pass the test. A stipulation requiring his court testimony may not effectuate agreements or be practically enforceable.

Opening for admissibility does not guarantee wholehearted acceptance in the criminal justice system. The nature of the stipulation may cause hesitancy by any of the parties involved. To what extent may the offer of a lie detector test be admissible as evidence?

Hemauer v. State,[72] although based on a trial court decision predating *Stanislawski*,[73] offered insight into one phase of the problem. The defendant made a gratuitous offer to take a polygraph test during police interrogation. Defense counsel attempted to get such statement into evidence to lessen the blow of other incriminating admissions. Denial was predicated upon the inadmissibility of such tests generally, such that an offer to undergo examination was "self-serving." In a footnote, the court stated that no reversal could be had because of *Stanislawski*, due to its prospective nature and the instant parties' failure to meet the qualifications.

It would seem that any test results ruled inadmissible by failure of stipulation or by judicial discretion would render a defendant's offers to cooperate "self-serving." The criteria for valid admission not having been met, a defendant would be reaping an undue benefit if the rule were otherwise. This theory's harshness might be mitigated if no inadmissibility were traceable to some action of the

71. 62 Wis. 2d 206, 214 N.W.2d 297 (1974).
71.1. 62 Wis. 2d at 742, 216 N.W.2d at 14.
72. 64 Wis. 2d 62, 218 N.W.2d 342 (1974).
73. *Id.* at 75, 218 N.W.2d at 348.

state, for which their stipulation or a judicial order would govern the offer's admission into evidence. A more difficult question occurs if the state outrightly refuses a polygraph, for time, monetary, or other reasons, as in *Hemauer*. The implication of lack of desire to learn the truth would be most damaging to the state if the rejected offer is admitted. The relevance of the offer to credibility may be arguably limited, but still justify admission absent the state's showing of a compelling reason for its refusal. Such a showing could justify inadmissibility for prejudice.[74]

Offers rejected by the defendant involve additional problems. Inadmissibility due to test deficiencies would be viable, but the more potent defense would be based on constitutional rights. *Schmerber v. California*,[75] while allowing some tests of physical evidence to be made upon an accused, explicity excepted lie detectors. The responses elicited in a test are "essentially testimonial," and as compelled would violate the Fifth Amendment protection against self-incrimination.[76] Similar to the rule barring comment on an accused's failure to testify, comment on a refused polygraph would impair the constitutional shield.[77] Also, as in the case of other solicited statements, questions of knowing waiver of *Miranda* rights, and voluntariness in general may be raised, especially in cases of uncounseled defendants under investigation.

The widespread use of polygraphs may never come, their use being restricted to the major felonies or cases involving a sufficiently solvent defendant. Given the qualifications required of the operator, plus the knowledge required and wide latitude allowed

74. WISCONSIN RULES OF EVIDENCE, 59 Wis. 2d R73 § 904.03 provides:

> Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This broad exclusion power should be given liberal application, especially if *Stanislawski* results in wholesale requests for polygraphs in mine-run cases, where the defendant has little to lose and the possibility of a good showing to gain. Since the district attorney would not have the time nor money to accede to all such requests, especially if available evidence strongly implicated defendant. In other cases the refusal might not comport with the duty to find the truth rather than to merely prosecute, and the offer should be admitted.

75. 384 U.S. 757 (1966).

76. United States v. Dionisio, 410 U.S. 1 (1973).

77. Bowen v. Gyman, 324 F. Supp. 339 (D.C. Ariz. 1970). Comment generally has not been allowed on the basis of the test's inadmissibility. For a discussion of curative guidelines and methods of determining the prejudice by erroneous disclosure, there is Annot., 95 A.L.R.2d 819 (1964).

under supervision," and foreshadowed the *Oestrich* decision by citing the juvenile procedure as being not essentially different than adult parole.[85]

This change was not to last long. The *Gunsolus* ruling reached the United States Supreme Court, which produced a modified right of counsel's presence that *Cresci* adopts. Specifically, the federal tribunal in *Gagnon v. Scarpelli*[86] found that:

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succintly in the record.[87]

The conditions are framed to apply to appointment of counsel for indigents, but the Wisconsin court stated that the guidelines apply to appearance by retained counsel also.[88]

An elaboration on *Scarpelli* made by *Cresci* was its inapplicability to juvenile proceedings. The "aftercare supervision" stemming from a general juvenile delinquency finding, although similar to parole in one view, was found still significantly different due to the lack of a criminal conviction. Therefore, counsel's presence is always guaranteed.[89] The court further intimated that even after it is determined that counsel's presence is needed, there is a further hurdle for him; the extent of his participation can be restricted by the hearing examiner.[90]

85. State ex rel. Bernal v. Hershman, 54 Wis. 2d 626, 196 N.W.2d 721 (1972).
86. 411 U.S. 778 (1973).
87. *Id.* at 790-791, adopted in Cresci, 62 Wis. 2d at 412-413, 215 N.W.2d at 366-367.
88. 62 Wis. 2d at 413-414, 215 N.W.2d at 367.
89. 62 Wis. 2d at 410, n. 1, 215 N.W.2d at 365.
90. *Id.* at 414, 215 N.W.2d at 367, stating:

> The extent to which either retained or appointed counsel participate in probation and parole revocation hearings must be the result of a determination of the hearing

By adoption of *Scarpelli*, Wisconsin has sacrificed a rule of easy application (right to counsel at every hearing) for a rule that is more economical and perhaps more realistic. In many cases, especially where the parolee-probationer is before the department due to pending charges for post-release acts, the department can proceed on the allegations of the charge or on collateral violations of the person's release agreement, such as failures to report to the department agent.[91] The factual allegations may be virtually incontestable and mitigating circumstances may be the only defense, arising only rarely.

Unfortunately, the "more realistic" rule may be misleading in that the very same department which will conduct the hearing is also the party that determines whether there are factual disputes or mitigating circumstances requiring counsel's hand.[92] In Cresci's case, the hearing examiner refused use of active counsel participation to both Cresci and the bureau of probation and parole. A majority of the supreme court found no factual dispute over the alleged violation, while the dissent (Heffernan, Hallows and Wilkie) found an arguable factual defense of unintentional violation of travel restrictions. It is possible that the department, in similar situations, could unconsciously defeat potential defenses by a decision made prior to the actual final revocation hearing.

The function of defense counsel at the hearing, besides actively contesting the commission of an agreement violation when appropriate, would most likely be concentrated in the area of "complex mitigating circumstances."[93] The tactics of counsel would include stress of the mitigating factors and presentation of non-revocation options. This is indicated by guidelines adopted by the court in *State ex rel. Plotkin v. H & SS Dept.*,[94] a probation case:

"In any event, the following intermediate steps should be consid-

agency on a case-by-case basis and such determination must be based on the exercise of sound discretion.

Cresci did have counsel present at the hearing, but participation was limited to observation and a few statements. Such presence, perhaps for the purpose of advising of appeal possibilities, would seem consonant with the guidelines for admission of counsel. Such purpose should be stated on the record. *Id.*

91. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROBATION § 5.3 and commentary.

92. 62 Wis. 2d at 415, 215 N.W.2d at 368.

93. Text accompanying note 87, *supra*. Private counsel will probably participate only on a retained basis, as indigent appointments are to go to the public defender's office. State ex rel. Fitas v. Milwaukee County, 65 Wis. 2d 130, ___ N.W.2d ___ (1974).

94. 63 Wis. 2d 535, 217 N.W.2d 641 (1974).

ered in every case as possible alternatives to revocation:
"(i) a review of the conditions, followed by changes where necessary or desirable;
"(ii) a formal or informal conference with the probationer to re-emphsize the necessity of compliance with the conditions;
"(iii) a formal or informal warning that further violations could result in revocation."[95]

A violation may not be grounds for a hearing at all and often may not call for revocation.[96] The nature of the violation in relation to the original conviction, the length of time on release without violation, and the extent of the controls imposed with release may all be vital factors to be considered in relation to the additional guidelines promulgated in *Plotkin*:

"(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the dispostion, however, unless the court 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."[97]

Besides implementing a common structure to the revocation decision, the adopted guidelines provide a framework for making informed evaluations of appeal possibilities. The standard on review is whether the department committed an "abuse of discretion" in its order.[98]

The appeal should be made to the court of original jurisdiction on a writ of certiorari, although both circuit and county courts have concurrent jurisdiction. This procedure is governed by Wisconsin Statute section 260.03. Further appeal follows the applicable provisions of civil actions generally.[99] The appellate route is

95. *Id.* at 544-545, 217 N.W.2d at 645-646, quoting ABA STANDARDS *supra* note 91, § 5.1(b).

96. *See* ABA STANDARDS, *supra* note 91, § 5.1 and commentary; State ex rel. Cresci v. H & SS Dept., 62 Wis. 2d at 403-404, 215 N.W.2d at 362.

97. 63 Wis. 2d at 544-545, 217 N.W.2d at 645, quoting ABA STANDARDS, *supra* note 91, § 5.1(a).

98. *See, e.g., id.* at 541, 547, 217 N.W.2d at 644, 647.

99. State ex rel. R.R. v. Schmidt, 63 Wis. 2d 82, 91-92, 216 N.W.2d 18, 22 (1974); State

thus consistent with frequent statements that a revocation proceeding is not part of the criminal process.[100]

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DOMESTIC RELATIONS

The cases decided on the subject of domestic relations in the August, 1973 Term of the Wisconsin Supreme Court fall generally into the areas of the adoption and custody of children, and property division and settlement agreements.

I. THE ADOPTION AND CUSTODY OF CHILDREN

The *Adoption of Tachick*[1] was the most significant decision dealing with the adoption and custody of children, because it was the first Wisconsin case to define "the best interests of the child."[2] In this case petitioners sought to adopt an illegitimate grandson who had been born to their son and a fifteen year old girl who had been living in their home. A number of months after giving birth, the mother of the child returned to her own family, leaving the child with the petitioners. Approximately two years after the child's birth, the county department of social services held a hearing, at which the rights of both parents were terminated. The child

ex rel. Hanson v. H & SS Dept., 64 Wis. 2d 367, 379, 219 N.W.2d 267, 274 (1974). Wis. Laws 1973, ch. 217 creates § 261.01(9m) and changes § 253.11(1) to provide concurrent jurisdiction.

100. State ex rel. Hanson v. H & SS Dept., 64 Wis. 2d at 379, 219 N.W.2d at 274; State ex rel. R.R. v. Schmidt, 63 Wis. 2d at 90, 216 N.W.2d at 21.

1. 60 Wis. 2d 540, 210 N.W.2d 865 (1973).

2. *Id.* at 543, 210 N.W.2d at 867. In State ex rel. Lewis v. Lutheran Social Services, 59 Wis. 2d 1,9, 207 N.W.2d 826, 831 (1973), the court stated:

> The phrase, "best interests of the child," means all things to all people: it means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents, and still something different to disinterested observers. If judges were endowed with omniscience, the problem would not be difficult; but the tendency in man is to apply intuition in deciding that a child would be "better" with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being "in the best interests of the child." Courts have not laid down any definite guidelines which can be followed in every case to insure protection of what the average person means by "best interests." . . . The "best-interests-of-the-child" test does not speak in terms of the present, the immediate future, or even the ultimate future of the child.