2003-04 IOWA CRIMINAL CASELAW UPDATE

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April 29, 2004

NOTE: All personal opinions expressed in this outline are of the author, and in no way represent the views of the Federal Public Defender or any other person.

I. Constitutional Law 1

A. Art. 1, Sec. 10 – Ex Post Facto
  1. Criminal Nature of Proceeding
  2. Prospective Effect of Statutes
  3. Reviving Barred Prosecutions
B. Iowa Const. art. I, § 12 – Bailable Offenses
C. First Amendment
  1. Free Speech -- Cross Burning
  2. Freedom of Expression
  3. Freedom of Association – Prison Visits
D. Fourth Amendment
  1. Expectations of Privacy
    a. Guests
    b. Curtilage
  2. Warrant Searches
    a. Probable Cause
    b. Sufficiency of Warrant
    c. Knock and Announce
  3. Warrantless Searches
    a. *Terry* Stops -- Reasonable Suspicion
    b. Probable Cause
      1) Automobile Stops
      2) Passengers in a Vehicle
    c. Exigent Circumstances
    d. Investigatory Roadblocks
    e. Community Caretaker Exception
    g. Border Searchess
E. Fifth Amendment
  1. Self-Incrimination
    a. *Miranda*
      1) Exclusion of Evidence
      2) Custody
    b. Police Deception
    c. Contact with Family Members
    d. Civil
  2. Due Process
    a. Destruction of Evidence
    b. Forced Medication to Restore Trial Competency
    c. Inconsistent Theories of Prosecution
F. Sixth Amendment
  1. Right to Counsel
    a. Statements Elicited by Police
    b. Conflicts of Interest --Prior Representation of Witnesses
    c. Breakdown in Communication
    d. Ineffective Assistance
      1) Breach of Duty
        A) Failure to Challenge Rejection of Plea Agreement
        B) Failure to Move for Judgement of Acquittal
        C) Failure to Obtain Psychological Evaluation
        D) Trial Strategy

E) Appellate Counsel
2) Prejudice
2. Confrontation
a. Testimony
b. Witness Protection Measures
3. Right to Jury Trial – – Colloquy
4. Right to Testify – Colloquy
G. Eighth Amendment (Iowa Const. art. I, sec. 17) – Proportionality – Three Strikes
H. Fourteenth Amendment – Due Process
1. Procedural Due Process
a. Vagueness
b. Late Disclosure of Evidence
c. Competency to Stand Trial – Sexually Violent Predator Hearings
2. Substantive Due Process
a. Access to the Courts
b. Sodomy Laws

II. Substantive Offenses 38

A. Child Endangerment – Three Separate Acts
B. Controlled Substances
1. Sufficiency of the Evidence
a. Constructive possession
b. Delivery
c. Conspiracy to Manufacture
d. Tax Stamp Provisions
2. Possession With Intent – Instructions
3. Habitual Offender --Accommodation Offense
4. Possession of Precursors with Intent to Manufacture – Sufficiency
C. Harassment – Sufficiency
1. "Personal contact with the intent to intimidate, etc."
2. Intent to Threaten, Intimidate or Alarm – Sufficiency
D. Homicide Offenses
1. Murder – Sufficiency
a. Premeditation
b. Malice Aforethought
2. Vehicular Homicide
a. Sufficiency
1) Recklessness
2) Proximate Cause
3) Aiding and Abetting
b. Instructions – Recklessness
E. Kidnaping – Kidnaping by Torture – Sufficiency
F. Motor Vehicle Provisions
1. Operating While Intoxicated
a. Implied Consent
1) Preliminary Breath Tests – Required Procedures
2) Blood Withdrawal – Requirements
3) Laboratory Testing – Required Procedures
b. Sentencing -- Suspension – Concurrent with Administrative Suspension
2. Eluding
a. Lesser offenses

b. Multiple Punishment
G. Public Intoxication – "Public Place" defined
H. Sexual Offenses
1. Sexual Abuse – "by force or against the will" – Sufficiency
2. Lascivious Acts – Lesser Offenses
3. Evidence
4. Sexually Violent Predator Commitment
a. Recent Overt Act
b. Instructions
5. Inclusion on Sexual Abuse Registry
I. Theft
1. Sufficiency
a. Dominion and Control
b. Intent to Permanently Deprive – Sufficiency
c. Value
d. Theft by Deception
2. Jury Instructions – Theft by Deception

III. Pre-trial Issues 57

A. Limitations – General v. Specific
B. Venue – Prejudice from Denial of Change
C. Indictment or Information
1. Specificity
2. Uncharged Alternatives
D. Pretrial Motions
1. Motion to Dismiss Trial Information
2. Bills of Particulars
E. Consular Notification

IV. Trial Issues 60

A. Guilty Pleas
1. Judicial Colloquy
a. Substantial Compliance
b. Misdemeanors
c. Waiver of Counsel
d. Motion in Arrest of Judgment – Necessity
2. Voluntariness
B. Evidence/Witnesses -- Evidence
1. Iowa R.Evid. 5.403 (Prejudice v. Probative Value)
2. Iowa R.Evid. 5.404(b) (Other Bad Acts)
3. Iowa R.Evid. 5.412 (Rape Shield Provision)
4. Impeachment
5. Iowa R.Evid. 5.605 – Presiding Judge as Witness
6. Iowa R. Evid. 5.801 (Hearsay)
a. Hearsay Defined – Implied Assertions
b. Iowa R.Evid. 5.803(2) (Excited Utterances)
c. Iowa R.Evid. 5.803(17) (Market Report Exception)
5. Foundation
6. Chain of Custody
7. Sufficiency

a. General
b. Corroboration of Confessions and Accomplices
C. Defenses
1. Self Defense – Right to Present Evidence
2. Justification – Resisting Arrest
3. Insanity – Commitment After Acquittal – Standard
4. Diminished Capacity
D. Prosecutorial Misconduct
1. Cross-Examination
2. Comments on Witness' Credibility
3. Impeachment with Inadmissible Evidence
4. Closing Arguments
E. Mistrial – Sufficiency
F. Jury Instructions – Spoliation of Evidence
G. Motion for New Trial – Weight of the Evidence – Standard

V. Sentencing 77

A. Procedures – Reasons for Sentences
1. Consecutive Sentences
2. Fixed Sentencing Policy
B. Particular Sentences
1. Habitual Offenders – Proving Prior Convictions
2. Credit for Time Served
3. Restitution -- Credit for Payments Made by Others
4. Probation Fee – Refund of Fee
5. Limitations Periods
6. D.N.A. Profiling
C. Reconsideration – Imposition of Higher Sentence
D. Resentencing After Appellate Reversal – Judicial Vindictiveness

VI. Appeal and Collateral Review 81

A. Appeal and Error
1. Jurisdiction of the District Court During Appeal
2. Appealable Issues – Final Judgment – Deferred Judgment
3. Preservation of Error
a. Preservation – Changes in the Law
b. Waiver
1) In General
2) Invited Error
3) Ineffective Assistance of Counsel
4) Waiver of Appeal
4. Standard of Review
a. Guilty Plea Procedures
b. Harmless Error
c. Violation of International Treaties
d. Evidentiary Foundation
e. New Trial Motion
f. Forfeiture
B. Federal Habeas Corpus

1. Extent of Review – State Court Application of Federal Law
2. Grounds for Relief – Ineffective Assistance
3. Procedures
   a. Exhaustion of State Remedies
   b. Original Petition – Judicial Reclassification
   c. Preservation of Error – Specification of Constitutional Grounds
   d. "Pending case"
   e. Certificate of Appealability

C. Federal Appeal – Makeup of the Appellate Panel

VII. Prisons 98

A. Prison Legal Assistance

VIII. Collateral Issues 98

A. 42 U.S.C. § 1983 Civil rights lawsuits
   1. Exhaustion of Remedies
   2. Qualified Immunity
B. Attorney Fee Claims
C. Legal Malpractice – Limitations

I. Constitutional Law

A. Art. 1, Sec. 10 – Ex Post Facto

1. Criminal Nature of Proceeding

Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)
A State sexual offender registration statute, which requires registration of all individuals convicted of sexual crimes, regardless of whether there is any proof of future dangerousness, and publishes information about registrants on the Internet, is civil and not punitive in nature, and thus does not violate the Ex Post Facto Clause with respect to individuals whose offenses occurred prior to its enactment.

– With the exception of Justice Thomas' reminder that, under his concurring opinion in *Seling v. Young* (2001), Ex Post Facto challenges may only be lodged to statutes that violate the Clause on their faces rather than as applied, the point of contention in the four remaining opinions was the proper standard to be used in measuring whether a statute is civil or punitive.

In his majority opinion, Justice Kennedy relied on four of the seven factors announced in *Kennedy v. Mendoza-Martinez* (1963). The factors relevant to the current inquiry, Justice Kennedy noted, were "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." In his concurrence, Justice Souter found evidence to be nearly in equipoise as to whether the scheme has a punitive purpose. The deciding factor, in his view, is the principle that legislative purpose must be overcome by "only the clearest proof" that a statue is truly punitive. Joined by Justice Breyer in her dissent, Justice Ginsberg adopted Justice Souter's analysis but found that the Alaska statute fell on the other side of the line.

In his dissent, Justice Stevens indicated that a statute is punitive if it "(1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty. . ." All three of these conditions applied to the Alaska statute.

Schreiber v. State, 666 N.W.2d 127 (Iowa 2003)
Iowa Code § 13.10, requiring submission to D.N.A. testing by inmates prior to their release from incarceration, is civil and not punitive in nature, and thus does not violate the Ex Post Facto clauses of the Iowa and United States Constitutions as applied to defendants who were convicted prior to its enactment.

– **NOW, WAIT A MINUTE!!** Justice Larson correctly sets out the standard of *Beazell v. Ohio* (1925), under which "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." The issue here, he claims, is identical to that involved in the Ex Post Facto challenge to the Sexual Offender Registry in *State v. Pickens* (1997), in which the Court found the registry was not punitive because it was "motivated by concern for public safety, not to increase the punishment." Under § 13.10, Justice Larson recognizes, the policy bases of D.N.A. profiling include "the deterrent effect of DNA profiling, the likelihood of repeated violations, and the seriousness of the offense." But deterrence, preventing recidivism, and adjusting the remedy to fit the gravity of the offense are the traditional goals of **incarceration**, not of a civil remedy "motivated by concern for public safety."

There was no dissent.

2. Prospective Effect of Statutes

Gully v. State, 658 N.W.2d 114 (IowaApp.2002)
The decision of the Iowa Supreme Court that a new habitual offender statute for sexually predatory offenses applies, for *ex post facto* purposes, only to defendants whose prior offenses occurred after its enactment applies to defendant whose conviction was on appeal when the decision came down, despite the fact that its analysis has been repudiated in subsequent cases and the legislature has amended the statute to extend habitual offender status to prior offenses preceding the original enactment.

– This is interesting. Judge Sackett holds that Gully is able to avail himself of analysis that has been overruled, not only legislatively but also by the Supreme Court, since it was the interpretation in effect when his case was pending.

3. Reviving Barred Prosecutions

Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003)
While it is constitutionally permissible to extend the statute of limitations with respect to criminals for whom the statute has not yet run, the *Ex Post Facto* Clause precludes extending a limitation in a manner that will revive a prosecution that was previously barred.

– The second most surprising thing about this issue is that it has not already been resolved, since Justice Breyer's holding seems to be the most obvious reading of the *Ex Post Facto* Clause. The most surprising aspect (and maybe I'm just naive) is that the Court split 5-4 on the issue. To be honest, I am most disappointed in Justice Scalia, from whom I would expect an opinion proclaiming, "If *Ex Post Facto* doesn't mean you can't revive a time-barred prosecution, what does it mean?" Yet he joins Justice Kennedy's dissent.

The meaning of the Clause, Justice Breyer writes, is best described in Justice Chase's opinion in *Calder v. Bull* (1798):

> I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws are manifestly unjust and oppressive.

The statute in question was a California provision that permits prosecution of sexual abuse crimes at any time up to one year after they are first reported. This enabled California to prosecute Marion Stogner for his acts between 1955 and 1973, no less than 22 years after the statute had run. Justice Breyer used the second of the *Calder* criteria to invalidate the statute as applied to Stogner. It's never been interpreted that way, Justice Kennedy argues. Of course it hasn't, Justice Breyer responds. Nobody's ever tried anything like this before.

B. Iowa Const. art. I, § 12 – Bailable Offenses

State v. Briggs, 666 N.W.2d 573 (Iowa 2003)
Provision in Article I, section 12[1] of the Iowa Constitution that every criminal defendant, before trial, be bailable *by sufficient sureties* guarantees only that the defendant be bondable by some form of surety, and does not entitle the defendant to obtain the services of a commercial bondsman, and does not preclude cash-only bonds.

– The dissent in this rare 4-3 split of the Iowa Supreme Court was authored by Justice Carter, who argued that the discretion of the district court is limited to setting the amount of bail, and that the Constitution means just what it says, that the defendant must be permitted to utilize the services of a surety.

Tonya Briggs' challenge to the bail order was, of course, long since rendered moot by her plea and sentence. Justice Cady found that all of the conditions were present for deciding an issue that was now moot in the case before the Court.

> Questions resting on the nature and propriety of cash only bail are of a pressing public interest. The imposition of cash only bail is a regular occurrence in our district courts. The constitutional implications of this form of bail are of great relevance for members of the public, the bar, and the judiciary. The need to provide guidance on this issue is manifest. Moreover, in the absence of authoritative guidance, it is highly likely this issue will recur, potentially resulting in varied and inconsistent interpretations of important constitutional provisions. Finally, although it is conceivable that this issue could reach us under circumstances that would not involve a moot controversy, we believe this issue is highly likely to recur yet evade our review. For all of these reasons, we believe this is one of the exceptional circumstances in which our review is proper even in light of the mootness of the underlying controversy.

C. First Amendment

1. Free Speech -- Cross Burning

Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)
While the act of burning a cross is, standing along, expression protected by the First Amendment, the Government may criminalize the burning of a cross with the intent to intimidate, as speech designed to incite violence is not protected.

– The case was remanded to the State court on the basis of language in the Virginia cross-burning statute that permitted the jury to infer, from the burning of a cross, the intent to intimidate. Led by Justice O'Connor, author of the majority opinion articulating the above holding, four justices

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[1]Briggs also challenged the bond order as a violation of the Iowa Const. art. I, § 17 proscription of excessive bail. The same analysis answers both challenges, Justice Cady responded.

characterized the permissive inference as a shortcut not permitted by the First Amendment. Justice Scalia concurred in the remand, opining that the State court should construe the issue. Justices Souter, Kennedy and Ginsburg would have held the cross-burning statute to be unconstitutional on its face, even with the intimidation element. Justice Thomas, on the other hand, recites a history of cross burning and the Ku Klux Klan, and argues in his dissent that cross burning with the intent to intimidate is not expression, and thus the First Amendment is not implicated. He opposes remand based upon the permissive inference, pointing out the profound effect of a cross burning upon its audience, even without the intent to intimidate.

2. Freedom of Expression

State v. Evans, 672 N.W.2d 328 (Iowa 2003) (Evans I)
Although a defendant may have a First Amendment right to publish photographs of women's feet, there is no right to obtain the photographs in a manner that is threatening, intimidating or alarming to the subject.

3. Freedom of Association – Prison Visits

Overton v. Bazzetta, 539 U.S. 126, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003)
The First Amendment right to intimate association with family members, also recognized as being protected by Fourteenth Amendment substantive Due Process, is not violated by statewide prison rules restricting the number and nature of prison visits, provided the rules further legitimate legislative goals, that prisoners have reasonable alternative means of communicating with family and friends, and no alternative remedy exists to further the goals at no more than *de minimus* cost to the Government.

– Justice Kennedy also rejected the Eighth Amendment challenge to the measures, in the absence of evidence that the regulations permanently precluded, or precluded for a long period of time, visits for all inmates, or that the regulations were applied arbitrarily. The door was also left open to individuals completely denied visitation to articulate First and Fourteenth Amendment challenges to the regulation as applied to them.

D. Fourth Amendment

1. Expectations of Privacy

a. Guests

State v. Lovig, 675 N.W.2d 557 (Iowa 2004)
Even though not necessarily an overnight guest at the time of a search, an individual who spends much time at the residence of a cousin, stores personal effects there, and sleeps there at least three nights a week possesses a reasonable expectation of privacy in the residence bringing into play the protection of the Fourth Amendment.

– **Really??** Cool. My suggestion to Ms. Lovig's defense counsel is when you get the Iowa Supreme Court to extend *Minnesota v. Olson* (1990) to this degree, make sure you get the Court to base its ruling, at least in part, on State constitutional grounds. Justice Cady found that Ms. Lovig's status was somewhere between an overnight guest and an individual conducting a business transaction, who possesses no reasonable expectation of privacy, *Minnesota v. Carter* (1998), but that she fell closer to the former than the latter.

b. Curtilage

State v. Lewis, 675 N.W.2d 516 (Iowa 2004)
While the actions of two individuals who, after being told by police to stop, turn and walk briskly toward a crowd of people in a fenced-in backyard may or may not provide reasonable suspicion for an investigatory stop, they do not rise to the level of probable cause that would justify officers entering the fenced area, from which they were able to open a door to an enclosed porch and observe the odor of burnt marijuana.

– Justice Wiggins' majority opinion in *Lewis* is outstanding in a number of respects. An example is his discussion of the principles involved in the search of the curtilage of a residence. He derives his definition of a curtilage from the United States Supreme Court decision in *United States v. Dunn* (1987):

> To determine the extent of a home's curtilage, the *Dunn* Court determined the question should be resolved with reference to four factors. These factors are: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." . . . "[T]he primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home."

> The ultimate question is whether "an individual reasonably may expect that the area

in question should be treated as the home itself." Under this definition, Mr. Lewis' driveway was not part of the curtilage of his residence, while the fenced-in back yard was. The officers' observations of activities in the back yard from an outside vantage point were not unreasonably obtained. Observations made after officers crossed into the protected area, however, were made in violation of the Fourth Amendment.

The other remarkable aspect of Justice Wiggins' opinion was its insight into the dynamics of residing in a high-crime area. Officers in *Lewis* had received from the owner of the property rented by Lewis a "no-trespass" letter, listing individuals [including Melvin Lewis] who were renters and who had a right to be present. Anyone else was trespassing. Justice Wiggins noted that tenants, and not owners, are vested with the right to grant or deny police access to the rented property [absent, of course, probable cause and exigent circumstances]. They also have the right, under law, to invite guests onto the property. Justice Wiggins appears to caution against holding individuals to a different standard by the mere virtue of the location of their residences:

> Having a party at 9:30 p.m. on a summer evening should not raise any suspicion. Citizens living in high crime areas have the right to enjoy the use of their property just as much as citizens living in other parts of the city do. The only factor that drew police attention to Lewis's party was that it was taking place in a high crime area.

Justice Wiggins also rejected the State's argument that officers were justified in following the two individuals into Lewis' enclosed porch under the theory that they were in hot pursuit. This case is distinguishable from *State v. Legg* (2001) and *State v. Pink* (2002) in that the two individuals who walked away from police had not committed any offense in doing so.

Joined by Justice Larson, Justice Cady bases his dissenting opinion upon Chief Justice McGiverin's holding in *State v. Breuer* (1998) that, while a person may have a reasonable expectation of privacy in a premises (in *Breuer* the hallway separating units in a duplex), a police entry into the premises is not unreasonable where the object is to conduct

an investigation and not a search for evidence. Not surprisingly, *Breuer* is the only authority Justice Cady could muster in support of this theory.

2. Warrant Searches

a. Probable Cause

State v. Bowers, 661 N.W.2d 536 (Iowa 2003)
A statement to police by the victim of alleged sexual abuse that the perpetrator also videotaped a minor female taking a shower and drying herself generates probable cause that evidence of illegal activity will be found in the alleged perpetrator's house, justifying the issuance of a warrant.

– Thus, the defendant's subsequent confession is not the product of an illegal search, especially where there is no connection between the substance of the confession and the fruits of the search.

b. Sufficiency of Warrant

Groh v. Ramirez, _____ U.S. _____, 124 S.Ct. 1284, _____ L.Ed.2d _____ (2004)
Although the affidavit in support of a search warrant describes with particularity all of the items agents expect to seize, where in the actual warrant the statement of items to be seized inadvertently describes only the place to be searched the warrant is invalid on its face, and any search conducted pursuant to the warrant is essentially a warrantless search.

– This portion of Justice Stevens' opinion was joined by six members of the Court, with Justice Scalia joining in Justice Thomas' dissent. Writing for a 5-4 majority, Justice Stevens also found that because the particularity requirement is express in the Fourth Amendment, the agent who drafts and then executes a search warrant that does not describe items to be seized is unentitled to qualified immunity. Justice Thomas responded that this imposes a "proofreading" requirement.

Had the language in the warrant affidavit describing items officers expected to seize been incorporated by reference in the warrant, the warrant most likely would have been valid.

Ramirez may be helpful in the limits it places upon the good faith exception of

United States v. Leon (1984). While the Iowa courts do not recognize a *Leon* exception to the State constitutional warrant requirement, *Leon* has effectively eviscerated much of the protection of the Fourth Amendment in Federal court. *Leon* recognizes, and *Ramirez* magnifies, that law enforcement is not permitted to rely in good faith upon a warrant that is invalid on its face which, in this case, means a warrant lacking a particular description of its objects.

c. Knock and Announce

United States v. Banks, _____ U.S. _____, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003)
Where police executing a search warrant have reasonable grounds to believe either that exigent circumstances exist or that waiting for an answer would be futile, the Fourth Amendment is not violated by the forced entry into premises 15 to 20 seconds after police knock and announce their presence.

– In his unanimous opinion, Justice Souter rejects the four-level approach of the Ninth Circuit, under which the permissible length of delay is a function of whether entry can be accomplished without property damage and whether exigent circumstances exist. Reasonable suspicion that exigent circumstances exist is the standard applied to law enforcement and, where they are present, the potential for property damage is not a factor.

The relevant exigency giving rise to forced entry is measured from the perspective of the law enforcement officer. Thus, the fact, unknown to police, that Banks was in the shower when officers knocked and announced their presence did not render the short delay unreasonable. The reasonableness of each entry is judged on a case-by-case basis, and Justice Souter begins his opinion with a profound caution against attempts to generalize a universal Fourth Amendment theory from the body of prior appellate decisions:

> The Fourth Amendment says nothing specific about formalities in exercising a warrant's authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be "secure . . . against unreasonable searches and seizures." Although the notion of reasonable execution must therefore be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts

> of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones. . .We have, however, pointed out factual considerations of unusual, albeit not dispositive significance.

3. Warrantless Searches

a. *Terry* Stops -- Reasonable Suspicion

State v. Heuser, 661 N.W.2d 157 (Iowa 2003)

The cumulative facts that the defendant and his associate went to three different stores to buy pseudoephedrine pills and lithium batteries, and that the two switched positions in their automobile and took turns going into the store support the law enforcement officer's belief that reasonable cause existed to conduct a *Terry* stop of the vehicle.

b. Probable Cause

1) Automobile Stops

State v. Tague, 676 N.W.2d 197 (Iowa 2004)

Driver who very briefly crosses the left edge line on a four-lane undivided highway, but does not travel across the center line, does not violate Iowa Code § 321.297 (crossing center line of highway) or § 321.306 (changing lanes without first ascertaining that it is safe to do so), so police lack probable cause to stop the vehicle.

– The State also argued that, even if probable cause was locking, the officer had reasonable suspicion for an investigatory stop. Because Tague's actions did not violate the law, Justice Wiggins responds, and because there is no other evidence that the defendant was driving erratically or in a manner that would create reasonable suspicion that Tague was intoxicated or fatigued, the stop could not be justified as a valid *Terry v. Ohio* seizure. The very limited nature of Tague's crossing the edge line distinguished his case from *State v. Tompkins* (1993) and

State v. Otto (1997), in which officers observed patterns of swerving, weaving and speeding.

State v. Maddox, 670 N.W.2d 168 (Iowa 2003)

Where defendants are observed making a late night trip to Wal-Mart, in which they purchase a series of items (i.e. starting fluid, coffee filters, plastic tubing) that are all, with one exception, precursors to the manufacture of methamphetamine, where one of the defendants appear to be evasive when he spots officers and where the other defendant refuses to consent to a search of the cab of his semi truck, police have probable cause to conduct a search of the truck under the automobile exception to the warrant requirement.

– This wasn't, however, a warrantless search. Maddox apparently challenged the warrant on the ground that it was unsupported by probable cause. The district court agreed, and suppressed the fruits of the search. So did the Court of Appeals. But on further review Justice Streit concludes that, even if the warrant was not valid, a warrantless automobile search was justified. But why? Wouldn't the probable cause for the warrantless search also give rise to the warranted one, and vice versa? There may be more to this case than Justice Streit is telling us.

One telling feature of Justice Streit's opinion is its reliance upon *State v. Heuser* (2003), a case very similar in its facts. What the Court found in *Heuser*, however, was not that a full search was justified by probable cause but that police had reasonable suspicion to execute an investigatory seizure.

A subject's refusal to consent to a search is not, alone, probable cause sufficient for a full search. It might, however, in combination of other indicia of probable cause. And even seemingly innocent behavior may, together with other actions, support a probable cause finding.

2) Passengers in a Vehicle

Maryland v. Pringle, _____ U.S. _____, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)

Where $763 in cash is found in a glove box directly in front of the defendant, a passenger in the vehicle, where a quantity of controlled substances are concealed behind a rear seat armrest, and where none of the three occupants of the vehicle claim ownership of the controlled substances, police have probable case to search all three occupants, including the defendant.

– In his unanimous opinion in *Pringle*, Chief Justice Rehnquist distinguishes *Ybarra v. United States* (1979) and *United States v. Di Re* (1948). In the former, the Court held that a bystander's mere proximity in a tavern to others who officers have probable cause to believe committed criminal offenses does not amount to probable cause to search the bystander. Pointing to the decision in *Wyoming v. Houghton* (1999), the Chief Justice observed that passengers in a vehicle are more likely to be engaged in a common criminal enterprise than strangers in a bar. And specific information in *Di Re* singled out the other occupants, and not the defendant, as being involved in criminal activity, a circumstance not present in *Pringle*.

Chief Justice Rehnquist begins the *Pringle* opinion with a highly useful discussion of the meaning of probable cause.

c. Exigent Circumstances

State v. Lovig, 675 N.W.2d 557 (Iowa 2004)

Evidence of the offense of operating while intoxicated (blood alcohol content) does not dissipate so rapidly as to create an exigent circumstance justifying warrantless entry into a residence to seize a suspected drunk driver.

– Justice Cady found that, where the driver of a vehicle that rolled over and crashed abandoned the vehicle and drove off with a friend, and where a witness had detected the odor

of alcohol on the driver's breath, law enforcement had probable cause to suspect the driver of operating while intoxicated. Exigent circumstances did not justify the entry into a residence in which the driver was hiding.

d. Investigatory Roadblocks

Illinois v. Lidster, _____ U.S. _____, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004)
A roadblock set up at the site of a week-old hit-and-run homicide for the purpose of asking drivers whether they had any information concerning the offense is inherently different from suspicionless investigatory roadblocks that are automatically invalid under *Indianapolis v. Edmond* (2000), and thus does not automatically violate the Fourth Amendment.

– When Lidster approached the roadblock, he swerved to the side and nearly struck a law enforcement officer. Testing revealed that he was intoxicated. He challenged the stop as being based upon an *Edmond* violation. Because *Edmond* was found not to apply, the second prong of the inquiry was a determination of whether the stop was unreasonable under the particular circumstances of the case. Finding the question to have been sufficiently argued below, Justice Breyer determined that the stop of Lidster was reasonable, and therefore constitutional. The law enforcement interest was grave, and the stop significantly furthered that interest. The stop was brief and relatively unintrusive.

Arguing that the Supreme Court "should be especially reluctant to abandon our role as a court of review in a case in which the constitutional inquiry requires analysis of local conditions and practices more familiar to judges closer to the scene," Justice Stevens dissented from the last line of analysis. In his view, the lower courts should make the factual findings which are to be measured against the constitutional standard.

e. Community Caretaker Exception

State v. Crawford, 659 N.W.2d 537 (Iowa 2003)

A reasonable person would believe that a law enforcement officer was acting in his function as a community caretaker where the officer stopped a vehicle after the officer received a telephone communication indicating that an individual in the vehicle had taken some pills and was acting in a disoriented and violent manner.

– The individual who was acting erratically was the passenger in a truck driven by Mr. Crawford. After Mr. Crawford became uncooperative when stopped, the officer detected the odor of alcohol on his breath. Mr. Crawford then refused to submit to sobriety tests, and was charged with and convicted of operating while intoxicated. The "community caretaker" exception to the warrant requirement, Justice Lavorato explained, is very similar to the "emergency aid" exception, the difference being that the former involves the officer's reasonable belief that his assistance is required, while the later arises when there is a reasonable belief that a serious and dangerous event is about to occur.

f. School Locker Room Searches

State v. Jones, 666 N.W.2d 142 (Iowa 2003)

Although students do hold reasonable expectations of privacy in the contents of their school lockers, and particularly items in the pockets of clothing stored in the lockers, a school program of opening all student lockers in the presence of the student, and on the next day those of students who have absented themselves, for the purpose of locating misplaced food and school supplies along with weapons and controlled substances, is a reasonable intrusion when conducted to further a policy of promoting the educational environment of the school and the health and safety of students, and justifies entries into the pockets of clothing stored in lockers.

g. Border Searches

United States v. Flores-Montano, _____ U.S. _____, 124 S.Ct. 1582, _____ L.Ed.2d _____ (2004)

The stop of a motor vehicle coming into the United States, followed by the removal and search of its gasoline tank, is a "routine border search" that may be conducted without probable cause or even reasonable suspicion.

– Wow! Here's an area of Fourth Amendment jurisprudence I knew nothing about. I read this decision on April 1 (two days after it was announced), and thought it was an April Fools joke – but it wasn't. Apparently, it is well established that the Government has the authority to protect its borders and prevent the introduction of contraband into the United States by conducting routine border searches without even reasonable suspicion. See, for example, *United States v. Ramsey* (1977). What constitutes "non-routine" searches might include body cavity searches or x-rays of the person, but not searches of automobiles. Nobody really has any privacy interest in a car's gas tank, Chief Justice Rehnquist explains, since it's really only built for storing gasoline. What standard should be followed for non-routine searches? The Court doesn't say. The Ninth Circuit devised its own test, the validity of which is not in question since the entry into Mr. Flores' gas tank was determined to be routine.

E. Fifth Amendment

1. Self-Incrimination

a. *Miranda*

1) Exclusion of Evidence

State v. Peterson, 663 N.W.2d 417 (Iowa 2003)

Where police visit in prison a defendant who has been charged by complaint (but not informed of the charges) with murder, question him in a small locked interrogation room with no intention of allowing him to leave, and then continue to question the defendant after the defendant indicates that he no longer wishes to answer questions without the assistance of counsel, all subsequent statements made by the defendant in response to police-initiated questioning, even after *Miranda* warnings are administered and waived, must be suppressed as violative of the Fifth Amendment.

– Peterson's Sixth Amendment right to counsel was also violated because the murder prosecution against him had been initiated, by complaint, prior to the invocation of his right to counsel. The Court of Appeals had found a Fifth Amendment violation, but affirmed Peterson's conviction on the ground of harmless error. On further review, Justice Lavorato held that the Constitutional error could not be harmless beyond reasonable doubt, since the most persuasive remaining evidence against Peterson was the testimony of his two accomplices, the credibility of whom was subject to serious question.

While not all questioning of prisoners is inherently custodial, Mr. Peterson was in custody where his freedom of movement was impeded to a degree greater than that to which he was subjected by nature of his status as a prisoner.

2) Custody

State v. Miranda, 672 N.W.2d 753 (Iowa 2003)

Where police enter the defendant's home in the middle of the night, remove the defendant and another individual from a bedroom in handcuffs, and confront the defendant with evidence of his own guilt, the defendant is in custody, requiring the administration of *Miranda* warning prior to interrogation.

– Perhaps drawn in by the allure of vacating on Fifth Amendment grounds the conviction of a defendant named Miranda, Justice Streit may have been a little generous towards Victor Miranda. He recognized that being in one's own home is generally not an indicia of custody. Nor was the large number of persons present at the residence during the entry, or the fact that "questioning" consisted of nothing more than a question posed of two persons at the same time. But, because the defendant was handcuffed, because of the strong evidence against him and because the defendant was not told he was not under arrest, Justice Streit found Mr. Miranda was in custody. From there, he determined that the officer's question constituted interrogation, and ultimately rejected the States obligatory harmless error argument, relying on the following language from *State v. Peterson* (2003):

> The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. . . . To establish harmless error, the State must ""prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."" . . . [W]e must ask whether the force of the evidence is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same without the erroneously admitted evidence. Only when the effect of the erroneously admitted evidence is comparatively minimal to this degree can we say that there is no reasonable possibility that such evidence might have contributed to the conviction.

b. Police Deception

State v. Bowers, 661 N.W.2d 536 (Iowa 2003)

Use by police of deception in questioning a defendant is just one circumstance in the determination of whether the defendant's will was overborne to a degree that his or her confession was voluntary and, standing alone, does not necessarily mandate suppression.

c. Contact with Family Members

State v. Bowers, 661 N.W.2d 536 (Iowa 2003)

Denial of a post-arrest opportunity to consult with a family member does not automatically mandate exclusion of any custodial statements made by the defendant, as this is simply a factor to be considered in determining whether under the totality of circumstances the defendant's statements are voluntary.

– Iowa Code § 804.20 deals primarily with the defendant's right to consult with counsel after arrest, but does include language giving the accused a right to "see a member of the person's family or an attorney of the person's choice, or both." Bowers did see his wife for a very brief time after his arrest. Any argument he might have was additionally diluted by the fact that his wife was also charged in the same incident.

Justice Carter also rejected Mr. Bowers argument that the jury should be instructed that the denial of his right to consult with a family member is a factor to be considered by the jury in evaluating the voluntariness of his confession. Voluntariness is a question for the court, Justice Carter explained. The weight and credibility are for the jury.

d. Civil Remedies

Chavez v. Martinez, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003)

The Fifth Amendment is not violated by the coerced taking of a statement by law enforcement where the declarant is never charged with an offense and thus not required to testify against him- or herself.

– This is actually the holding of only four Justices in an opinion authored by Justice Thomas. The context was a civil lawsuit under 42 U.S.C. § 1983 against a police investigator who persisted in interrogating a subject who had been shot numerous times, including several times in the face, who believed he was dying, and who pleaded that questioning cease and that he be given medical treatment. The Ninth Circuit rejected the investigator's request for summary judgement based on a theory of qualified immunity, because his actions violated a clearly established Fifth Amendment right. Joined by Justice Breyer, Justice Souter concurred in the result, suggesting that circumstances might exist under which actions of police might threaten the core protection of the Fifth Amendment (the right not to be compelled to provide evidence against one's self) to the extent that some remedy besides exclusion of a coerced statement might be warranted. The complainant, however, must make a powerful showing that such a remedy is appropriate, and Martinez did not justify in his case the civil remedy he sought.

The three dissenters, particularly Justice Kennedy, expressed the belief that the Fifth Amendment was more than simply a rule of evidentiary exclusion, and provides protection from all coercive questioning.

Part II of Justice Souter's opinion, joined by the majority of the Court, remanded the case to consider the alternative argument that the coercive questioning violated Substantive Due Process, thus negating a claim of qualified immunity. Writing for himself alone, Justice Thomas rejected the theory, while Justice Scalia noted that the argument was not raised below.

2. Due Process

a. Destruction of Evidence

Illinois v. Fisher, 540 U.S. _____, 124 S.Ct.1200, _____ L.Ed.2d _____ (2004)

Even where the defense has made a specific discovery request of evidence of a particular nature, and even where the evidence in question could be crucial to the case for the defense, where the evidence is not materially exculpatory on its face, Due Process is violated only where it is destroyed intentionally by the Government.

– Under *Brady v. Maryland* (1963) and *United States v. Agurs* (1976), the destruction of materially exculpatory evidence violates Due Process, regardless of the good or bad faith of law enforcement. Destruction of evidence potentially helpful to the defense is a violation only if done in bad faith, under *Arizona v. Youngblood* (1988). Here, the defendant was arrested and charged in 1988 and, soon after, filed a motion to produce. But then the defendant absconded and did not resurface until November, 1999. Coincidentally, the drugs for which he was charged had been destroyed just two months earlier. Justice Per Curiam noted that they had already been tested four times, so they clearly were not plainly exculpatory.

b. Forced Medication to Restore Trial Competency

Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003)

Due Process does not preclude the administration of antipsychotic drugs to render a criminal defendant competent to stand trial if the court first finds (1) that an important governmental interest is at stake, (2) that the administration of drugs will significantly further that interest, (3) that the administration of drugs is necessary for that purpose, and (4) that the administration of drugs is medically appropriate (i.e., will not generate any dangerous side effects).

– The order requiring administration of such medications to Sell was vacated, however, because these four criteria were not employed. Justice Breyer, in his majority opinion,

pointed out that this is the test only for the forced administration of drugs to restore competency. It is not necessary where the drugs are administered for some medical purpose (i.e., averting dangerousness, treating serious illness), and Justice Breyer suggested that courts first determine whether the administration of medication is necessary to further one of these ends before engaging in the Due Process analysis.

Justice Scalia dissented on the ground that appeal was improper under the procedural circumstances of this case. The district court's order was not a final judgment. The majority and the dissent agreed that the proper test for whether the appellate court has jurisdiction to review a pretrial order was articulated in *Coopers & Lybrand v. Livesay* (1978), under which such a non-final ruling may be reviewed where it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." Justice Breyer found all three conditions to be present in *Sell*. Justice Scalia disagreed on the third.

c. Inconsistent Theories of Prosecution

State v. Watkins, 659 N.W.2d 526 (Iowa 2003)
While reliance by prosecutors upon factual theories against separate defendants in separate trials arising out of a single course of behavior that are egregiously inconsistent and lacking in good faith may violate Due Process, the government is otherwise entitled to rely upon different, and even inconsistent theories.

– The differences in the State's cases against Heidi Watkins and Jesse Wendelsdorf for the killing of Watkins' child, Shelby Duis, involved divergent theories of who caused the child's death. The differences became inconsequential when both defendants were acquitted of homicide. Additionally, there was evidence of sexual abuse offered against Wendelsdorf that

was not offered against Watkins, who was charged with several acts of child endangerment. Watkins also alleged that the evidence was insufficient to support her conviction. The Court responded by setting out, count by count, the evidence upon which her convictions were based.

F. Sixth Amendment

1. Right to Counsel

a. Statements Elicited by Police

Fellers v. United States, 540 U.S. _____, 124 S.Ct.1019, 157 L.Ed.2d 1016 (2004)

Where, after the defendant has been indicted in a drug conspiracy, police travel to the defendant's house and tell the defendant that they had come to discuss the defendant's role in drug distribution, the defendant's incriminating statements have been deliberately elicited by police, mandating their suppression under the Sixth Amendment.

– The 8th Circuit Court of Appeals confused the Sixth Amendment standard of whether incriminating statements have been deliberately elicited from the defendant with the Fifth Amendment standard of whether the defendant has been interrogated. Suppression in warranted under the former, Justice O'Connor writes for the unanimous Court. Additionally, the lower courts found that Fellers' subsequent repetition of the substance of the in-home interview following the administration of *Miranda* warnings to have been knowing and voluntary. The question under the Sixth Amendment, Justice O'Connor explains, is not whether the second confession is knowing and voluntary, but whether it was a fruit of the invalid one. The case was remanded for an answer.

b. Conflicts of Interest --Prior Representation of Witnesses

Pippins v. State, 661 N.W.2d 544 (Iowa 2003)

Where defendant requested at the time of his trial that his attorney continue to represent him, the fact that counsel previously represented a witness against him does not deprive the defendant of his Sixth Amendment right to counsel, where no actual conflict can be demonstrated.

– Justice Larson's opinion in *Pippins* contains a useful review of decisions of other jurisdictions discussing concurrent and non-concurrent representation of parties with diverse interests. A couple of questions are raised, however. The Court declines to address Mr. Pippins' complaint that he never appeared at a hearing concerning the possible conflict because, it finds, there is no conflict. And isn't there a strong appearance of a conflict where a defendant's attorney is required to cross-examine a prior client? In fulfilling his or her duty to the present client, counsel would be compelled to delve into areas of impeachment known only as a result of the attorney-client relationship. Trial counsel in *Pippins* told the court he was aware of no such confidential impeachment material. But if counsel *doesn't* cross-examine the witness, the appearance is created that counsel was holding back, due to the prior professional relationship.

c. Breakdown in Communication

State v. Tejeda, _____ N.W.2d _____ (Iowa 2004)

When the district court receives information that the relationship between a defendant and counsel has broken down, the court has a duty to conduct a hearing *sua sponte* to determine whether the breakdown is complete and permanent.

– Apparently it was unclear from the facts whether Tejeda was claiming that his problems in communicating with his attorney were permanent. So, rather than simply remanding the case for the hearing that should have been held, Justice Streit preserved the issue for

postconviction review.

d. Ineffective Assistance

1) Breach of Duty

A) Failure to Challenge Rejection of Plea Agreement

Fullenwider v. State, 674 N.W.2d 73 (Iowa 2004)

Defense counsel is not ineffective in failing to object to the ditrict court's refusal to allow him to accept a plea offer on the second date of trial where the decision in *State v. Hager* (2001) proscribing a fixed policy of rejecting trial date pleas (1) came after trial of the defendant's case and could not have been anticipated, (2) represents the minority of jurisdictions that have decided the issues, and (3) is factually distinguishable from the defendant's case.

B) Failure to Move for Judgement of Acquittal

State v. White, 668 N.W.2d 850 (Iowa 2003)

Trial counsel breaches no duty to the defendant in failing to argue in a motion for judgment of acquittal in his prosecution for first-degree kidnaping and first-degree burglary that there was insufficient evidence from which a jury could find that he intended to inflict serious injury, where substantial evidence did exist and there was no chance that defendant would have prevailed on that ground.

– See *State v. Davis* under Appeal and Postconviction Relief for a discussion of the extent of counsel's obligation to challenge his or her clients conviction of behavior that, according to precedent announced after trial, may not constitute the offense.

C) Failure to Obtain Psychological Evaluation

Gully v. State, 658 N.W.2d 114 (IowaApp.2002)

Counsel is not ineffective in permitting the defendant to enter a plea of guilty without first obtaining a psychological evaluation where counsel is not aware of the defendant's efforts to commit suicide, where counsel informed the court that there were questions (which he did not disclose due to attorney/client privilege) concerning the defendant's competency and where the district court engaged in an extensive colloquy with the defendant.

– Judge Sackett also rejected a number of other ineffective assistance claims advanced by Mr. Gully. Contrary to Gully's allegations, the record reveals that he was aware that he would serve a full eighty-five percent of his sentence without parole and that he might be committed as a sexually violent predator after his release from prison.[2] Counsel was not ineffective in failing to move to dismiss the original first-degree kidnaping charge. He pleaded to third-degree kidnaping, but took the position that he would have scored a better deal had he not been facing life imprisonment on the original charge. Trial counsel testified in post-conviction that he felt the first-degree kidnaping charge was weak under the current state of the law, but the plea was a good one in that it enabled Gully to avoid the potential life sentence.

Contrary to Gully's claims, there was probable cause to arrest him and, because he consented to its collection, the acquisition of his D.N.A. was not improper. Finally, Justice Sackett rejected Gully's

[2]Although, as Judge Sackett points out, there is no obligation to inform the defendant of collateral consequences of his plea.

argument that his plea was invalid, in that no matter what sentence was imposed in his case he would be confined the rest of his life as a sexually violent predator.

D) Trial Strategy

State v. Heuser, 661 N.W.2d 157 (Iowa 2003)

Trial counsel is not ineffective in failing to call the defendant to testify, when the failure to do so is a clear product of trial strategy.

E) Appellate Counsel

Fullenwider v. State, 674 N.W.2d 73 (Iowa 2004)

Where the defendant arguably may have had knowledge of the presence of cocaine in his girlfriend's apartment, where he was sleeping overnight, in the absence of evidence that the defendant had control over the area in which the cocaine and a firearm were found appellate counsel is ineffective in failing to challenge on appeal the denial of the defendant's motion for judgment of acquittal arguing that the evidence was insufficient to establish that the defendant was in constructive possession of them.

– ***Now look at THIS one!!!*** Fullenwider's appellate counsel *did* argue the evidence was insufficient to show constructive possession of the gun found hidden under the bed – ***and he LOST!!*** When asked why he didn't argue the evidence insufficient to show constructive possession of the cocaine, in a plastic bag on a chair, appellate counsel responded that he didn't raise the issue because he didn't think he'd win. Justice Larson finds that he was ineffective. Based on any standard of constructive possession, the State hadn't met its burden of connecting Fullenwider with the gun or the drugs. All of the convictions were thrown

out.

But wait a minute!! Appellate counsel challenged his constructive possession of the gun, which was his stronger argument. And the Court of Appeals ruled against him. Now, for the first time, on further review of a Court of Appeals affirmance of the denial of his postconviction relief application, the Supreme Court goes the other way. And who gets raked over the coals for this one? The defense attorney, of course.

– See *Massaro v. United States*, under Appeal and Postconviction Relief, below, for a discussion of the United States Supreme Court holding that, in Federal criminal cases, issues of ineffective assistance of trial counsel are most properly presented for the first time in a Habeas Corpus petition, contrary to the Iowa formulation that requires all questions of ineffective assistance to be raised initially on direct appeal.

2) Prejudice

State v. Tejeda, _____ N.W.2d _____ (Iowa 2004)

Where counsel fails to object to an instruction informing the jury that the defendant made an admission, although there may have been no such admission, and telling the jury the admission could be considered for any purpose, counsel's failure to object is not reversible where the defendant is unable to demonstrate a reasonable probability that the outcome of his trial would have been affected.

– Justice Streit explains that the "jury, as arbiter of the facts, should have disregarded the court's suggestion[3] that the prosecution had offered evidence to

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[3]The district court's "suggestion" in *Tejeda* read as follows:

show Tejeda had made an admission, and we think that such is the inevitable conclusion to be drawn about the jury in this case." ***ARE YOU SERIOUS?????*** Do you think that where, without objection, the judge gives a **JURY INSTRUCTION** declaring that the defendant had confessed, the jurors are not going to take *that* to heart? You think they're going to say, "Well, the judge says there's a confession, but we heard the evidence and know there isn't, so we're just going to ignore that particular instruction"? I thought the jurors were presumed to follow the instructions. And you don't think ***that's*** prejudicial – telling the jury there's a confession when there isn't one? You don't think there's a reasonable probability that an instruction from the court that the defendant confessed would affect the outcome of trial?

State v. Voll, 655 N.W.2d 548 (IowaApp. 2002)

Defendant in prosecution for attempted murder is not prejudiced by trial counsel's failure to object to a tape recording of the defendant, threatening to kill the victim and other drug dealers who supplied his daughter, *not* being sent to the jury for deliberations.

– Yes, believe it or not, this was Mr. Voll's argument. The Government has a tape recording of the defendant threatening to kill the victim, and then for some reason neglects to send it back for deliberations. On appeal, it is the *defendant* who complains, arguing that the taped threat would be evidence of a "truce" between himself and the victim upon whom he attempted to carry out his threat. Ouch!!

Evidence has been offered to show the Defendant made statements at an earlier time and place while not under oath. These statements are called admissions. You may consider an admission for any purpose.

That's painful to even think about.

Characterizing trial counsel's failure to object as clear error, Judge Sackett first analyzes the case under *Strickland v. Washington* (1984), under which, in order to establish prejudice, the defendant must prove that the outcome would have been different had the errors not occurred. This is correct. But then Judge Sackett notes that constitutional error is reversible unless it is harmless beyond reasonable doubt. This may be true for many constitutional issues, but I don't think it applies to claims of ineffective assistance. Even under that standard, however, Voll was not entitled to reversal.

State v. Reynolds, 670 N.W.2d 405 (Iowa 2003)

Defendant in prosecution for harassment was not prejudiced by testimony of the alleged victim that she was afraid she was going to be killed and that she wondered why the defendant was driving a car after being convicted of driving under suspension, where the remarks were isolated and were not emphasized, where the victim's fear of the defendant was relevant to a material issue of fact and where the jury was already made aware of the fact that the defendant had been convicted of a driving offense.

2. Confrontation

a. Testimony

Crawford v. Washington, 541 U.S. _____, 124 S.Ct. 1354, _____ L.Ed.2d _____ (2004)

The Confrontation Clause bars the introduction against a defendant of outside "testimony" where the declarant is unavailable to testify at the defendant's trial and the defendant had no opportunity to cross-examine the declarant during the taking of the prior testimony.

– *Crawford* is a major decision. Despite his reputation for being among the most conservative justices, Justice Scalia's legacy with the Supreme Court may be in the mark he has placed upon the Court's interpretation of the Confrontation Clause. In *Crawford*, Justice

Scalia overrules *Ohio v. Roberts* (1980), under which an out-of-court statement of an unavailable witness not subject to cross-examination is admissible if justified by a "firmly-rooted hearsay exception" or supported by circumstantial guarantees of reliability. With respect to any declaration that is not "testimony," the States are free to adopt exceptions to the hearsay rule under which they might be admissible. If the declaration is testimony, however, the hearsay exceptions are inapplicable.

What is testimony? This question, posed by Chief Justice Rehnquist in his concurring opinion, remains to a large degree unanswered by Justice Scalia. Testimony is not limited to sworn testimony, and includes answers given during police interrogation. The testimony in *Crawford* were the somewhat inculpatory answers of the defendant's wife to police questioning. The defendant's invocation of the marital privilege resulted in her unavailability, and the Washington Court violated the Sixth Amendment in using her testimony against him.

b. Witness Protection Measures

State v. Shearon, 660 N.W.2d 52 (Iowa 2003)

The defendant's right to Confrontation was not violated by, and thus trial counsel did was not ineffective in failing to object to, the closed-circuit trial testimony of the victim of a charge of lascivious acts, despite the court's failure to follow the Iowa Code § 915.38 requirements that the victim be informed that the defendant would be viewing his or her testimony and that the defendant have the opportunity to confer with counsel.

– One very disturbing aspect of Justice Neuman's opinion in *Shearon* is the following language:

> Three main rights may be claimed by Shearon under the Confrontation Clause: (1) testimony under oath, (2) cross-examination by his counsel, and (3) the right to have the jury observe the witness's demeanor. . . None of these rights was infringed here.

This statement is almost identical to the analysis employed by the Court in 1986 to reject a challenge to the employment of a screen between the defendant and the complaining witness, in *State v. Coy* (1986). The United States Supreme Court sharply rejected this position in Justice Scalia's majority opinion in *Coy v. Iowa* (1988), declaring that personal face-to-face confrontation is central to the Sixth Amendment. The subsequent decision in *Maryland v. Craig* (1990), upon which Justice Neuman relies, held simply that the Sixth Amendment right of personal confrontation may be overcome by a showing of trauma to a child victim. The requirements of § 915.38 were adopted to bring Iowa procedures in line with *Craig*.

3. Right to Jury Trial – – Colloquy

State v. Liddell, 672 N.W.2d 805 (Iowa 2003)

A defendant's waiver of jury trial must be both in writing and in an oral colloquy with the court sufficient to assure that the defendant understands the nature of the right being waived, possibly including such factors as (1) he or she has a right to a jury of twelve persons drawn from the community, (2) he or she may participate in jury selection, (3) the jury's verdict must be unanimous, (4) if the jury is waived, the court alone will decide the issue of the defendant's guilt or innocence, and (5) the defendant will receive no benefit for waiving the jury.

– In *State v. Lawrence* (1984), the Court held that a written waiver was sufficient. Then, in *State v. Stallings* (2003), a waiver was deemed insufficient where the only record made was an entry in defense counsel's fee claim. The Court relied on language in Iowa R.Crim.P. 2.17(1) that the waiver must be "in writing and on the record." Liddell claimed that *Stallings* overruled *Lawrence*, and alleged that his attorney was ineffective in permitting him to waive jury trial only in writing. Additionally, the written waiver did not contain language that he understood that he had a right to participate in voir dire, and that jury members would be drawn from his community. Justice Streit answered the second claim by pointing out that rigid compliance with a firm test is not required under

Rule 2.17. He held that the "in writing and on the record" requirement was not found in *Stallings* to require a face-to-face colloquy. But then he held that oral colloquy *is* required. But counsel was not ineffective because the holding is new law, and counsel could not have been expected to be a crystal ball gazer. **OUCH!!** Justice Cady authored a special concurrence, arguing that there was no reason to abandon the principle of *stare decisis* and to overrule *Lawrence*.

– On the same day that *Liddell* was announced the Court reached an identical conclusion on an identical set of facts, in *State v. Spies* (2003)..

State v. Miranda, 672 N.W.2d 753 (Iowa 2003)
Although the district court fails to advise the defendant of all aspects of jury trial mentioned in *State v. Stallings* (2003) as required during a jury waiver, the court's colloquy is sufficient when it assures that the defendant's waiver is knowing, intelligent and voluntary.

– Even if the colloquy in *Miranda* did not hit all five points discussed in *Stallings*, the defendant was advised " (1) by waiving his right to a jury trial, the judge would decide the case on the minutes of testimony alone; (2) if the defendant would have asserted his right to a jury trial, the State would have provided him an attorney, if he was unable to afford one; (3) the defendant would have had the opportunity to testify at his trial; (4) if the defendant had chosen not to testify, no one could force him to do so, nor use his silence against him; (5) at a jury trial, the State would have to bring witnesses in to testify, which he could cross-examine; (6) the State would have to prove guilt beyond a reasonable doubt to the satisfaction of twelve jurors; (7) the decision of the jurors would have to be unanimous; (8) if the defendant could not afford to bring witnesses into court, the public would pay for him to do so; (9) by waiving his right to a jury trial, the court alone would decide the case and in the same manner that a jury would; and (10) explained the maximum punishment for the crime for which he is charged and that a conviction would require the state to prove his guilt beyond a reasonable doubt." Trial counsel was not ineffective in failing to assure that the colloquy mirrored what was suggested

in the not-yet-announced-*Stallings* decision, as counsel is not expected to be a crystal ball gazer.

4. Right to Testify – Colloquy

State v. Reynolds, 670 N.W.2d 405 (Iowa 2003)

The responsibility of advising the defendant of his or her right to testify at trial is the attorney's, not the court's, and there is no Constitutional requirement that the district court conduct a colloquy with the defendant prior to a decision not to testify at his or her own trial.

– Jurisdictions are split on whether such a responsibility exists, and Justice Ternus' opinion in *Reynolds* places Iowa in the majority. Apparently, the states that require a colloquy are Alaska, Colorado, Hawaii and West Virginia.

G. Eighth Amendment (Iowa Const. art. I, sec. 17) – Proportionality – Three Strikes

– See *Lockyer v. Andrade* under Appeals and Postconviction, below, for a discussion of Federal review of State sentences on proportionality grounds.

Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003)

The California "three-strikes" law does not violate the Eighth Amendment requirement of proportionality in sentencing with respect to a defendant convicted of shoplifting three golf clubs worth $1,200 who was sentenced to a term of incarceration of 25 years to life.

– The analysis in Justice O'Connor's opinion, announcing the decision of the Court, was joined by only the Chief Justice and Justice Kennedy. Her focus was upon language in Justice Kennedy's concurrence in *Solem v. Helm* (1983) in which he outlined the four principles of proportionality review in noncapital cases as being "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors," that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." The test involves a comparison of the

gravity of the offense against the harshness of the penalty. The California Legislature found its three strikes legislation necessary to battle the serious problem of recidivism among defendants who previously have been convicted of serious offenses.

"In weighing the gravity of Ewing's offense," Justice O'Connor concludes, "we must place on the scales not only his current felony, but also his long history of felony recidivism." The product was not what Justice Kennedy referred to in his concurrence in *Harmelin v. Michigan* (1991) as "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."

In separate concurrences, Justices Scalia and Thomas restated their opinions that the Eighth Amendment contains no principal of proportionality. The one apparent thread of agreement among the majority and concurring opinions in *Ewing* is that the proportionality standard of *Solem*, *Harmelin* and other cases is extremely difficult to apply.

Writing for the four-justice dissent, Justice Breyer carefully follows the analysis in Justice Kennedy's *Harmelin* concurrence, beginning with the threshold comparison of the gravity of the offense and the sentence imposed, followed by a comparison of sentences imposed upon other criminals in the same, and other, jurisdictions. The application of the three-strikes provision to Ewing was the rare case " in which a court can say with reasonable confidence that the punishment is 'grossly disproportionate' to the crime." Agreeing with the writers of the majority opinions that a bright-line rule would be easier to follow, Justice Breyer stressed that proportionality analysis must nevertheless be applied on a case-by-case basis.

An interesting aspect to both *Ewing* and *Lockyer v. Andrade*, discussed below under Appeal and Postconviction, is that both cases involve the application of the California "wobbler" statute. In California the same offense may be classified as both a felony and a misdemeanor. The prosecution has some discretion in choosing whether to charge the offense as a felony or a misdemeanor, and the district court may also elect to

sentence a defendant for a misdemeanor. In both cases, the defendants were sentenced as felons – a fact relied upon by writers of majority and concurring opinions to illustrate the apparent gravity in the minds of the sentencing judges of the defendants' past histories.

H. Fourteenth Amendment – Due Process

1. Procedural Due Process

a. Vagueness

State v. Dalton, 674 N.W.2d 111 (Iowa 2004)

The alternative of vehicular manslaughter that punishes a defendant who "unintentionally" causes the death of a victim by acting with "willful and wanton disregard" for the victim's safety, does not contain conflicting mens rea requirements, and thus is not constitutionally vague.

– Language that the defendant acted "unintentionally" does not create a strict liability offense, as this language simply renders the statute applicable to accidental deaths. The standard is clearly one of recklessness, and thus trial counsel was not ineffective in failing to raise the vagueness ground. Dalton also contended that the statute was facially invalid. Judge Streit rejected this argument, pointing out that there is no First Amendment interest at stake, and Dalton could point to no constitutionally-protected interest that would be substantially impeded by the statute's application.

b. Late Disclosure of Evidence

State v. Piper, 663 N.W.2d 894 (Iowa 2003)

Procedural due process is not violated by the late disclosure of evidence to the defense, where the evidence had little or no materiality to the issues of the case and where the defendant knew or should have known of their content previously.

– A Due Process Fair Trial violation is established, in the same sense as in *Brady v. Maryland* (1963), by showing that (1) evidence was suppressed, (2) the evidence is favorable to the defense, and (3) the evidence is material.

c. Competency to Stand Trial – Sexually Violent Predator Hearings

In re the detention of Cubbage, 671 N.W.2d 442 (Iowa 2003)
In re the detention of Garrett, 671 N.W.2d 497 (Iowa 2003)
The Due Process protection against being brought to trial when mentally incompetent to do so applies only to criminal proceedings, and does not preclude the civil commitment of mentally incompetent persons as sexually violent predators.

2. Substantive Due Process –

a. Access to the Courts

Walters v. Kautzky, _____ N.W.2d _____ (Iowa 2004)
Prison inmates are entitled to relief for the failure of prison officials to provide sufficient access to legal materials and representation only where they can demonstrate actual injury resulting from the denial.

– In *Bounds v. Smith* (1977) the Supreme Court suggested various devices by which, used in combination, prison officials can sufficiently satisfy inmates' right of access to the courts. In 1996, the Court in *Lewis v. Casey* limited *Bounds* by finding that summary judgment against inmates is reversible only where the inmates prove actual injury. Of the three inmates whose suits were the subject of *Walters*, one did not assert any actual injury, another had managed to pursue his claim in the courts (though unsuccessfully), and only one presented any factual claim that he was unable to proceed in court due to the denial of legal resources. The district court's summary judgment order was reversed only with respect to the third inmate.

b. Sodomy Laws

Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003)

Texas law criminalizing sexual conduct between members of the same sex, conducted in private by consenting adults, furthers no legitimate State interest and thus violates a the defendants' liberty interest under the Due Process Clause.

– To reach this result, Justice Kennedy expressly overruled the 1986 decision in *Bowers v. Hardwick*, in which the Court upheld a Georgia sodomy statute. Justice O'Connor concurred, on the ground that the prohibition of relations between homosexuals under the Texas statute that would not be illegal if conducted between heterosexuals violates Equal Protection.

It goes without saying that the *Lawrence* decision drew a vociferous response from Justice Scalia – joined, of course, by Justice Thomas and the Chief Justice. The bulk of his dissent boils down essentially to, "Yeah, you can overrule *Bowers* but you can't overrule *Roe v. Wade*." Then he focuses his wrath on homosexuals.

"Let me be clear," he writes, "that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means." This protest is not quite so clear read together with other language in the opinion:

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium[4] that has traditionally attached to homosexual conduct. . .It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in

[4]This word "opprobrium" is one I never use. I'm not sure I know what it means, but assume it is something bad.

> their home. They view this as protected themselves and their families from a lifestyle that they believe to be immoral and destructive.

Were the phrase "persons who openly engage in homosexual conduct" to be replaced, as it might have been in previous generations, with any other minority group, the result would be an opinion that even Justice Scalia wouldn't sign. While not finding a basis for striking down the Texas statute, at least Justice Thomas recognized, in his dissent, that the law "is . . . uncommonly silly," and were he in the Texas legislature rather than the Supreme Court, he would vote to repeal it.

II. Substantive Offenses

A. Child Endangerment – Three Separate Acts

State v. Yeo, 659 N.W.2d 544 (Iowa 2003)

To be convicted under the "three separate acts" enhancement of a conviction of child endangerment, set out in Iowa Code § 726.6A, it is sufficient that the particular acts are shown to be separated by time and place, and the State is not required to prove the specific time, or even the date, on which the individual acts occurred.

B. Controlled Substances

1. Sufficiency of the Evidence

a. Constructive possession

State v. Bash, 670 N.W.2d 135 (Iowa 2003)

To establish constructive possession of contraband, specifically controlled substances, the State must prove more than the defendant possessed the raw physical ability to exercise control over it, but must show that the defendant had "some proprietary interest or an immediate right to control or reduce the controlled substance to the defendant's possession."

– Chief Justice Lavorato's majority opinion in *Bash* is another giant step forward by the

Court in protecting the rights of the innocent. No longer may an unwilling participant, such as housewife Patricia Lynn Bash, be held criminally liable for contraband possessed by spouses, roommates, etc., the presence of which the party is aware but over which the party has no true possessory interest. Justice Cady argues in his lone dissent that the rule adopted by the majority limits too narrowly the ability of the State to prosecute constructive possession cases. My response is ***"what's wrong with that?"***

State v. Cashen, 666 N.W.2d 566 (Iowa 2003)

Although where the evidence shows that the defendant exercised exclusive control over a place where contraband is found it may be inferred that the defendant had knowledge of the presence of contraband and exercised dominion over it, defendant's joint control over the place is insufficient to support a conviction of constructive possession absent some direct or circumstantial evidence of knowledge and dominion.

– A non-exclusive list of factors that might, according to Justice Streit, support a conviction of constructive possession include "incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing drugs, and any other circumstances linking the defendant to the drugs."

b. Delivery

State v. Spies, 672 N.W.2d 792 (Iowa 2003)

The offense of delivery of controlled substances includes the attempted transfer of drugs, and where the defendant agrees to supply a quantity of drugs to an undercover officer, calls his supplier, gets in his car, and begins driving to his supplier's residence, the defendant has taken the "first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made."

c. Conspiracy to Manufacture

State v. Weatherly, _____ N.W.2d _____ (Iowa 2004)

The presence of the defendant at 3:45 a.m. outside a hotel room in which many elements of a methamphetamine laboratory are present, together with statements by the defendant indicating that the defendant has knowledge of manufacturing activity in the room, the discovery on the defendant's person of items involved in production of methamphetamine, the odor of ether on the person of the defendant, the flight of the defendant from police when confronted, and the fact that a person other than the defendant rented the hotel room, constitute sufficient evidence from which a rational jury could find beyond reasonable doubt that the defendant was involved in a conspiracy to manufacture methamphetamine.

– This case was distinguished from *State v. Speicher* (2001), in which no conspiracy was found, in that here there was more evidence of a conspiracy than the defendant's presence (with another person) at the scene of a meth lab, the odor of ether, and the defendant's flight.

– Justice Cady also rejected Weatherly's argument that his trial counsel was ineffective in failing to lodge a host of constitutional challenges to the prosecution against him. Most had already been disposed of in *State v. Biddle* (2002). The one that had not, the allegation that prosecution under Iowa Code § 901.10 constituted cruel and unusual punishment under the Eighth Amendment, was preserved for postconviction review.

d. Tax Stamp Provisions

State v. Rhiner, 670 N.W.2d 425 (Iowa 2003)

The requirement that a tax stamp be purchased immediately upon manufacture mandates purchase of a stamp for methamphetamine of which the process of manufacture is completed, and does not apply to methamphetamine in the third of the five-step manufacturing process.

–"If the legislature intended to require a drug tax stamp on methamphetamine in its unfinished state," Chief Justice Lavorato observes, "it knew how to do so." **Guess what the Iowa Legislature will be doing THIS session!!**

2. Possession With Intent – Instructions

State v. Scalise, 660 N.W.2d 58 (Iowa 2003)

To convict a defendant of possession with intent to distribute more than five grams of a controlled substance, the jury must find, and must be instructed that it must find, that the defendant intended to distribute more than five grams.

– The jury in Ms. Scalise's case was told in the marshaling instruction that it must find that she intended to deliver a controlled substance. The court submitted a separate interrogatory requiring the jury to determine if more than five grams were involved, without specifically asking whether Ms. Scalise *intended to deliver* more than five grams. Justice Lavorato agreed that the jury must find the latter to convict of the higher offense. Instructions are read in their totality, however, so the jury in her case was properly instructed.

3. Habitual Offender --Accommodation Offense

State v. Rankin, 666 N.W.2d 608 (Iowa 2003)

While conviction of possession with intent to deliver one-half ounce or less of marijuana carries the same sentence as a conviction of simple possession of marijuana, it remains a conviction of possession with intent for the purpose of applying the habitual offender enhancement of Iowa Code § 124.401(5).

4. Possession of Precursors with Intent to Manufacture – Sufficiency

State v. Heuser, 661 N.W.2d 157 (Iowa 2003)

The facts that the defendant and his companion went to three separate stores, in which they switched off in their roles of going into the store and remaining in the vehicle, that they purchased 312 pseudoephedrine pills and twelve lithium batteries, and that the defendant told law enforcement officers that the lithium batteries were for a smoke detector (although the smoke detector used a 9-volt battery and the defendant purchased AA batteries), supply sufficient evidence for a rational jury to find beyond reasonable doubt that the defendant possessed the items with the intent to manufacture methamphetamine.

C. Harassment – Sufficiency

1. "Personal contact with the intent to intimidate, etc."

State v. Reynolds, 670 N.W.2d 405 (Iowa 2003)

The element of Iowa Code § 708.7(1)(b) harassment that the defendant have "personal contact with another person with the intent to threaten, intimidate, or alarm that other person" is satisfied when the defendant comes into proximity of the victim, and it is not necessary that the victim be aware of the defendant's identity.

2. Intent to Threaten, Intimidate or Alarm – Sufficiency

State v. Evans, 672 N.W.2d 328 (Iowa 2003) (Evans I)

Notwithstanding the defendant's keen interest in women's feet and the fact that the defendant was an accomplished woman's foot photographer, a rational jury could find beyond reasonable doubt that the defendant intended to threaten, intimidate or alarm his victim when he asked to look at the victim's shoe, and then grabbed her foot, telling her it was a beautiful foot when she handed the shoe to him, and waived at her as she drove away.

State v. Evans, 671N.W.2d 720 (Iowa 2003) (Evans II)

Despite the absence of any threat, a rational jury could find that the defendant intended to intimidate or alarm his victim after he repeatedly contacted her, attempting to obtain her permission to photograph her feet, attempted to recruit her to appear in a pictorial depicting the life of freed slave Dred Scott, approached her in a car wash (where she abandoned her car to avoid him), and appeared at her house wearing red strap high heels and painted toenails.

– Despite the absence of a direct threat, the Court also found that all the elements of stalking were established, as the victim told the defendant repeatedly that she was uninterested in his advances, and fled from him on two occasions.

D. Homicide Offenses

1. Murder – Sufficiency

a. Premeditation

State v. Buenaventura, 660 N.W.2d 38 (Iowa 2003)

The facts that the defendant disapproved of the victim's lifestyle and of her meddling in his personal affairs, that they had argued repeatedly in the past, and that witnesses overheard a protracted heated argument around the time of the victim's death supplied sufficient evidence to support a finding that the killing of the victim was premeditated.

b. Malice Aforethought

State v. Buenaventura, 660 N.W.2d 38 (Iowa 2003)

Evidence of the poor relationship between the victim and the defendant prior to the victim's death, along with evidence of the severe nature of the victim's injuries, was sufficient to support the element of malice aforethought essential to a conviction of murder.

2. Vehicular Homicide

a. Sufficiency

1) Recklessness

State v. Begey, 672 N.W.2d 747 (Iowa 2003)

Where the defendant asked a friend to drop her off two blocks from the home of her mother's boyfriend, where her mother's car was located, where the defendant's mother had offered the car to anyone who could recover it from the mother's former boyfriend, and where the defendant operated the vehicle in speeds in excess of the speed limit, with the mother's former boyfriend riding on the hood, and slammed on the brakes, hurling the mother's former boyfriend to his death, evidence is sufficient for a rational jury to find beyond reasonable doubt that the defendant acted recklessly.

– Even if trial counsel was ineffective in failing to argue in a motion for judgment

of acquittal that evidence was insufficient to prove recklessness, Begey was not prejudiced for the above reasons.

2) Proximate Cause

State v. Begey, 672 N.W.2d 747 (Iowa 2003)

Even if the victim's act of pushing himself off of the defendant's vehicle was a contributing cause to his death, it was not the sole proximate cause where the defendant operated the car at a high rate of speed with the victim riding on the hood, and then suddenly applied the brakes, so trial counsel was not ineffective in failing to move for judgment of acquittal on the ground that evidence was insufficient to establish that the defendant's acts were the sole probable cause of the victim's death.

State v. Dalton, 674 N.W.2d 111 (Iowa 2004)

Defendant who punched and kicked victim hanging on to the outside of a moving vehicle is not entitled to appellate reversal of his vehicular homicide conviction on the ground that evidence that a friend of the victim's followed the moving vehicle in his car, striking the vehicle and causing the victim to fall off and die generated reasonable doubt as to whether the defendant was the proximate cause of the victim's death, where (1) the jury may not have believed that the friend's actions were the cause of the victim's death, or (2) the friend's actions were not the *sole* cause of the victim's death.

3) Aiding and Abetting

State v. Dalton, 674 N.W.2d 111 (Iowa 2004)

Even if a defendant who kicks and punches a victim hanging from a rapidly moving vehicle does not aid or abet the driving of the vehicle, the defendant does aid and abet the vehicular homicide, and evidence is sufficient to submit the case to the jury.

b. Instructions – Recklessness

State v. Begey, 672 N.W.2d 747 (Iowa 2003)

Because Supreme Court decisions announced prior to the defendant's trial finding that "for recklessness to exist the act must be fraught with a high degree of danger" and that "the danger must be so obvious from the facts that the actor knows or should reasonably foresee that harm will probably—that is, more likely than not—flow from the act," included no holding that this language must be included in the jury instruction defining recklessness, counsel is not ineffective in failing to object to the giving of a Model Jury Instruction not including the language.

– The Model Jury Instruction defining recklessness has since been modified to include the above language.

E. Kidnaping – Kidnaping by Torture – Sufficiency

State v. White, 668 N.W.2d 850 (Iowa 2003)

Kidnaping by torture may be accomplished through the infliction of mental torture as well as physical torture, and the element of torture is established where the defendant holds the victim at gunpoint for hours, subjecting the victim to verbal abuse and threats and forcing the victim to watch a two-hour videotape of himself in which he repeatedly discusses killing her.

F. Motor Vehicle Provisions

1. Operating While Intoxicated

a. Implied Consent

1) Preliminary Breath Tests – Required Procedures

State v. Bird, 663 N.W.2d 860 (Iowa 2003)

Especially where other sobriety tests support police officer's determination of probable cause that a driver is intoxicated, the failure of the officer's agency to follow Iowa Administrative Code requirements that the value and type of standard used in calibrating preliminary breath test (PBT) equipment does not invalidate the driver's arrest and the subsequent administration of an intoxilyzer test.

– PBT results are used in Iowa only to assist in the probable cause determination, and are not admissible in evidence. For this reason, substantial compliance with calibration regulations is sufficient. The Court also rejected Bird's argument that the failure to administer a second PBT, as suggested by the equipment manufacturer, but not required under Iowa law, does not affect the validity of the defendant's arrest. This argument was previously addressed in *State v. Albrecht* (2003).

2) Blood Withdrawal – Requirements

State v. Green, _____ N.W.2d _____ (Iowa 2004)

For the purpose of the Iowa Code § 321J.11 provision that blood may be drawn for implied consent testing only by enumerated professionals, a "medical technologist" is not limited to individuals with specific training or licensing, but may include phlebotomists.

– The term "may" include phlebotomists, Justice Cady said, but he remanded Gran's appeal to the district court to make findings as to whether a phlebotomist, or at least the specific phlebotomist in this case, was sufficiently qualified to constitute a medical technologist.

3) Laboratory Testing – Required Procedures

State v. Hornick, 672 N.W.2d 836 (Iowa 2003)

The Iowa Code § 321J.11 requirement that, in collecting breath and urine samples to test for alcohol concentration, officers must use "devices and methods approved by the commissioner" does not mean that the Commissioner of Public Safety must approve devices and methods personally and may not delegate this task to the Division of Criminal Investigation laboratory.

– To require the commissioner to address these questions personally, rather than

assigning them to employees with more expertise, would actually reap results counter to the legislative intent underlying § 321J.11, Justice Cady noted. Nevertheless, the *Hornick* case was a State's appeal of 16 separate cases in which test results had been invalidated on this ground.

State v. Stratmeier, 672 N.W.2d 817 (Iowa 2003)

Unless the procedures used in administering chemical testing are "so unreliable as to preclude consideration," the failure of officers to follow administrative regulations prescribed for the use of testing devices goes to the weight of their results, and not their admissibility.

– I know there are many lawyers out there who find these OWI issues to be fascinating. If you're one of them, there is what I imagine to be a titillating discussion in *Stratmeier* about whether the proper procedures were followed when the testing officer employed a manual override and, after an unsuccessful attempt to provide a sample, failed to change the little rubber tip on the testing mach-ZZZZZZZZZZZZZZZZZZZZZZZZZZZzzzzzzzzzzz. . . (sorry).

b. Sentencing -- Suspension – Concurrent with Administrative Suspension

Iowa Department of Corrections v. District Court for Dubuque County, 670 N.W.2d 114 (Iowa 2003)

The district court does not have the authority to order that the six-year license suspension for third-offense operating while intoxicated to begin running at the time of the defendant's administrative suspension for failure to submit to chemical testing.

– For half of Justice Streit's opinion, it looks like Thomas Naber (the intoxicated driver) had a chance. The statute does not say that the court *cannot* impose the OWI sanction to begin at some earlier point in time, even the date the driver refused the implied consent test. But then Justice Streit shifts gears, and holds that the court may not do this because the criminal

and administrative penalties serve different interests. The purpose of the implied consent law is "*to prevent highway deaths* due to intoxicated drivers," while the criminal statute exists "to protect the public by providing that drivers who have demonstrated a pattern of driving while intoxicated be removed from the highways." (emphasis supplied). You tell *me* what the difference is.

The kicker is that the concurrent suspensions were part of the plea agreement between the parties. This is not something that can be bargained away, Justice Streit responds, because neither the county attorney nor the district court has the power to bind the DOT. This is exactly how the DOT views the Iowa governmental organizational chart, with itself neatly above all the conventional branches of government. But nobody bound the DOT in this case. Its suspension was already imposed. This case concerns the criminal suspension. The statute does not authorize the district court to run the two suspensions concurrently, Justice Streit concludes. Yes, but again, the statute does not prohibit such a result, either.

2. Eluding

a. Lesser offenses

State v. Rice, 661 N.W.2d 550 (IowaApp.2003)

Because the Iowa Code § 321.279 offense of eluding defines a single offense with three levels of sentencing, the highest of which applies where the defendant has been convicted of a prior felony, the felony that elevates a conviction to the highest level is an element of the offense, and thus merger is not required.

– Judge Vogel observes that "[i]t is not readily apparent which rule should be followed in this instance." If this is true, shouldn't the Court of Appeals have relied upon the rule of

lenity, resolving any ambiguity in favor of the defendant? Even if the offenses merge, she adds, clear legislative intent can be found for multiple punishments for eluding and for the drunk driving offense which elevates it to its highest level. But this escape from the workings of the Double Jeopardy Clause should apply only when such intent is clearly *expressed* by the legislature.

b. Multiple Punishment

State v. Eckrich, 670 N.W.2d 647 (IowaApp.2003)

Because the legislature clearly intended that defendants be punished cumulatively for the offenses of felony eluding and the underlying felony (in this case, operating while intoxicated), Double Jeopardy is not violated by multiple punishment for the two offenses.

– In this case, Judge Vogel employs the same flawed shortcut used by the Supreme Court in many cases over the past ten years. Under *Missouri v. Hunter* (1983), the legislative branch may overrule the Fifth Amendment proscription against multiple punishment with a clear statement of intent to impose additional penalties. Here, Judge Vogel makes a very reasoned, logical argument that, because of the nature of the penalties imposed for the two offenses, the Legislature *must have* intended to authorize cumulative punishment. But a determination that a legislature must have meant something is not the same as a clear statement of legislative intent. Judge Vogel could have easily relied on more accurate Double Jeopardy analysis. A conviction of felony eluding requires that the defendant be committing an underlying felony. It does not require that the defendant be committing OWI. Thus, the elements of Operating While Intoxicated are not necessarily included in those of felony eluding, and the Fifth Amendment is not implicated.

G. Public Intoxication – "Public Place" defined

State v. Booth, 670 N.W.2d 209 (Iowa 2003)
The public area and front stairs in a six-unit apartment building are public places for the purpose of the offense of public intoxication.

– Ms. Booth attempted to analogize her case to *State v. Lake* (1991), whose conviction of public intoxication was reversed because the private automobile in which she was a passenger was a place from which the public could be excluded. Other tenants in the apartment building, Justice Ternus explained, are members of Ms. Booth's "public," the protection of which is a legislative goal of the public intoxication proscription. Additionally, case law that has developed in the context of the Fourth Amendment does not support a reasonable expectation of privacy in such an area. Joined by Chief Justice Lavorato, Justice Carter found that none of these justifications were relevant, and dissented.

H. Sexual Offenses

1. Sexual Abuse – "by force or against the will" – Sufficiency

State v. VanderEsch, 662 N.W.2d 689 (IowaApp.2002)
Where the defendant uses deception to induce his victim to engage in a sex act, characterizing it as a scientific experiment, the act is committed by force or against the will of the victim under Iowa Code § 709.4(1).

-- In this case, Judge Mahan vests himself with legislative authority to create a new alternative formulation of sexual abuse. Does this mean, he is asked, that an individual who receives sexual favors from a partner in exchange for an insincere declaration of love has committed sexual abuse by obtaining sex by force? The distinction, Judge Mahan explains, is that in such a case the victim has nevertheless consented to the sexual act, albeit for reasons brought on by deceit. If you have to dig this far, then clearly the statute is constitutionally vague. VanderEsch raised this issue on appeal, but

not in the district court, so it was not considered.

VanderEsch, by the way, owned Pizza Ranch restaurants and persuaded his youthful male employees that he was also conducting scientific research on human semen. Using a special semen collection device (a condom) that only he could operate correctly, VanderEsch would manually extract samples from the naive subjects. In one case, he even had his subject ride along with him to University Hospitals in Iowa City, having the boy wait in the car while he went inside to deposit the sample for evaluation. There should be a law against such behavior, Judge Mahan obviously thought, so he crafted one out of the existing sexual abuse statute.

2. Lascivious Acts – Lesser Offenses

State v. Shearon, 660 N.W.2d 52 (Iowa 2003)
Because it is possible to commit the offense of lascivious acts with a child without committing the offense of indecent contact, the latter is not a lesser-included offense of the former.

– Mr. Shearon requested that indecent contact be submitted as a lesser of lascivious acts. One commits lascivious acts by touching the fondling of a child's *genitals*, while indecent contact involves "the inner thigh, groin, buttock, anus or breast." Furthermore, one form of indecent contact punishes the defendant who "solicits" such touching. Solicitation is not required for lascivious acts. In this respect, Justice Neuman repeats the State's argument that "once the defendant solicits the child under section 709.12(4), the crime is complete. Because no actual touching or fondling is necessary, the crime of indecent contact does not qualify as a lesser-included offense of lascivious acts." While the remainder of her analysis is correct, this statement, if it is being cited as adopted by the Court, is misdirected. It is not because an offense lacks elements of the greater that disqualifies it as a true lesser. It is the converse that is true.

In her opinion in *Shearon*, Justice Neuman explicitly overrules dicta in *State v. Capper*

(1995) that suggests that indecent contact is a lesser offense of lascivious acts.

3. Evidence

– See discussion of admissibility of prior false complaints by the complaining witness in a sexual abuse prosecution in *State v. Baker*, discussed in Trial Issues, Evidence.

4. Sexually Violent Predator Commitment

a. Recent Overt Act

In re the detention of Swanson, 668 N.W.2d 570 (Iowa 2003)

The Iowa Code § 229A.2(6) requirement that for civil commitment the defendant commit an overt act "that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm" may be fulfilled even where the victim is unaware of facts that would result in a reasonable apprehension of sexual harm, and sufficient evidence of such an act is proven where the defendant begins contacting a near-stranger with suggestions that he move in to her one-bedroom domicile "with no strings attached," where his prior sexual assaults began with a nearly identical offer.

b. Instructions

In re the detention of Garrett, 671 N.W.2d 497 (Iowa 2003)

Although jury instructions in a sexually violent predator commitment trial do not follow express statutory language, instructions are sufficient where the jury is required to find that the defendant suffers from a mental abnormality that cause him to have serious difficulty in controlling his or her sexually dangerous behavior.

– In *In re detention of Barnes* (2003), the Supreme Court endorsed the following instruction:

> As used in this instruction, mental abnormality means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior.

The *Barnes* language was not used. The Supreme Court, however, found essentially

that the court in *Garrett* was in substantial compliance.

In re detention of Barker, 661 N.W.2d 175 (Iowa 2003)

Marshaling instruction in sexually violent predator commitment proceeding that requires the jury to find the defendant "likely to engage in *predatory* acts constituting sexually violent offenses" but only that the defendant "has serious difficulty controlling his sexually violent behavior" is a correct statement of the law, and thus is not erroneous.

– It is obvious from Justice Neuman's opinion in *Barker* that the arguments advanced by the parties were a refreshing exchange between two experienced appellate litigators. Rather than tossing up a flurry of arguments to see which one would stick, the Attorney General and the First Assistant State Public Defender ceded their common ground, focusing their debate on a narrow area of dispute. The Kansas statute that was the subject of the *Kansas v. Crane* (2002), under which Due Process requires a finding that the defendant have "serious difficulty" controlling his or her sexually violent behavior, is distinguishable from the Iowa statue in that the latter contains an element that the sexually violent behavior be predatory. Predatory acts are defined in Iowa Code § 229A.2(5) as those "directed toward a person with whom a relationship has been established or promoted for the primary purpose of victimization." The marshaling instruction is correct, Justice Neuman concludes, because the term "predatory" defines the nature of the relationship rather than the assaultive behavior.

5. Inclusion on Sexual Abuse Registry

Brummer v. Iowa Department of Corrections, 661 N.W.2d 167 (Iowa 2003)

Because inclusion on the published sexual abuse registry implicates a true liberty interest, and because the decision involves adjudicative facts that are subject to erroneous application, the offender is entitled as a matter of due process to a hearing prior to inclusion on the registry.

– In reaching this decision, Justice Cady noted Professor Bonfield's four exceptions to the hearing requirement, set out in *Allegre v. Iowa State Board of Regents* (1984), in cases in which disposition

is the product of the resolution of adjudicative facts:

> [A hearing is not required in cases involving] (1) interests of an individual that cannot be characterized as either "life, liberty, [or] property" within the meaning of the due process clause of the fourteenth amendment because no entitlement be established; (2) absence of relevant disputed facts; (3) emergency agency action; and (4) use of inspections, examinations, and testing to determine relevant facts.

Of these, the only arguable exceptions are the first and the fourth. Justice Cady's holding addressed both.

I. Theft

1. Sufficiency

a. Dominion and Control

State v. Donaldson, 663 N.W.2d 882 (Iowa 2003)

The offense of theft of a motor vehicle is complete when the defendant enters the motor vehicle without authorization, removes the steering wheel cover and takes other actions towards removing the vehicle, even where the offense is stopped before the vehicle is removed.

– Under common law, a completed theft required "caption" (taking possession with the intent to deprive the owner) and "asportation" (movement of the object to another place). Caption without asportation was a mere attempt, punishable as a misdemeanor. Recently, the distinction between attempt and actual theft, both in their elements and in the level of punishment, has blurred. Asportation is no longer required, if the defendant takes control of property with the intent to deprive the owner permanently. In a footnote, Justice Streit suggests that the jury instruction be given in all theft cases that "a theft is completed when the defendant secures dominion over the object of the theft or uses it in a manner beyond his authority." *Donaldson* is an interesting discussion of the historical development of the crime

of theft, and a case that obviously was well-argued at both the appellate and district court levels.

b. Intent to Permanently Deprive – Sufficiency

State v. Morris, _____ N.W.2d _____ (Iowa 2004)
Where a defendant exercises control over a truck at 4:30 a.m. and drives a short distance before being pursued by law enforcement, at which time he exits the vehicle and flees, evidence is insufficient for a rational jury to find beyond reasonable doubt that the defendant acted with the intent to permanently deprive the owner.

– Thank you, Justice Per Curiam, but *are you sure*? The fact that the defendant possessed the vehicle a short time may not alone render the evidence insufficient, Justice Per Curiam recognizes. But the Court goes on to hold that the fact that Mr. Morris jumped out of the truck and ran the moment police began to gave chase is inconsistent with a finding that he intended to deprive its owner permanently. The (very slim) majority relies upon *State v. Schminkey* (2001) for its holding. Joined by Justices Streit and Cady, Justice Larson's dissent is the better opinion. *Schminkey* made sense when you're talking about a guilty plea, where defendant's admission (or the Court's finding during defendant's *Alford* plea) that he took the vehicle establishes only the taking element of theft, and not the element of intent to permanently deprive. In a jury trial, however, the jury is instructed (as it was in Mr. Morris' case) that it may infer intent from possession of recently stolen property. It should be presumed, Justice Larson argues, that the jury in Mr. Morris' case simply followed the instruction. Maybe, after *Morris*, the permissible presumption is no longer appropriate in theft cases.

The Court of Appeals first reversed Morris' conviction and remanded for "further proceedings consistent with" its opinion. On further review, the Supreme Court determined

that the trial jury essentially found the elements of exercising control over stolen property, and remanded for entry of judgment on that lesser charge.

c. Value

State v. Kluge, 672 N.W.2d 506 (IowaApp.2003)
Because a state sales tax is imposed upon the transaction, and not the property, the district court errs in instructing the jury that the value of property in a prosecution for theft includes the applicable sales tax.

– Mr. Kluge's case was remanded for resentencing and, if it weren't for the fact that he had "other problems," this decision would have made a dramatic difference to him. Mr. Kluge rented, and then pawned, a tile saw which could have been purchased from the rental agency for $995. That would make him guilty of theft in the third degree. But Mr. Kluge was convicted of theft in the second degree and, because he had "other problems," was sentenced to a 15-year term of incarceration for being an[5] habitual offender. The jury may have found him guilty of the class "D" felony because it followed the district court's instruction and added sales tax into the total value. Or it may have given credence to the testimony of the assistant manager of the rental agency that the replacement value of the tool was in excess of $1300. Mr. Kluge returned to Woodbury County for a bench trial, in which the value was determined to be under $1000 and, thus, his sentence was reduced to two years.

Good work, Tricia Johnston. Mr. Kluge did himself a favor in not elected to represent himself on this appeal, as he has done in many of his previous encounters with the

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[5]Of the many areas in which I am drawn into disagreements about what I put in this outlines, the one that provokes the most violent arguments is the question of whether someone like Mr. Kluge is "a habitual offender" or is "an habitual offender." Judge Vogel, like most appellate jurists in this State, has selected the former – consciously or subconsciously. I am not swayed.

criminal justice system.

d. Theft by Deception

State v. Williams, 674 N.W.2d 69 (Iowa 2004)

The defendant's presentation to a used car dealership of a letter on what appears to be the stationery of a law firm indicating, falsely, that the defendant is soon to receive a substantial inheritance, together with the defendant's false representation that he was employed, was sufficient evidence to establish the element of deception in a prosecution for theft by deception.

– What perverted theory of public policy supports prosecuting a man for deceiving a ***used car salesman***? Williams agreed that his case could have been submitted to the jury under other theories, but the Court recognized that it is reversible error to submit under multiple theories if it possible to convict the defendant using the deficient one.

2. Jury Instructions – Theft by Deception

State v. Williams, 674 N.W.2d 69 (Iowa 2004)

While the intent to deceive is an essential element of the offense of theft by deception, a marshaling instruction that requires the jury to find that the defendant created a false impression about the existence or non-existence of a fact knowing that the impression is false is sufficient, despite the failure to state that the defendant's actions must be done "knowingly."

– It is preferable, Justice Carter stressed, to include the element of knowledge in the marshaling instruction.

III. Pre-trial Issues

A. Limitations – General v. Specific

In the matter of the seizure of property for forfeiture of Williams, _____ N.W.2d _____ (Iowa 2004)

While a general statute of limitation affects the remedy available to the complaining party, a specific statutory limitation is incorporated as an element into the right to the remedy.

– The competing limitations in *Williams* were the five-year general limitation under Iowa Code § 809A.20 for filing forfeiture claims and the 90-day limitation under Iowa Code § 809A.8(1)(a)(1) within which time the State must file notice of pending forfeiture.. Failure to comply with the latter extinguishes the State's right to forfeit property.

B. Venue – Prejudice from Denial of Change

State v. Evans, 671N.W.2d 720 (Iowa 2003) (Evans II)

Prejudice may not be presumed from the denial of defendant's motion for change of venue when the only evidence offered supporting the request for a change was a single newspaper article that was predominantly factual in nature.

C. Indictment or Information

1. Specificity

State v. Dalton, 674 N.W.2d 111 (Iowa 2004)

A trial information that correctly sets out the chapter and section of the Iowa Code the defendant is alleged to have violated, but does not specify, by number, the particular paragraph under which the charge is brought, is sufficiently specific where the charged alternative is apparent from the minutes of testimony.

– Thus, trial counsel was not ineffective in failing to object to the trial information on this ground.

2. Uncharged Alternatives

State v. Yeo, 659 N.W.2d 544 (Iowa 2003)

Although defendant was not charged in the trial information with the skeletal injury alternative of child endangerment, new trial is not required where the defendant was given sufficient notice of the variance through the evidence offered at trial, and at the defendant's first trial that was the subject of a successful motion for new trial, and the defendant was thus not prejudiced by his conviction under that alternative.

– Yeo's attorney failed to object at trial to the presentation of evidence concerning the uncharged alternative.

D. Pretrial Motions

1. Motion to Dismiss Trial Information

State v. Petersen, _____ N.W.2d _____ (Iowa 2004)

As the purpose of the preliminary complaint and preliminary hearing are to determine the legality of detaining the defendant until the defendant is officially charged by indictment or trial information, and as legal deficiencies in the complaint and preliminary hearing do not affect the validity of the trial information once it is approved, the district court errs in dismissing a trial information based upon defects in the preliminary complaint.

– Petersen's attorney countered that the dismissal could be found valid under Iowa R.Crim.P. 2.5(4), that allows the district court to dismiss an information and send the case to the grand jury. That might be well and good, Justice Wiggins responds, but the district court in this case merely dismissed the information, and didn't refer the case to the grand jury.

2. Bills of Particulars

State v. Watkins, 659 N.W.2d 526 (Iowa 2003)

Where the precise timing of the infliction of injuries on a victim of child endangerment is impossible to ascertain, it is sufficient for the State to allege that the injuries occurred within a specified range of time and that they occurred separately from each other, and the district court does not err in denying a bill of particulars requesting a more specific statement with respect to the multiple counts with which the defendant is charged.

E. Consular Notification

State v. Buenaventura, 660 N.W.2d 38 (Iowa 2003)

Because the Vienna Convention on Consular Relations does not contain an evidentiary exclusionary rule for cases in which law enforcement officers do not notify foreign nationals of their right to notify their consular officials of their custodial status, exclusion of evidence is not an available remedy.

– Justice Ternus' opinion is slightly confusing, in that she begins by placing this case in the category with other cases in which the Court found it was not necessary to determine whether consular notification is a trial right,

in the absence of some showing of prejudice to the defendant. But then she goes on to declare that exclusion is not appropriate under such circumstances. The two passages are not entirely contradictory, but the former would seem to render the latter unnecessary.

IV. Trial Issues

A. Guilty Pleas

1. Judicial Colloquy

a. Substantial Compliance

State v. Loye, 670 N.W.2d 141 (Iowa 2003)

The district court does not fulfill its responsibility under Iowa R.Crim.P. 2.8(2)(b) to explain the nature of the charges to a defendant entering a plea of guilty where the court merely sets out the title and maximum penalty for the offense without specifying all of the essential elements of the offense, and counsel's assurance that the elements were explained to the defendant does not satisfy the court's duty to conduct a colloquy on this matter.

b. Misdemeanors

State v. Meron, 675 N.W.2d 537 (Iowa 2004)

The Iowa R.Crim.P. 2.8(2)(b) provision that permits the waiver of a plea colloquy in cases of serious and aggravated misdemeanors still requires that the defendant be advised, in a written colloquy, of the matters that must otherwise be discussed in the oral colloquy.

– The waiver language of Rule 2.8(2)(b) was the codification of the Court's decision in *State v. Kirchoff* (1990), Justice Cady observes. Under the rule and under *Kirchoff*, the Court still has the responsibility to assure that a plea is voluntary, intelligent and supported by a factual basis. In this case, Meron was not advised of her rights to compulsory process and against self-incrimination.

c. Waiver of Counsel

Tovar v. Iowa, _____ U.S. _____, 124 S.Ct. 1379, _____ L.Ed.2d _____ (2004)

In accepting a defendant's plea of guilty, the district court must inform the defendant of the nature of the charges against him or her, the right to counsel in a plea proceeding, and the range of allowable punishments, but there is no requirement under the Sixth Amendment that the defendant be informed that by waiving the assistance of counsel he or she may fail to recognize a viable defense and is giving up the opportunity for an independent opinion on the wisdom of pleading guilty.

– We knew *this one* was coming. It was a grand gesture on the part of the Iowa Supreme Court to write so much protection into the Sixth Amendment. On the morning after the unanimous decision overruling the State decision was announced, Tovar's attorney was telling the *Des Moines Register* that the State Supreme Court could still read its *Tovar* analysis into the State Constitution. That's true. Justice Ginsburg herself concluded the *Tovar* opinion with the recognition that "States are free to adopt by statute, rule or decision any guides to the acceptance of an uncounseled plea they deem useful."

d. Motion in Arrest of Judgment – Necessity

State v. Meron, 675 N.W.2d 537 (Iowa 2004)

The defendant's statement that her attorney explained to her that she had a right to file a motion in arrest of judgment and that she waived the right was not sufficient evidence that she was adequately advised where there is no record that she was advised of the appellate consequences of her waiver.

– Under *State v. Barnes* (2002), the advice concerning a motion in arrest can be given by way of a written waiver in misdemeanor cases. In *Meron*, the State sought to extend *Barnes* to allow that the requirement be fulfilled by an assurance on the record that the defendant was advised of her rights by counsel. Justice Cady declined to address this request, since even if oral advice was sufficient the advice given Meron was insufficient to satisfy the rule.

State v. Loye, 670 N.W.2d 141 (Iowa 2003)

The court's statement to a defendant pleading guilty for the purpose of entering drug court that the defendant may opt out of the program within two-weeks and will have the opportunity to proceed with her case as if the plea had never been entered is not sufficient to satisfy the requirement that the defendant be advised of her right to file a motion in arrest of judgment within 45 days of the plea, and that failure to do so will preclude appellate relief.

2. Voluntariness

State v. Thomas, 659 N.W.2d 217 (Iowa 2003)

Because the district court retains the authority to dismiss a prosecution at any time in the interests of justice, the court's advice to a defendant entering a guilty plea that if the defendant successfully completes a drug court program the charges against the defendant would be dismissed is not inaccurate, and does not render the plea involuntary with respect to a defendant who later fails the drug court program and now faces twenty years incarceration.

– Mr. Thomas pointed out that under Iowa Code § 124.401E(1) an individual sentenced to drug court may earn a suspended sentence. This language would appear to exclude a deferred sentence as an available remedy. Justice Cady responds that Mr. Thomas was not sentenced, but merely pled guilty, and the remedy in § 124.401E(1) is not an exclusive one.

The district court promised Mr. Thomas that if he was unsuccessful in drug court he would end up with a sentence of twenty years in prison. So, after Thomas absconded from the drug court program, the court entered an order sentencing the defendant to two consecutive ten-year terms. Because Thomas was not afforded counsel or an opportunity for allocution at this stage, the case was vacated for resentencing.

B. Evidence/Witnesses -- Evidence

1. Iowa R.Evid. 5.403 (Prejudice v. Probative Value)

State v. Baker, _____ N.W.2d _____ (Iowa 2004)

In a prosecution for sexual abuse, the district court abuses its discretion in excluding, as violation of

Iowa R.Evid. 403, prior false claims of sexual abuse by the alleged victim.

– Unless the proposed evidence is excluded by the Rape Shield Provision of Iowa R.Evid. 5.412, the potential embarrassment or other detriment suffered by a non-party witness is not a consideration in the prejudice/probative value balance of Iowa R.Evid. 403. It's all part of our civic duty to testify if called.

In *Barker*, Justice Larson corrects two misconceptions left by the Court in its opinion in *State v. Alvey* (1990). First, *Alvey* suggests that doubt of the truth of the proffered testimony reduces its probative value. Actually, it's the other way around. The second is the misguided focus on the detriment to the victim. What do you suppose the Legislature will be during *next term*?

2. Iowa R.Evid. 5.404(b) (Other Bad Acts)

State v. Sullivan, _____ N.W.2d _____ (Iowa 2004)
In a prosecution for possession of controlled substances with intent to deliver, evidence that the defendant previously admitted possessing drugs and intending to sell them is not automatically admissible under Iowa R.Evid. 5.404(b) unless the State is able to "articulate a tenable noncharacter theory of logical relevance."

– This is a beautiful opinion by Chief Justice Lavorato,[6] and a major step towards returning Rule 5.404(b) to what it was supposed to be, a rule of exclusion. Prior to *State v. McDaniel* (1994),[7] Justice Lavorato noted, the rule was applied "as it was meant to be," allowing other crimes evidence only where the proponent was able to articulate a theory of relevance. Beginning, with *McDaniel*, the rule "in effect turned the rule from one of exclusion to one of inclusion whenever bad-acts evidence is

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[6]Although I have to feel for Polk County District Court Judge Robert Blink, whose adherence to the existing interpretation of Rule 404(b) in the caselaw earned him Supreme Court reversals in *State v. Daly* (2001) and in this case. Under the circumstances, I can imagine a district court judge tearing out his hair, asking himself, "What am I supposed to do?"

[7]Although I think the erosion of Rule 404(b) began well before 1994.

offered to prove specific intent." In *Sullivan,* Justice Lavorato explicitly overrules *McDaniel*.

State v. White, 668 N.W.2d 850 (Iowa 2003)

Evidence that defendant assaulted his estranged wife one month earlier is relevant in a prosecution for kidnaping in the first degree and burglary in the first degree to prove that the defendant intended to inflict serious injury on the victim.

– Under the circumstances of this case, the prejudicial effect of the evidence did not outweigh its probative value, so as to render it inadmissible under Iowa R.Evid. 5.403.

State v. Piper, 663 N.W.2d 894 (Iowa 2003)

The district court does not abuse its discretion in admitting, in the prosecution of the defendant for the sexually-violent murder of a woman in a hotel, evidence that the defendant had engaged in an extra-marital affair with his next-door neighbor, where the evidence is relevant to discredit the defendant's wife's alibi testimony by showing that she was not aware of his activities, and where the defendant himself introduced evidence of an affair with a separate woman to establish the source of semen discovered in the victim's hotel room.

– The evidence was also challenged, unsuccessfully, on Iowa R.Evid. 403 grounds. There was additional evidence that Piper had threatened the ex-paramour in an effort to influence her statements to law enforcement – additional proof, Justice Ternus noted, of Piper's consciousness of guilt.

3. Iowa R.Evid. 5.412 (Rape Shield Provision)

State v. Baker, _____ N.W.2d _____ (Iowa 2004)

In a sexual abuse prosecution, the complaining witness' prior false claims of sexual abuse are not sexual conduct, so they are not excluded by the Rape Shield Provision of Iowa R.Evid. 412.

4. Impeachment

State v. Jordan, 663 N.W.2d 877 (Iowa 2003)

A party against whom hearsay evidence is offered is entitled to impeach the credibility of the declarant in the same manner as if the declarant appeared to testify at trial.

– Justice Cady answers a very interesting question in *Jordan*. So much focus is placed in the case law

upon whether particular hearsay evidence is or is not admissible, and there is very little discussion of the extent to which the credibility of such evidence can be tested. The conventional wisdom that only the testifying party is subject to impeachment is debunked in *Jordan*.

5. Iowa R.Evid. 5.605 – Presiding Judge as Witness

State v. Gardner, 661 N.W.2d 116 (Iowa 2003)

Neither Iowa R.Evid. 5.605, which precludes parties from calling the presiding judge as a witness at trial, nor the Due Process Clause is violated where, after defendant is found guilty by a jury, the trial judge is listed as a witness in the subsequent trial of the defendant for being an habitual offender, over which a different judge presides.

– Although she found no reversible error, Justice Ternus expressed strong disapproval of the Black Hawk County Attorney's practice of listing the presiding judge as a witness in the habitual offender stage of trial. If nothing else, the public would be led to question the fairness of a trial in which a single individual appeared as a judge and a witness.

6. Iowa R. Evid. 5.801 (Hearsay)

a. Hearsay Defined – Implied Assertions

State v. Dullard, 668 N.W.2d 585 (Iowa 2003)

Implied assertions, meaning words or conduct that may be inferred to communicate a point not expressly stated, may, depending upon the context for which they are offered, constitute hearsay evidence even if the declarant did not intend to communicate the assertion.

– *Dullard* is another of the well-researched, well-written opinions breaking new ground in answering an interesting question of law that have been authored by Justice Cady during his tenure on both the Court of Appeals and the Supreme Court. Are implied assertions hearsay? Does it matter if the declarant intended to communicate the assertion? These are questions, not previously addressed in Iowa, which have generated an entire spectrum of answers in

other jurisdictions since 1835. Judge Cady sets out a detailed history of how implied assertions have been treated elsewhere, and then constructs a thoughtful solution for Iowa state courts.

Mr. Dullard was charged with possessing precursors for methamphetamine production. In the garage, police found a note from some anonymous writer to "B.,"[8] complaining about the presence of a police officer down the street, watching them. From this note, jurors were expected to infer that the recipient (Dullard) needed to be informed of factors that would affect his methamphetamine production.

The Court of Appeals reversed with directions that the charge be dismissed, since the remaining evidence was insufficient to support a conviction. Justice Cady vacated the Court of Appeals and ordered a new trial, pointing out that acquittal is proper only where the evidence was insufficient based upon *all* evidence offered at trial, including the improper evidence. Joined by the Chief Justice, Justice Carter argued in his dissent that, even considering the improper evidence, there was insufficient evidence to support conviction.

In the past, opinions of the Iowa Supreme Court have diverged on whether the admission of hearsay involves an exercise of judicial discretion, which is the general standard for evidentiary decisions, or whether it is subject to review for error. The two positions can be reconciled. At the outset of *Dullard*, Justice Cady provides the most concise and accurate discussion to date of the proper standard of review of decisions concerning hearsay:

> We typically review rulings on the admission of evidence for an abuse of discretion. *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003). "Except in cases of hearsay rulings, trial courts have discretion to admit evidence under a rule of evidence." Id. Hearsay, however, must be excluded as

[8]Presumed to be Dullard, whose first name is Brett.

> evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision. See Iowa R. Evid. 5.802. This means a district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, subject, of course, to the rule of relevance under rule 5.403, and has no discretion to admit hearsay in the absence of a provision providing for it. Similarly, the question whether a particular statement constitutes hearsay presents a legal issue. See *United States v. McGlory*, 968 F.2d 309, 332 (3d Cir. 1992). Thus, it is within this framework that we review hearsay rulings for correction of errors at law. See *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). Hearsay inadmissible under the rule is considered to be prejudicial to the nonoffering party unless otherwise established. *Id.*

b. Iowa R.Evid. 5.803(2) (Excited Utterances)

State v. Tejeda, _____ N.W.2d _____ (Iowa 2004)

In a prosecution for willful injury, the district court does not abuse its discretion in refusing to admit, as an excited utterance, hearsay testimony that another individual admitted the offense, where the admission came (1) 30 minutes after the attack, and (2) in response to a direct question.

– One wonders why the third-party confession wasn't sought to be admitted as a statement against penal interest, under Iowa R.Evid. 5.804(b)(3). The answer may be that this particular hearsay exception applies only where the declarant is unavailable to testify at trial. I know from checking the Iowa Courts website that the declarant, who was in state custody, was brought back for Mr. Tejeda's trial. It is not clear whether the witness became unavailable to testify by, for example, pleading the Fifth Amendment. Additionally, the *Tejeda* opinion indicates that the district court found the evidence unreliable. Case law analyzing Rule 5.804(b)(3) requires a showing of reliability prior to the introduction of hearsay that inculpates the declarant while exculpating the defendant.

c. Iowa R.Evid. 5.803(17) (Market Report Exception)

State v. Heuser, 661 N.W.2d 157 (Iowa 2003)

Label on cold medicine container indicating that the medicine contains pseudoephedrine and label on packaging of batteries indicating that the batteries contain lithium are inherently reliable, and fall under the Iowa R.Evid. 5.803(17) market report exception to the hearsay rule.

– This question appears to be one of first impression in Iowa. It was not necessary for the State to provide advance notice of this class of evidence, as notice is only required prior to offering evidence for admission under the residual exceptions.

5. Foundation

State v. Sayles, 662 N.W.2d 1 (Iowa 2003)

Computer-generated slides offered to illustrate the substance of an expert witness' testimony are admissible if the witness testifies that their content is what they purport to be.

– There is a distinction, Justice Ternus explains, between an "animation," offered to explain a witness testimony, and a "simulation," intended to recreate the circumstances of an event. A witness who was not present to observe the event could not testify that the portrayal is accurate, so more emphasis would be placed upon the methodology used in fabricating the simulation from the available data.

6. Chain of Custody

State v. Piper, 663 N.W.2d 894 (Iowa 2003)

Although police paperwork purports to indicate that among items released to a murder victim's family were a laboratory slide and a pair of socks containing bodily fluids that ultimately were admitted at trial, the district court does not abuse its discretion in finding that a continuous chain of custody was established where the evidence also shows that the family notified the police that the questioned items were not among property received, and where there is no indication that the items ever left police custody.

– Piper also raised a chain-of-custody question concerning a vaginal swab that had been sent to

Cellmark Laboratories for testing then, when returned, was inadvertently stored in a refrigerator for several years until trial. The Supreme Court affirmed the district court's finding that there no real question concerning the location of the evidence during the intervening time period.

There may be something of an inconsistency in Justice Ternus' opinion with respect to this issue. At the outset, she quotes language from *State v. Gibb* (1981), that the threshold determination that chain of custody is established is a question the for court. Any further question that the item is what it purports to be goes to the weight of the evidence. But later, Justice Ternus affirmed the denial of Piper's request for a jury instruction on the chain of custody question, on the ground that "[w]hether the prosecution has established a proper chain of custody is a decision for the trial court, not the jury."

7. Sufficiency

a. General

State v. Sayles, 662 N.W.2d 1 (Iowa 2003)

Despite the testimony of a defense expert that child's injuries could occurred over a broader range of time and that, during that time, the child was in the care of four different individuals, evidence was sufficient for a rational jury to find that the defendant was the perpetrator where the State's expert concluded that the injuries were inflicted during a time period that the child was in the defendant's care, where several witnesses, including the defendant, made statements that the child was exhibiting no symptoms prior to being placed in the defendant's care, and where the defendant was making statements indicating that he was more interested in disassociating himself with the child's injuries than in the child's condition.

– The latter evidence has been held in the past to be admissible to demonstrate the defendant's "consciousness of guilt."

b. Corroboration of Confessions and Accomplices

State v. Douglas, 675 N.W.2d 567 (Iowa 2004)

The rules that require corroboration of accomplice testimony and corroboration of confessions serve different purposes, so the testimony of an accomplice is sufficient to corroborate a confession, and vice versa.

– Justice Ternus did not, however, abrogate the longstanding rule that multiple accomplices may not corroborate each other. The confession corroboration rule guards against police relying upon eliciting confessions as the sole technique of criminal investigations, while the accomplice corroboration rule recognizes the self-serving nature of accomplice testimony. The testimony of more than once accomplice against a defendant might suggest collusion.

State v. Douglas, 675 N.W.2d 567 (Iowa 2004)

Where it is undisputed that a person is an accomplice, and the circumstantial evidence suggests only that conclusion, the court must find as a matter of law that the person is an accomplice, while where the evidence is subject to differing interpretations the question is one of fact for the jury.

State v. Yeo, 659 N.W.2d 544 (Iowa 2003)

The testimony of the mother of a child endangerment victim, found to be an accomplice in the trial of her boyfriend, was sufficiently corroborated by medical testimony indicating that the child's injuries were consistent with the mother's accounts, and by eyewitnesses who observed the events as they occurred.

C. Defenses

1. Self Defense – Right to Present Evidence

State v. Begey, 672 N.W.2d 747 (Iowa 2003)

Even where the evidence supporting a claim of self-defense is relatively weak, where the defendant asserts the defense and provides the "smallest supporting evidence" it is error for the district court to preclude the defendant from putting on evidence in support of the defense.

– The defendant has a fundamental right under the Fourteenth Amendment to put on a defense.

2. Justification – Resisting Arrest

State v. Bedard, 668 N.W.2d 598 (Iowa 2003)

Where defendant's striking a police officer who was attempting to execute an arguably invalid arrest was not reasonably necessary to protect the defendant from injury or loss, the State has met its burden of proving that the defendant did not act in self defense under Iowa Code § 704.1.

–The burden is on the State to prove that the defendant did not act in self defense. Because the defendant may be presumed to intend the natural consequences of his or her acts, Justice Carter found that Bedard intended to place the officer in fear of immediate contact that would be painful, insulting, etc., to him.[9]

The State had prevailed in the Court of Appeals arguing (1) that the investigatory stop of Bedard was valid, and (2) that despite the fact that the detention was an investigatory stop and not an arrest, Iowa Code § 804.12, prohibiting a person from resisting even an invalid arrest, should also prohibit resisting an investigatory stop. It was unnecessary to address either of these arguments, Justice Carter concluded, because Bedard's use of force was not reasonable.

3. Insanity – Commitment After Acquittal – Standard

State v. Huss, 666 N.W.2d 152 (Iowa 2003)

To justify the commitment under Iowa R.Crim.P. 2.22(8) of a criminal defendant who has been adjudicated not guilty by reason of insanity, the State must prove by clear and convincing evidence (1) that the defendant suffers from mental illness, and (2) represents a danger to himself or others, and the latter prong is not established where the most recent violent act by the defendant occurred seventeen years earlier.

– This decision may signal the end of litigation involving Loren Huss' conviction of first degree murder for the 1986 beating death of his girlfriend. After his conviction was vacated by the Eighth

[9]A recent amendment to the Iowa assault statute makes assault a general intent crime. Nevertheless, Justice Carter notes that the State continues to bear the burden of establishing all of the statutory elements, including the intent to place the victim in fear.

Circuit Court of Appeals on Double Jeopardy grounds, his case was remanded to the district court for completion of his aborted first trial. He was adjudicated not guilty by reason of insanity. Following acquittal, provisions of Rule 2.22(8) were invoked to commit Mr. Huss for mental health treatment. The two-pronged test, with the burden on the State of proving its elements by clear and convincing evidence, is the Constitutional standard for civil commitment articulated in *Addington v. Texas* (1979). Justice Neuman rejected the State's argument that a different standard should apply to criminal commitment.

This decision does not, however, mark only the end of the era of Loren Huss. Five days before her opinion in this case was announced, Justice Linda Neuman retired from the Supreme Court. It is, of course, possible for her to continue to sit as a Senior Judge. Otherwise, *Huss* is among her final decisions with the Court. As is characteristic of her seventeen-year body of work, this decision is well-reasoned, readable and thorough. Justice Neuman was an independent and fair jurist whose reasoning was driven by the merits of an issue rather than any apparent ideology. She treated litigants with courtesy and respect in argument. She asked probing questions, but not in a confrontational or embarrassing manner. The niche she carved out on the Court will be difficult to fill.

4. Diminished Capacity

State v. Watkins, 659 N.W.2d 526 (Iowa 2003)

Because the defense of diminished capacity is unavailable where the charged offense contains the element that the defendant merely act "knowingly," the district court does not err in finding that the defense was established as a matter of law.

D. Prosecutorial Misconduct

1. Cross-Examination

State v. Werts, _____ N.W.2d _____ (Iowa 2004)

It is "grossly improper" in a prosecution for the first-degree murder of a child to ask the defendant whether she attended the funeral of the victim or sent a sympathy card to the victim or her family and to suggest that the defendant "knocked the life" out of the child and "robbed that little boy of his life because he didn't fit within your schedule," as such questions appeal improperly to the passions of the jury.

State v. Werts, _____ N.W.2d _____ (Iowa 2004)

Questioning by the prosecution of a defense expert witness on the facts that the witness testified exclusively in favor of the defense, had done so 46 times for defendants charged with killing children, and had formed his opinion in the case only after addressing a seminar sponsored by the Iowa Public Defenders' Association, was improper because it portrayed the witness in a bad light no matter what his answers to questions might be.

– In this holding, Justice Carter continues down the same dubious road the Court began following in *State v. Graves* (2003). The result in *Werts* was an excellent one for the defendant and a tribute to the fine legal work of Al Parrish and Andy Dunn. However, the sword of *Graves* and *Werts* ultimately will cut both ways. Why *can't* a party vigorously impeach an opposing expert with circumstances that betray a strong bias?

2. Comments on Witness' Credibility

State v. Graves, 668 N.W.2d 860 (Iowa 2003)

The province of the jury is invaded by questions and argument that comment upon the credibility of trial witnesses, so it is improper for a prosecutor to ask the defendant on cross-examination whether witnesses whose testimony conflicted with the defendant's were lying, and to argue to the jury in closing that the defendant was lying.

– In addition to these acts of misconduct, the prosecutor referred to defendant's arguments as "a smoke screen," commented that a police officer/witness would have no motivation to lie against the

defendant, essentially testified that he, the prosecutor, would not leave large sums of cash laying around a "flop house," and shifted the burden of proof with the factually incorrect assertion that if the jury did not believe the defendant then the defendant must be found guilty.

Although trial counsel did not object to the prosecutor's antics, Justice Ternus and a five-justice majority reversed Mr. Graves' conviction on grounds of ineffective assistance of counsel.[10] At the risk of looking a gift horse in the mouth, did Justice Ternus go too far for Mr. Graves? On both the question of whether a prosecutor may ask a witness whether a contradictory witness is lying and the question of whether it is improper in closing arguments to claim that a particular witness lied, Justice Ternus sets out competing authority from other jurisdictions and resolves the issues in favor of the defendants. On the latter question, the weight of authority appears to support the opposing view. And, while dicta in two prior Iowa decisions appears to foreshadow the holding here, both holdings are of first impression. So whatever became of the principle that attorneys are not expected to be crystal ball gazers in predicting developments in the case law?

Furthermore, Justice Ternus makes her findings on direct appeal, and not in a postconviction relief proceeding. Trial counsel can have no strategic basis for failing to object, she concludes, that might justify an opportunity to explain his or her omissions. But, in the experience of veteran criminal trial attorneys, there are instances in which it is effective to sit silently and allow an opponent to overreach. Especially in cases such as Graves' in which, according to Justice Ternus, the evidence against the defendant was weak, a barrage of personal attacks upon the defendant might be perceived by the jury as a sign of desperation. Where the prosecutor asks the defendant if it must follow from

[10]Justice Ternus pointed out that each of the individual violations were probably not sufficient, alone, to warrant reversal. The sum of the prosecutor's misconduct, however, formed the basis for the outcome. Joined by Justice Larson, Justice Cady dissented. A prosecutor should not engage in such behavior, he agreed, but *Strickland* prejudice was not established.

his or her testimony that the complaining officer is lying, a particular defendant might respond with a convincing, "Why yes, if you put it that way, the officer *must* be lying." The subtle nuances that inform such determinations can never be gleaned from a paper transcript, but may be apparent to a defense lawyer familiar with the personality of the defendant and the complaining officer. Shouldn't that lawyer have been afforded the opportunity to at least respond to a conclusion by the Supreme Court, in a published opinion that will obviously be cited as precedent on a number of subjects, that he or she simply overlooked the error and provided deficient representation?

3. Impeachment with Inadmissible Evidence

State v. Werts, _____ N.W.2d _____ (Iowa 2004)
It is improper for the State to elicit a response from the defendant during cross-examination for the sole purpose of impeaching the defendant with evidence that would otherwise be inadmissible.

– Leann Werts was a babysitter charged with murder in the first degree in connection with the death of a child in her care. In a pretrial ruling in limine, the district court barred the State from presenting evidence that, on a previous occasion, Werts had struck the child in anger, causing the child considerable pain. During cross-examination, the State elicited testimony from Werts that she had told the child's parents that she would never hurt the victim. This opened the door, the district court ruled, to cross-examination concerning the previous incident.

Justice Carter disagreed, likening the court's action to the practice, outlawed in *State v. Turacek* (1990), of calling a witness for the sole purpose of impeaching him or her.

Because the district court's ruling concerned an evidentiary issue, *DeVoss v. State* (2002) does not preclude affirmance on other grounds. The prejudicial effect of the other bad acts evidence in *Werts*, however, reached the level that the evidence was not admissible for any purpose. Is this right, under the facts of *Werts*? The critical question of fact was whether it was Werts who caused the child's

death. Isn't the fact that the defendant reacted violently with the child in the past relevant both in this respect and also to prove malice?

4. Closing Arguments

State v. Werts, _____ N.W.2d _____ (Iowa 2004)

It is misconduct in a prosecution for the first-degree murder of a child for the prosecutor to inflame the passions of the jury by displaying an empty baby book to the jury and commenting that the book will never be written, tearing pages out of the book for each childhood activity in which the child would not engage.

State v. Bowers, 661 N.W.2d 536 (Iowa 2003)

Where defendant was charged with four counts of sexual abuse which were inexact in time and, during trial, the State introduced evidence that the defendant and the victim engaged in one to three sex acts per week for approximately a year, it was not misconduct for the prosecuting attorney to comment in closing argument that the State could have charged the defendant in fifty separate counts.

– Defense counsel was not ineffective in failing to object. This is the same issue raised by Bowers' wife in the appeal of her convictions for the same behavior, in *State v. Bowers* (2002).

E. Mistrial – Sufficiency

State v. Piper, 663 N.W.2d 894 (Iowa 2003)

The district court does not abuse its discretion in denying a motion for mistrial arguing that the State was late in providing discovery materials to the defense, where the court granted continuances and other remedies to reduce any potential prejudicial effect, and where the items provided late to the defendant had little or no materiality to the issues at trial.

F. Jury Instructions – Spoliation of Evidence

State v. Bowers, 661 N.W.2d 536 (Iowa 2003)

The routine destruction by law enforcement of interview notes after incident reports are prepared does not justify a spoliation instruction where the policy is neutral and does not apply only to interviews with subjects who are accused of crimes.

– The failure of law enforcement to tape-record interviews also does not justify a spoliation instruction. For

these reasons, trial counsel in *Bowers* was not ineffective in failing to request a spoliation instruction.

G. Motion for New Trial – Weight of the Evidence – Standard

State v. Scalise, 660 N.W.2d 58 (Iowa 2003)

In ruling that the jury verdict of guilt was supported by the evidence, the district court utilizes the wrong standard for evaluating a motion for new trial under Iowa R. Crim. P. 2.24(2)(b) on the ground that the jury verdict was against the weight of the evidence.

– District Court Judge Staskal did note that he “cannot in this case say that the jury's verdict is contrary to the bulk of the evidence. . .” This would appear to be close to the correct standard. Justice Lavorato also explained that the district court has a duty to conduct an independent evaluation of the case, taking into account the credibility of witnesses, and that this was not done in Ms. Scalise’s trial. The case was remanded to permit the district court to make the required inquiry.

– See *State v. Reeves*, under Appeal and Postconviction Review, below, for a discussion of the appellate standard of reviewing rulings on motions for new trial challenging the weight of the evidence

V. Sentencing

A. Procedures – Reasons for Sentences

1. Consecutive Sentences

State v. Evans, 672 N.W.2d 328 (Iowa 2003) (Evans I)

Defendant’s prior criminal history, along with his prior acts of harassment and indecent exposure, together with the district court’s belief that consecutive sentences would afford the greatest potential for rehabilitation, are sufficient reasons for the imposition of consecutive sentences.

State v. Evans, 671N.W.2d 720 (Iowa 2003) (Evans II)

The district court’s recognition of the defendant’s recidivism, apparent lack of remorse, and the fact that the defendant “just doesn’t seem to get it – that this is about scaring people” were sufficient reasons for the imposition of consecutive sentences.

2. Fixed Sentencing Policy

State v. Liddell, 672 N.W.2d 805 (Iowa 2003)

The district court's statement, in revoking the defendant's deferred judgment and imposing sentence after the defendant failed to make required restitution payments, that "I don't have a choice other than to revoke your deferred judgment and sentence" is not a statement by the district court that it had no discretion in sentencing.

– I don't know. That's what it sounds like to me.

B. Particular Sentences

1. Habitual Offenders – Proving Prior Convictions

State v. Jordan, 663 N.W.2d 877 (Iowa 2003)

While the mere identity of names is insufficient to establish that the defendant is the same individual convicted of prior offenses used to establish habitual offender status, a unique first name or the fact that defendant has the same prison identification number as the other individual may render evidence sufficient to prove the charge.

2. Credit for Time Served

State v. Trader, 661 N.W.2d 154 (Iowa 2003)

Where defendant serves time in a community correctional facility and that person's probation subsequently is revoked, the defendant is entitled under Iowa Code § 907.3(3) to credit on his sentence for time served in the facility.

State v. Eckrich, 670 N.W.2d 647 (IowaApp.2003)

The provision of Iowa Code § 903A.5 that the sentencing court must give the defendant credit for time served in custody prior to his or her conviction becoming final applies only to sentences to the Iowa Department of Corrections, and does not necessarily apply where the defendant is sentenced to a term in the county jail.

3. Restitution -- Credit for Payments Made by Others

State v. Paxton, 674 N.W.2d 106 (Iowa 2004)

Because an employer who is vicariously liable for the defendant's wrongdoing and makes payments to compensate the defendant's victim is viewed to be the same party as the defendant, the defendant's restitution debt is reduced *pro tanto* [dollar for dollar] by the amount of the payment made by the employer.

– The State argued that rewarding Paxton in this manner frustrates the objective of restitution of "to instill responsibility in offenders." If this rationale controlled, Justice Ternus responds, there would be no credit for payments made by insurance companies. The State advances an argument that, because restitution obligations are based upon civil standards, the comparative fault provisions of Iowa Code § 668 should operate to award Paxton only a proportional credit. Cases of fraud are not covered under § 668, the Court finds. Even if this were not true, comparative fault would not reduce Paxton's credit because his responsibility together with his employer's constitutes a "single fault."

4. Probation Fee – Refund of Fee

State v. Pickett, 671 N.W.2d 866 (Iowa 2003)

The district court does not have the authority to order the refund of an Iowa Code § 914.25 probation enrollment fee to a defendant whose probation is terminated after the defendant fails to comply with its terms.

– The first question was whether the defendant was under the supervision of the Department of Corrections for purposes of the application of § 914.25. The Court found that, even with self-supervised informal probation, the defendant was supervised by the DOC. In imposing probation, the district court does not have authority to waive the fee. Only the Department of Corrections has that authority. Without explicit statutory authority, the court cannot order the Department of Corrections to refund a fee that it did not waive.

5. Limitations Periods

In the matter of the seizure of property for forfeiture of Williams, _____ N.W.2d _____ (Iowa 2004)

The actual seizure of property accompanied by notice that the property is seized for forfeiture constitute seizure putting into play the 90-day limitation of Iowa Code § 809A.8(1)(a)(1) and, even within the five-year limitation period of Iowa Code § 809A.20, the State may not re-seize the property outside of the 90-day period by serving a new notice of forfeiture.

– In what appears to be his first published criminal opinion, Justice Wiggins has tackled an interesting and somewhat complex question. Forfeitures are not favored under Iowa law, he points out, and the statutory time limitations are mandatory. The State originally seized Ms. Williams property in 1999. The Court of Appeals reversed the ultimate forfeiture, because the case was not brought to hearing within 90 days of seizure. The Des Moines County Attorney then "re-seized" the property in 2002. But this too, Justice Wiggins observed, was outside the limitation period.

The Court affirmed the denial of sanctions against the State, however, by finding that the County Attorney did conduct reasonable inquiry into the state of the law at the time it filed the second notice of forfeiture.

6. D.N.A. Profiling

State v. Shearon, 660 N.W.2d 52 (Iowa 2003)

While under Iowa Code § 901.5(8A)(a), D.N.A. profiling is appropriate after conviction of certain offenses enumerated in Iowa Code § 13.10, the court has authority under Iowa Code § 901.5(8A)(b) to order profiling following conviction of other, unenumerated offenses, where circumstances make testing appropriate.

C. Reconsideration – Imposition of Higher Sentence

State v. Trader, 661 N.W.2d 154 (Iowa 2003)

The district court errs in reconsidering the defendant's sentence for the aggravated misdemeanor of third degree burglary of a motor vehicle and imposing a judgment finding the violation to be a class "D" felony due to the defendant's prior conviction, where the State did not file a trial information alleging the prior conviction.

– In the Iowa State system, any provision that increases the level of a defendant's offense due to a prior conviction must be alleged in an information. Iowa R.Crim.P. 2.6(5)

D. Resentencing After Appellate Reversal – Judicial Vindictiveness

State v. Mitchell, 670 N.W.2d 416 (Iowa 2003)

The presumption of vindictiveness that arises where a defendant receives a higher sentence after exercising his or her right to appeal and obtaining a new trial or a resentencing does not apply where the defendant is resentenced by a different judge, although actual vindictiveness might be proven.

VI. Appeal and Collateral Review

A. Appeal and Error

1. Jurisdiction of the District Court During Appeal

State v. Mallett, _____ N.W.2d _____ (Iowa 2004)

The district court has no jurisdiction to rule, during the pendency of the defendant's direct appeal, upon a motion for new trial arguing that the defendant was never arraigned on the charges of which he was convicted.

– The three circumstances in which the district court has jurisdiction to consider a case on appeal are (1) where the parties consent to dismissal of the appeal, (2) where the appeals court grants a motion for limited remand, or (3) on matters that are collateral to the actual case (i.e., matters concerning bond, etc.). None of these circumstances were present in Mr. Mallett's case.

2. Appealable Issues – Final Judgment – Deferred Judgment

State v. Loye, 670 N.W.2d 141 (Iowa 2003)

A proceeding in which a defendant enters a plea of guilty and is admitted into a drug court program under which no judgment will be entered if the defendant successfully completes the program, and under which the defendant will automatically be sentenced to consecutive terms on all counts if he or she fails the program, is equivalent to a deferred judgment, and the time for appeal begins running on the date that the defendant is discharged from the program and the consecutive sentence is imposed.

3. Preservation of Error

a. Preservation – Changes in the Law

State v. Davis, 671 N.W.2d 28 (Iowa 2003)

As trial counsel is not expected to be a crystal ball gazer, counsel is not ineffective in failing to argue at trial that his client's action of reaching inside a vehicle to strike his victim was not burglary, where under case law existing at the time of trial such actions constituted burglary, although a Supreme Court decision subsequent to trial suggested that it might not be.

– This case does not set real well. In *State v. Keopasaeuth* (2003), decided after trial, the Court split 3-3 on the question of whether reaching inside a vehicle is burglary. Previous decisions were unanimous. *Keopasaeuth* raises the question as to whether a majority of the Court would follow the prior precedent. In the unanimous decision in this case, Justice Larson leaves us guessing. If, in fact, it is no longer burglary to strike a person through an open window, is Mr. Davis out of luck simply because his attorney did not anticipate the change? There are circumstances in which error can be corrected without a trial objection. An illegal sentence can be corrected at any time, and the court's lack of jurisdiction may be challenged at any time. Shouldn't the same rule apply to defendants who are convicted of behavior that is not the offense? Doesn't the court lack jurisdiction to enter judgment against a defendant who does not commit the offense?

b. Waiver

1) In General

State v. Evans, 671N.W.2d 720 (Iowa 2003) (Evans II)

Defendant's failure to raise a First Amendment challenge at the trial court level precludes its consideration on appeal

2) Invited Error

State v. Mitchell, 650 N.W.2d 619 (Iowa 2003)

Even on retrial following a Supreme Court determination that it was error to admit, in defendant's trial for child sexual abuse, evidence of his assaults on other victims, when the defendant alleges a conspiracy between the victim's mother and law enforcement to fabricate charges against him he opens the door for the State to elicit testimony that the mother was communicating with law enforcement in the investigation of the other charges.

– **Nice work, John Mitchell!!** Your attorneys were successful in winning you a new trial, and you decide to try your hand at practicing a little law and representing yourself at the retrial, in which you open the door to the State bringing in the very same evidence the Supreme Court had excluded (without objection, by the way), and you manage to earn yourself a 75-year sentence, in place of the 50-year sentence you received in your first trial.

3) Ineffective Assistance of Counsel

Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003)

Allegations of ineffective assistance of counsel in a Federal criminal trial may, and in most cases should, be raised for the first time in a 28 U.S.C. § 2255 petition for Habeas Corpus, and need not be asserted on direct appeal.

– In his unanimous opinion, Justice Kennedy notes that this holding is shared by

courts in a growing number of states. Unfortunately, Iowa is not among them. In its tragic decision in *Ledezma v. State* (2001), the Iowa Supreme Court declared that an experienced appellate defender was ineffective in advising her client to do just what the United States Supreme Court holds in *Massaro* should be done. Under *Ledezma*, counsel on direct appeal must waste valuable judicial resources and risk a premature adjudication of what might be determined, following an evidentiary hearing, to be a valid claim, by "preserving" claims of ineffective assistance of counsel on direct appeal. Justice Kennedy's opinion in *Massaro* sets out all the reasons why this holding is wrong:

> The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote these objectives.
>
> As Judge Easterbrook has noted, "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time. . ." Applying the usual procedural-default rule to ineffective-assistance claims would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim. Furthermore, the issue would be raised for the first time in a forum not best suited to assess those facts. This is so even if the record contains some indication of deficiencies in counsel's performance. The better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion in the district court under §2255. We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under §2255, whether or not the petitioner could have raised the claim on direct appeal.
>
> In light of the way our system has developed, in most cases a

motion brought under §2255 is preferable to direct appeal for deciding claims of ineffective-assistance. When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the Strickland analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance. . . In addition, the §2255 motion often will be ruled upon by the same district judge who presided at trial. The judge, having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial.

The Second Circuit's rule creates inefficiencies for courts and counsel, both on direct appeal and in the collateral proceeding. On direct appeal it puts counsel into an awkward position vis-à-vis trial counsel. Appellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help

appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence.

Subjecting ineffective-assistance claims to the usual cause-and-prejudice rule also would create perverse incentives for counsel on direct appeal. To ensure that a potential ineffective assistance claim is not waived–and to avoid incurring a claim of ineffective counsel at the appellate stage–counsel would be pressured to bring claims of ineffective trial counsel, regardless of merit.

Even meritorious claims would fail when brought on direct appeal if the trial record were inadequate to support them. Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the district court on collateral review. . . This concern is far from speculative. The Court of Appeals for the Second Circuit, in light of its rule applying procedural default to ineffective-assistance claims, has urged counsel to "err on the side of inclusion on direct appeal. . . "

On collateral review, the Second Circuit's rule would cause additional inefficiencies. Under that rule a court on collateral review must determine whether appellate counsel is "new." Questions may arise, for example, about whether a defendant has retained new appellate counsel when different lawyers in the same law office handle trial and appeal. The habeas court also must engage in a painstaking review of the trial record solely to determine if it was sufficient to support the ineffectiveness claim and thus whether it should have been brought on direct appeal. A clear rule allowing these claims to be brought in a proceeding under §2255, by contrast, will eliminate these requirements. Although we could "require the parties and the district judges to search for needles in haystacks–to seek out the rare claim thatcould have been raised on direct appeal, and deem it waived, . . ."–we do not see the wisdom in requiring a court to spend time on exercises that, in most instances, will produce no benefit. It is a better use of judicial resources to allow the district court on collateral review to turn at once to the merits.

The most to be said for the rule in the Second Circuit is that it

> will speed resolution of some ineffective-assistance claims. For the reasons discussed, however, we think few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution. And the benefits of the Second Circuit's rule in those rare instances are outweighed by the increased judicial burden the rule would impose in many other cases, where a district court on collateral review would be forced to conduct the cause-and-prejudice analysis before turning to the merits. The Second Circuit's rule, moreover, does not produce the benefits of other rules requiring claims to be raised at the earliest opportunity–such as the contemporaneous objection rule–because here, raising the claim on direct appeal does not permit the trial court to avoid the potential error in the first place. (Authorities omitted).

Although not bound by a Federal interpretation of Federal procedure, perhaps the Iowa Supreme Court will study Justice Kennedy's argument for a better rule, and rethink its holdings in cases such as *Ledezma*.

4) Waiver of Appeal

State v. Loye, 670 N.W.2d 141 (Iowa 2003)

While it is not improper to negotiate a plea agreement in which the defendant waives his or her right to appeal, such a waiver must be express in the plea agreement, and is valid only if it is voluntary, knowing and intelligent.

– In taking Ms. Loye's plea and accepting her into drug court, the judge made a comment that she was losing her right to appeal by doing so. This is not necessarily so, Justice Ternus responds. The State requested permission to expand the record with the written waiver of appeal executed by Ms. Loye upon her entry into the program. Even this would not be enough, Justice Ternus explains, absent some record that the waiver was knowing, intelligent and involuntary. Furthermore, any evidence of plea agreements must be placed in the record *at the time the plea is offered.*

4. Standard of Review

a. Guilty Plea Procedures

State v. Loye, 670 N.W.2d 141 (Iowa 2003)

Defendant's argument that the district court failed to engage in the required guilty plea colloquy implicates constitutional due process, and the appellate court thus reviews the claim *de novo*.

b. Harmless Error

State v. Sullivan, _____ N.W.2d _____ (Iowa 2004)

In cases of non-constitutional error in the admission of evidence, Iowa R.Evid. 5.103(a) provides that it is presumed that the substantive rights of the opposing party have been effected (and thus prejudice is suffered) "unless the record affirmatively establishes otherwise."

– In effect, Rule 5.103(a) codified the standard that existed prior to its adoption. Justice Lavorato went on to explain the interplay between Rule 5.103(a) and Iowa R.Evid. 5.403. The latter determines the *admissibility* of evidence by balancing prejudice against probative value. The Court then applies the substantive rights analysis of Rule 5.103(a) to determine whether error was reversible.

c. Violation of International Treaties

State v. Buenaventura, 660 N.W.2d 38 (Iowa 2003)

The appellate court reviews *de novo* allegations of violations of international treaties.

d. Evidentiary Foundation

State v. Hornick, 672 N.W.2d 836 (Iowa 2003)

While the standard of review of questions involving the sufficiency of evidentiary foundation is on abuse of discretion, where the facts are not in dispute and the foundational determination is based solely on an interpretation of law, review is for legal error.

e. New Trial Motion

State v. Reeves, 670 N.W.2d 199 (Iowa 2003)

In reviewing the grant by the district court of a new trial on the ground that defendant's conviction is against the weight of the evidence, the appellate court merely determines whether the ruling was an abuse of the court's broad discretion, and does not conduct its own balancing of the weight of the evidence.

– This is the third trip up for Valerie Reeves and her attorney, Jon Kinnamon. Her 1998 conviction of murder in the second degree was remanded by the Court of Appeals with instructions that the district court evaluate her new trial motion in light of the *State v. Ellis* (1998) weight-of-the-evidence standard, and not the standard applied to motions for judgment of acquittal. Then, in *State v. Reeves* (2001), the Supreme Court reversed the first ruling granting a new trial, on the ground that the district court erroneously held that the inference of malice from the use of a firearm is proper only where the defendant had an opportunity to deliberate. The district court then granted new trial on the grounds that the weight of the evidence supported a finding that Reeves was provoked and killed the victim without malice aforethought.[11] Because the balancing conducted by the court was within its discretion, Justice Lavorato ruled, the ruling would not be reversed.[12]

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[11]In one of its signature moves certain to add a little sting to an otherwise satisfying victory, the Court suggests that the evidence might also support a theory of self-defense, which would result in Reeves' acquittal. Self-defense was not raised in the defendant's new trial motion, however, and the Court does not engage in an independent weighing of the evidence.

[12]The 2003 decision in *Reeves* came on further review of a 2-1 Court of Appeals decision vacating the district court's ruling.

f. Forfeiture

In the matter of the seizure of property for forfeiture of Williams, _____ N.W.2d _____ (Iowa 2004)

Questions regarding the forfeiture of property are reviewed for errors of law.

– District court rulings on requests for sanctions in forfeiture proceedings are reviewed for abuse of discretion.

B. Federal Habeas Corpus

1. Extent of Review – State Court Application of Federal Law

Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)

In finding that the application to a Habeas Corpus petitioner of the California "Three Strikes" law in which the petitioner was sentenced to two consecutive sentences of 25 years to life did not violate the Eighth Amendment proscription against disproportionate sentences, the State Supreme Court did not render a decision that was contrary to established federal law, or an unreasonable application thereof.

– The controversy in *Andrade* involves three prior Supreme Court decisions that may appear to conflict. A narrow principal that sentences in non-capital cases may violate the Eighth Amendment if they are "grossly disproportionate" to the offenses for which they are imposed is recognized in *Harmelin v. Michigan* (1991). The California Supreme Court followed *Rummel v. Estelle* (1980), in which a sentence to life imprisonment with the possibility of parole did not violate the Eighth Amendment, in affirming Andrade's sentence of 50 to life for staling about $160 in videotapes, where he had a prior criminal history that included three residential burglaries. A life sentence for habitual criminal behavior was held to be constitutionally disproportionate in *Solem v. Helm* (1983), but in that case there was no possibility of parole. Each of these decisions retains effect, Justice O'Connor declared in the *Andrade* majority, and are useful in evaluating claims of gross disproportionality.

The Ninth Circuit found that the State court committed clear error in applying the established

precedent to Andrade's case. In reversing the Circuit Court, Justice O'Connor emphasized that the Habeas standard following enactment of the Anti-terrorism and Effective Death Penalty Act is not whether the Federal Court disagrees with the State Court's findings, but whether they represented an objectively unreasonable application of Federal law.

Writing for a four-justice dissent, Justice Souter argued that the circumstances of Andrade's case were functionally indistinguishable from those in *Solem*, as a sentence of no less than fifty years is, for all purposes, a life sentence for a 37-year-old defendant. Furthermore, any penal objectives that support a minimum 25-year sentence for a recidivist who commits a minor offense do not justify a 50-year sentence for two such offenses.

Price v. Vincent, 538 U.S. 634, 123 S.Ct. 1848, 155 L.Ed.2d. 877 (2003)

Where a State Supreme Court did not unreasonably interpret clearly-established Federal case law in finding that the state trial court's statement, "I think that second degree murder is the appropriate charge as to the defendants," did not terminate trial for first degree murder for Double Jeopardy purposes, Habeas Corpus relief is inappropriate.

– Federal Habeas Corpus may be used only to challenge a state court ruling that "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." It is not enough for the Habeas Court to believe the State court wrongly decided the issue in view of Federal precedent. To prevail the applicant must show that the application of precedent was objectively unreasonable.

Yarborough v. Gentry, _____ U.S. _____, 124 S.Ct.1, 157 L.Ed.2d 1 (2003)(per curiam)

State appellate court finding that trial counsel was not ineffective in delivering a closing argument that focused on a few issues without mentioning others, where he appeared to demean his client and where he did not urge the jury to acquit the defendant was not an unreasonable interpretation of *Strickland v. Washington* justifying reversal in a Habeas proceeding.

Mitchell v. Esparza, _____ U.S. _____, 124 S.Ct.7, 157 L.Ed.2d 263 (2003)(per curiam)

Although the defendant was not charged in an indictment with being the principal offender (the factor that makes the defendant eligible for the death penalty) in the robbery murder of which he was convicted, the State court finding that the defendant was the principal was harmless because the defendant was the only offender involved in the crime was not an unreasonable application of Federal Eighth Amendment precedent.

– The Sixth Circuit held that the district court's failure to instruct the jury on an element of the offense could not be subject to harmless error analysis. Justice Per Curiam explained that while the failure to instruct the jury that it must find the defendant guilty beyond reasonable doubt may not be harmless, the absence of a particular element of the offense may.

2. Grounds for Relief – Ineffective Assistance

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)

State appellate court applied *Strickland v. Washington* (1984) in an objectively unreasonable manner in its finding that the decision of defense attorneys in the penalty phase of a capital murder case not to perform a complete life history examination on defendant, but to focus instead on a position that the defendant did not directly kill the victim, was a valid strategic decision.

– This is one case in which it appears that Justice Scalia's dissent, joined only by Justice Thomas, appears to reflect more accurately the current state of the law. While appellate courts almost invariably defer to the professed strategic rationalizations of trial counsel, Justice O'Connor evaluates counsel's performance in *Wiggins* against the following standard in the language of *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Counsel's decision to rely during the sentencing phase of Mr. Wiggins' trial upon denial of

responsibility rather than upon reference to his very disturbed childhood was challengeable because it was a strategy adopted without a thorough investigation of law and facts. Counsel did not discharge their duty to make reasonable investigations, but made a cursory reference at sentencing to very general references in the presentence report and in a Department of Social Services Report to the defendant's disadvantaged background. In drawing different conclusions from the record, Justice O'Connor concludes, the Maryland Court of Appeals applied *Strickland* in an objectively unreasonable manner.

Justice Scalia takes issue with each of Justice O'Connor's findings, including her determination that Wiggins suffered *Strickland* prejudice. To meet this standard, he points out, Wiggins would have to demonstrate both (1) that, armed with more detailed knowledge of Wiggins' past, trial counsel would have altered their strategy and focused upon a theory of mitigation, and (2) that, if counsel did offer the additional information to the jury, and if such evidence were admissible (another point Justice Scalia disputes), the jury would not have sentenced Mr. Wiggins to death. He concludes with the comment that *Wiggins* "is extraordinary – even for our 'death is different' jurisprudence." Although not expressly stated in the majority opinion, it is probably correct that the majority reviewed this case more closely because it is a capital case.

3. Procedures

a. Exhaustion of State Remedies

Banks v. Dretke, _____ U.S. _____, 124 S.Ct. 1256, _____ L.Ed.2d _____ (2004)

The State's representation to the Habeas Corpus petitioner prior to his original capital murder trial that its file was open, and thus no formal motion for discovery was necessary, constitutes cause for failure to argue in lower proceedings that the State failed to disclose that a key prosecution was a paid informant and, where the witness' testimony was a crucial element of the State's case against the petitioner to the extent that a reasonable probability exists that the jury verdict's might have been different had the witness' status been disclosed,

the petitioner demonstrates prejudice.

– Banks' argument was that the State failed to disclose exculpatory evidence, under *Brady v. Maryland*. A *Brady* claim is established where (1) the Government is in possession of evidence that is favorable to the defense, (2) the evidence is suppressed, either intentionally or unintentionally, and (3) the defense is prejudiced as a result. The standard against which a Habeas Corpus petitioner is entitled to an evidentiary hearing to raise claims not advanced below consists of two elements similar to the last two prongs of the *Brady* test – the defendant must show (1) cause for failure to exhaust remedies, and (2) resulting prejudice. *Keeney v. Tamayo-Reyes* (1992).

This case, Justice Ginsburg wrote, is nearly identical to *Strickler v. Greene* (1999), in which a false representation by the Government that all of the discovery was being provided generated cause for a subsequent Habeas factual hearing. Justice Ginsburg rejected the State of Texas' argument that Banks somehow had a duty to locate the warrant during his state postconviction hearing and to investigate the possibility that the witness was a paid informant, writing that there is no support in precedent for a rule that "defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." She rejected the notion that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," in favor of a presumption that government officials "properly discharge their official duties." Nor did Banks' attorney fail to exhaust state remedies when he failed to request an appointed investigator for the state postconviction proceeding, when there was little evidentiary support for such a request. Finally, the State was not entitled to claim that the identity of an informant, called as a trial witness, was privileged information. The identity of a non-

testifying informant in possession of exculpatory information was held not to be privileged in *Roviaro v. United States* (1957). Justice Ginsburg refused to recognize a distinction for cases in which the informant testified for the Government.

It is important to note that the facts of *Banks* preceded passage of the Anti-Terrorism and Effective Death Penalty Act, so its holdings may be limited, to some degree, to pre-AEDPA cases.

b. Original Petition – Judicial Reclassification

Castro v. United States, _____ U.S. _____, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003)
The district court may not engage in the practice of reclassifying a mistakenly-drafted request for relief (in this case a Rule 33 motion for new trial) as a 28 U.S.C. § 2255 petition for Habeas Corpus relief without first informing the petitioner of its intention to reclassify the filing, giving the petitioner a chance to object and advising the petitioner of consequences of reclassification, such as its effect of barring a second or subsequent Habeas petition and, if such advice is not given, the reclassified motion may not be considered a first Habeas petition for the purpose of barring a second one.

– The lower court found that Castro's 1997 Habeas petition was barred as a second or subsequent Habeas petition, because the 1994 Rule 33 motion had been reclassified *sua sponte* as a Habeas Corpus petition. The Eleventh Circuit disagreed, finding that the 1997 petition was Castro's first. The Government first argued that under 28 U.S.C. § 2244(b)(3)(E) certiorari is unavailable to challenge the allowance or disallowance of a second Habeas action. This doesn't apply, Justice Breyer responds, because the Eleventh Circuit did not allow or disallow a second petition, as the 1997 petition was found to be the first. The reclassification of the 1994 petition should be the law of the case, the Government argued, because Castro never appealed. But this is the point, Breyer counters. Castro never appealed, because he was never told of the harm that reclassification could do down the line.

In a special concurrence joined by Justice Thomas, Justice Scalia questioned why reclassification is ever, in most cases, appropriate. Castro decided to advance his claim under Rule 33. If this was procedurally wrong, the worst that could happen is that the motion would be dismissed, and Castro would be free, in any case, to litigate his claims in Habeas.

c. Preservation of Error – Specification of Constitutional Grounds

Baldwin v. Reese, 541U.S. _____, 124 S.Ct. 1347, _____ L.Ed.2d _____ (2004)

A Habeas petitioner who in state court proceedings raised an issue of ineffective assistance of counsel as a matter of Federal constitutional law but, in establishing cause for failure to preserve the issue on direct state appeal, argued that appellate counsel was ineffective, without claiming that appellate counsel's ineffectiveness violated the Federal Constitution, failed to state a Federal claim of ineffective assistance which could be litigated in the Federal Habeas proceeding.

– Oh, come on, Justice Breyer, it's a joke, right? No, he's serious. Well, that's disappointing. Of *course*, Baldwin was arguing the Federal Constitution. Of the nine of them, Justice Stevens is the only one who got it right. But why does the Court even hear this case? Because it's out of the Ninth Circuit, that's why. Even if you make bad law, it's still a chance to reverse the Ninth Circuit.

d. "Pending case"

Woodford v. Garceau, 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003)

For the purpose of determining whether a Federal Habeas Corpus petition was pending prior to the implementation of Antiterrorism and Effective Death Penalty Act limitations, a case becomes pending when the petition is filed, and not when application is made for appointment of counsel or for stay of execution.

e. Certificate of Appealability

Banks v. Dretke, _____ U.S. _____, 124 S.Ct. 1256, _____ L.Ed.2d _____ (2004)

The question of whether Fed.R.Civ.P. 15(b) (providing that issues not proper pled may be tried by the consent of the parties) applies in pre-Anti-Terrorism and Effective Death Penalty Act Habeas Corpus proceedings is one upon which reasonable jurists may disagree, and thus the District Court and the Court of Appeals improperly denied a certificate of appealability to a Habeas Corpus petitioner whose factual claim, apparently litigated in the district court by the consent of the parties, was found to have been waived because it was not properly pleaded in the original petition.

C. Federal Appeal – Makeup of the Appellate Panel

Nguyen v. United States, 539 U.S. 69, 123 S.Ct. 2130, 156 L.Ed.2d 64 (2003)

A three-judge circuit court panel must consist only of judges appointed under Article III of the United States Constitution, and the fact that a panel includes a territorial judge appointed under Article IV must result in vacation of the court's action.

– This 5-4 decision was an exercise of the Court's supervisory powers. The petitioners' challenge was not Constitutional, based upon Articles III and IV, but rather on the ground that Chapter 5 of Title 8 of the United States Code permits only judges who enjoy Article III protection (service for life, etc.) to sit on Federal appeals. Writing for the unlikely alliance of Justices Scalia, Breyer, Ginsburg and himself, Chief Justice Rehnquist stressed that the defendants knew during their appeals about the assignment of the chief district judge of the Mariana Islands in one case and a district court judge from Guam in the other. Nor could the deficiency be found to constitute plain error, as there was no indication that the error affected the integrity of the judicial proceedings. Justice Stevens appears to respond in his majority opinion that waiver and plain error analysis do not apply where the court was constituted improperly.

VII. Prisons

A. Prison Legal Assistance

Walters v. Kautzky, _____ N.W.2d _____ (Iowa 2004)

The contract between the State Public Defender and the Iowa Department of Corrections providing for an attorney in the State correctional institutions to assist inmates in preparing certain applications for relief is, by its express terms, a private agreement between the Public Defender and the Department of Corrections with no third-party beneficiaries, so the district court does not err in granting summary judgment in lawsuits filed by prison inmates claiming they were denied benefits under the contract.

– See Constitutional Issues, Fourteenth Amendment, Access to the Courts, for a discussion of the *Walters* holding concerning the ability of Iowa inmates to sue prison officials on the ground that they have been denied access to the courts.

VIII. Collateral Issues

A. 42 U.S.C. § 1983 Civil rights lawsuits

1. Exhaustion of Remedies

Muhammad v. Close, _____ U.S. _____, 124 S.Ct. 1303, _____ L.Ed.2d _____ (2004)

The rule of *Heck v. Humprhey* (1994), that prisoners with claims implicating both civil rights violations (remediable in civil actions under 42 U.S.C. § 1983) and the validity of their sentences (for which the property remedy lies in Federal Habeas Corpus) must successfully obtain Habeas relief before proceeding with the § 1983 suit, does not apply where there is no real question about the validity of the petitioner's sentence, and thus exhaustion is not required.

2. Qualified Immunity

Groh v. Ramirez, _____ U.S. _____, 124 S.Ct. 1284, _____ L.Ed.2d _____ (2004)

A law enforcement officer who drafts and executes a search warrant is expected to be familiar with its contents and to assure that the warrant is constitutional on its face, so a case agent who prepares a search warrant that does not describe with particularity the items to be seized during a search (even where the items are listed in the warrant affidavit, but not incorporated by reference) is not entitled to qualified immunity from suit for an unlawful search.

– In one of two dissents to the five-justice majority, Justice Thomas characterized the holding as imposing a “proofreading” duty upon police.

B. Attorney Fee Claims

State Public Defender v. Iowa District Court for Johnson County, 663 N.W.2d.413 (Iowa 2003)

Language in Iowa Code §§ 13A.4(4)(d) and 13A.4(5) that challenges to actions of the State Public Defender concerning attorney fee claims must be filed within 20 and 30 days of the actions is an expression of the “manifest intent” of the legislature that challenges not meeting the statutory deadlines may not be entertained.

C. Legal Malpractice – Limitations

Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003)

Because a criminal defendant may succeed in a malpractice suit against his former attorney only after he receives judicial relief from his conviction, the limitation period begins to run from that point, and not the point at which the defendant was first aware of the basis of the malpractice claim.

– Justice Cady recognized the divergence among jurisdictions in determining when a defendant has a malpractice claim. In some jurisdictions, malpractice is “discovered” when the defendant first becomes aware of its basis. At the other end of the spectrum are jurisdictions that require not only that the defendant’s conviction be reversed, but that the defendant subsequently be adjudicated not guilty. In *Trobaugh*, Justice Cady selected the middle ground. The import of the holding is that Charles Trobaugh is able to pursue is claim

that trial counsel committed malpractice in being both the Assistant County Attorney who approved charges against him and then, after going to work for the State Public Defender, the attorney who represented him.