WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2015

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Dane
Grant
La Crosse
Milwaukee
Outagamie
Racine
Waushara

TUESDAY, MARCH 3, 2015

9:45 a.m.	13AP1345-CR	-	State v. Andrew M. Obriecht
10:45 a.m.	13AP679	-	MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust
1:30 p.m.	12AP2782-CR	-	State v. Andre M. Chamblis

WEDNESDAY, MARCH 4, 2015

9:45 a.m.	13AP430-CR	-	State v. Patrick I. Hogan
10:45 a.m.	13AP1532	-	Ash Park, LLC v. Alexander & Bishop, Ltd.
1:30 p.m.	13AP1715	-	The Journal Times v. Racine Police and Fire Commissioners

TUESDAY, MARCH 10, 2015

9:45 a.m.	13AP557-CR	-	State v. Corey R. Kucharski
10:45 a.m.	13AP1023	-	Adam R. Mayhugh v. State of Wisconsin
1:30 p.m.	{13AP1753-CR	-	State v. Rogelio Guarnero
	{13AP1754-CR	-	State v. Rogelio Guarnero

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 3, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Dane County Circuit Court decision, Judge William E. Hanrahan, presiding.

2013AP1345-CR State v. Obriecht

This case examines how sentence credit is to be applied when a defendant has been re-incarcerated following the revocation of his or her parole. More specifically, the Supreme Court reviews whether presentence incarceration credit may be applied to reduce a sentence's potential term of parole supervision rather than a period of re-incarceration.

Some background: In August 2001, Andrew M. Obriecht was sentenced to an indeterminate seven-year prison term for a crime committed prior to the enactment of the Truth-in-Sentencing statutes. Due to an error, Obriecht was not given credit at that time for 107 days he had spent in custody prior to sentencing.

In March 2011 Obriecht was released on parole, which was subsequently revoked. In January 2012 Obriecht received a reincarceration sentence less than the total amount of time remaining on the sentence. If Obriecht successfully serves the entire amount of reincarceration time, he will still have to serve some period of parole before his seven-year sentence is fully completed.

In August 2012, representing himself in court, Obriecht filed a motion asking for the 107 days of sentence credit he had never been granted. The circuit court agreed that Obriecht was entitled to the 107 days of sentence credit, and it amended the judgment of conviction to that effect in February 2013.

In March 2013 the state Department of Corrections (DOC) wrote a letter to the circuit court asking for clarification of the amended judgment with respect to the manner in which the sentence credit was to be applied. The DOC informed the court that it interpreted Wis. Stat. § 302.11(7) to mean that sentence credit awarded to an offender who is serving a reincarceration sentence is not applied to the period of reincarceration, but rather to the offender"s total remaining sentence. The circuit court agreed, meaning the sentence credit would reduce the period of parole that will occur after Obriecht completes the reincarceration sentence. The circuit court also denied Obreicht's motion for reconsideration, and the Court of Appeals affirmed in a published opinion.

The Court of Appeals concluded that the question of how to apply the sentence credit at this late date (when Obriecht's parole had been revoked and he was serving a period of reincarceration) was answered by the plain language of Wis. Stat. § 302.11(7)(b). Specifically, the Court of Appeals pointed to the language in the first sentence of that subsection that an offender whose parole has been revoked "shall be incarcerated for the entire period of time determined by the reviewing authority [here the Division of Hearing and Appeals (DHA)]."

The Office of the State Public Defender, which began representing Obreicht after the Court of Appeals" initial decision, asserts that presentence incarceration credit is always to be applied to the offender's term of incarceration under his/her sentence. Contrary to the Court of Appeals" decision here, the State Public Defender notes that some lower courts have indeed

ordered the DOC to apply presentence credit to a period of reincarceration. See, e.g., State v. Waugh, Dane County Case No. 02CF1130.

Obriecht contends that the circuit court and the Court of Appeals in his case (1) failed to consider the effect of the sentence credit statute, Wis. Stat. § 973.155, and (2) misread Wis. Stat. § 302.11(7)(am) and (b).

Obriecht also contends that the Court of Appeals" plain meaning interpretation of Wis. Stat. § 302.11(7) is inconsistent with the actual language of that section and ignores the context of the sentence in subsection (b) on which it primarily relies. See State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (plain meaning of a statute includes its context).

The state contends that Obriecht will not serve more time than for which he was sentenced because his total sentence was indeed reduced by the 107 days he spent in custody prior to sentencing. Thus, the state disputes Obriecht's claim that applying his sentence credit to the end of his total sentence will somehow enlarge his sentence.

The state also contends, on the other hand, that applying Obriecht's sentence credit to the period of reincarceration would mean that Obriecht would not be reincarcerated for the entire period determined by the DHA, which would violate the plain language of the first sentence of Wis. Stat. § 302.11(7)(b).

A decision by the Supreme Court is expected to have a statewide effect and clarify how sentence credits are applied in some cases.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 3, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an Outagamie County Circuit Court decision, Judge Michael W. Gage, presiding.

2013AP679 MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust

This real estate case examines issues related to the proper legal rules that apply to a right of first refusal.

Some background: The property at issue is farmland located in Outagamie County. In 1998, Tidy-View entered into a contract with Jean and Donald Fox [(subsequently the Donald P. Fox Family Trust and the Jean A. Fox Revocable Living Trust (the Foxes)], owners of the land, which gave Tidy-View two rights in exchange for about $4,000: a right of first refusal to purchase the property, and a right of first refusal to lease the property. The right of first refusal is "binding upon the respective parties, their heirs, personal representatives, successors in interest and assigns."

Tidy-View began leasing the property in 2001. In 2007, the Foxes signed a five-year lease extension with Tidy-View scheduled to expire in January 2012. In 2011, the Fox twice notified Tidy-View that its lease agreement would soon expire, and requested a bid to lease for property for the 2012 crop year. The Foxes also solicited offers from other potential lessees. The Foxes received two. The first offer, from Tinedale Cropping, was not acceptable to the Foxes, but the second, from Kavanaugh Farms, was. The Foxes presented Tidy-View with the Kavanaugh offer.

Tidy-View filed suit arguing it was permitted to lease the property under the Tinedale offer's terms. On March 6, 2012, Jean Fox notified Tidy-View that she was terminating the right of first refusal in its entirety, claiming it was unenforceable for vagueness as to its term. The Foxes then sought summary judgment, arguing the right of first refusal was void upon Jean Fox's notice of termination.

The circuit court opined that a contract must have "some reasonable delineation of the duration of the right," without which it is indefinite and contrary to public policy. The court reasoned that without a definite term of months or years, or a term tied to the life span of a principle or his or her heirs, the right of first refusal created a "perpetual right" that was terminable after a reasonable time by law. Then, citing the price paid as consideration for the right of first refusal, the court concluded that "15 years clearly meets a standard for the passage of a reasonable time for an agreement regarded as terminable at will."

The circuit court then granted the Foxes" motion for summary judgment, ruling that the right of first refusal terminated as of the date of the notice of the Foxes" termination letter.

Tidy-View appealed and the Court of Appeals reversed.

The Court of Appeals determined that the circuit court erred when it concluded the right of first refusal was indefinite and therefore terminable after a reasonable time. The Court of Appeals concluded that for "different reasons," both the right of first refusal's purchase and lease provisions extinguish upon sale or transfer of the property to a third party.

The Foxes maintain that a right of first refusal for real estate should be treated no differently under the law than any other contract. In other words, when a court finds that a contract is of an indefinite duration, the "Court will imply a reasonable time for performance." Farley v. Salow, 67 Wis. 2d 393, 402, 227 N.W.2d 76 (1975) (citing Delap v. Inst. of Am., Inc., 31 Wis. 2d 507, 512, 143 N.W.2d 476 (1966)).

Tidy-View contends the problem with the Foxes" argument is that this general principle has been applied strictly to contracts for goods, services, and employment. Tidy-View claims that there is a separate body of law that addresses the duration and terminability of future contingent interests in real property. It asserts that this unilateral termination rule has never been extended in the context of a future contingent interest in real estate.

A decision by the Supreme Court may clarify the apparent confusion as to the proper legal doctrine that should be applied in this type of situation.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 3, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed an La Crosse County Circuit Court decision, Judge Elliott M. Levine, presiding.

2012AP2782-CR State v. Chamblis

This case examines issues related to the state's appeal of a sentence imposed on a repeat drunken driver.

Some background: In November 2011, Andre M. Chamblis was stopped for driving with a cracked windshield. He was then arrested on suspicion of operating while intoxicated.

The state charged Chamblis with: (1) operating while intoxicated (OWI) as a fifth or sixth offense and as a repeater; (2) operating with a prohibited alcohol concentration (PAC) as a fifth or sixth offense and as a repeater; and (3) obstructing an officer as a repeater. The complaint alleged that Chamblis had previously been convicted of five OWI-related offenses in Minnesota.

In January 2012, the state filed an amended information charging Chamblis with OWI as a seventh, eighth, or ninth offense and as a repeater, and operating with a PAC as a seventh, eighth, or ninth offense and as a repeater, based on information that Chamblis had also been convicted of two additional OWI-related offenses in Illinois.

In August 2012, Chamblis filed a motion challenging the two Illinois convictions. He argued, among other things, that the documentation the state had submitted with the amended information was insufficient to prove that Chamblis had been convicted of an OWI-related offense in Illinois.

The circuit court agreed. The circuit court later rejected as untimely supplemental information submitted by the state and declined to consider these convictions. This became the substantive basis of the state's appeal.

On Sept. 19, 2012, Chamblis pled guilty to operating with a prohibited alcohol concentration, as a sixth offense. Chamblis was sentenced to four years" imprisonment (two years" initial confinement, two years" extended supervision).

The state successfully appealed. The Court of Appeals reversed and remanded with instructions for the circuit court to issue an amended judgment of conviction and to resentence Chamblis consistent with the penalty ranges for a seventh offense under Wis. Stat. § 343.307.

The Court of Appeals acknowledged that the state *could* have appealed under Wis. Stat. §§ 808.03(2) and 809.50(1) (appeal from a judgment not appealable of right), but determined that it was not *required* to do so in order to preserve its appeal rights. The Court of Appeals also concluded that the judgment of conviction and sentence was an "order and judgment adverse to the state."

Chamblis, who has served the confinement time ordered on his original sentence, challenges the authority of the state to appeal, and he contends that the remand for resentencing violates his constitutional rights.

Chamblis asks the Supreme Court to review whether State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986) and due process principles require that the number of prior offenses that count for sentence enhancement be determined *prior* to entry of his plea.

The state maintains that under State v. McAllister, 107 Wis. 2d 532, 319 N.W.2d 865 (1982) and State v. Matke, 2005 WI App 4, 278 Wis. 2d 403, 692 N.W.2d 265, the time for determining the number of priors in an OWI or PAC case is at sentencing. The state contends that Chamblis points to no authority holding that although the number of priors can be proved *after* a person is found guilty at trial, it must be proved *before* a person pleads guilty.

A decision by the Supreme Court is expected to determine whether the state may appeal the sentence under these circumstances and whether the Court of Appeals may remand such a case for resentencing based on the additional conviction after a plea was entered.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 4, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Grant County Circuit Court decision, Judge Craig R. Day, presiding.

2013AP430-CR State v. Hogan

This case examines whether evidence that led to the conviction of Patrick I. Hogan on charges of possession of methamphetamine and child neglect should have been suppressed because of the way police obtained the evidence during a traffic stop.

Some background: Hogan was driving a pick-up truck. His wife was in the front passenger seat, and their daughter was in a car safety seat on the rear bench seat of the vehicle. Police lawfully pulled Hogan over for a seatbelt violation. Police then extended the stop for an OWI investigation. The parties agree that the police lacked reasonable suspicion to extend the stop for an OWI investigation.

After being put through field sobriety tests, Hogan was told he was free to leave. About 16 seconds later, police re-approached and asked if they could search Hogan's vehicle. Hogan consented and police found methamphetamine, methamphetamine paraphernalia, and loaded guns in his pick-up truck.

During the ensuing criminal prosecution, Hogan moved to suppress the evidence obtained during the search of his vehicle. Hogan argued that the evidence was obtained in violation of his Fourth Amendment rights because police lacked reasonable suspicion to extend the traffic stop for field sobriety tests, and he was illegally seized at the time he consented to the search.

Following an evidentiary hearing, the trial court ruled that the police lacked reasonable suspicion that Hogan was impaired, and thus the extension of the stop beyond the seat belt citation was illegal.

However, the trial court also determined that the police officer terminated the stop after the field sobriety test ended, and that the subsequent contact and consent to search were sufficiently attenuated from the illegality to render Hogan's consent to search the vehicle valid. Accordingly, the trial court denied the motion to suppress. Hogan then pled no-contest to possession of methamphetamine and child neglect.

Hogan appealed, unsuccessfully. Hogan argued that he was illegally seized at the time he consented to a search, and thus his consent was invalid. Hogan also argued that, even if he was not seized at the time of the search, his consent was invalid because it was tainted by the prior illegal detention.

The Court of Appeals rejected both of Hogan's arguments, ruling that the illegal detention terminated when Officer Smith told Hogan he was free to leave, and that the illegal detention did not taint Hogan's consent to the search.

Hogan asks the Supreme Court to evaluate his claim that he was still constructively being illegally detained by police at the time he gave consent to search his truck. Hogan argues in the alternative that if the illegal detention is deemed to have ended when the officers briefly disengaged from Hogan, the 16 second disengagement of Hogan by law enforcement officers was not enough to attenuate the illegal detention of Hogan from his consent to search his truck.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 4, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Brown County Circuit Court decision, Judge William M. Atkinson, presiding.

2013AP1532 Ash Park v. Alexander & Bishop

This case involves a dispute over a $378,000 real estate commission for a multi-million dollar sale that fell through before closing.

Some background: In 2007, Ash Park entered into a one-party listing contract with Re/Max for the sale of property to Alexander & Bishop. The parties used the standard WB-3 vacant land listing contract form approved by the Wisconsin Department of Regulation and Licensing. The contract stated Re/Max would list the property for $6.2 million. It also provided for a 6-percent commission.

Alexander & Bishop contracted to purchase the property from Ash Park for $6.3 million but did not close on the property. Ash Park filed suit asking the court to enforce the sales contract and order specific performance. Ultimately, the circuit court ordered specific performance. The issue was litigated and both the Court of Appeals and this court affirmed on this issue. *See* Ash Park, LLC v. Alexander & Bishop, Ltd., 2009 WI App 71, ¶1, 317 Wis. 2d 772, 767 N.W.2d 614, *aff"d*, 2010 WI 44, ¶4, 324 Wis. 2d 703, 783 N.W.2d 294. However, Ash Park couldn"t succeed in enforcing the judgment for specific performance because Alexander & Bishop lacked sufficient funds to purchase the property. Ultimately, Ash Park agreed to settle the case and accepted $1.5 million from Alexander & Bishop in lieu of its purchase of the property.

Re/Max moved to intervene, seeking a judgment against Ash Park for its broker commission, prejudgment interest, costs, and attorney fees. It also moved to enforce a broker lien it had recorded on the property in October 2009.

Ash Park did not object to Re/Max's motion to intervene, and the court granted Re/Max's request. Ash Park then answered Re/Max's complaint, listing numerous affirmative defenses and moved for summary judgment, arguing Re/Max was not entitled to a commission. Re/Max opposed Ash Park's summary judgment motion and also moved for summary judgment asserting it was entitled to a commission. The circuit court reasoned the contract was not enforceable "in fact" because, although the court tried, it could not compel Alexander & Bishop to actually purchase the property. Accordingly, the circuit court concluded Re/Max was not entitled to a commission.

The Court of Appeals reversed, concluding that Re/Max is entitled to its commission because Ash Park and Alexander & Bishop had an "enforceable contract" and the listing contract provides, in relevant part, that a commission is earned when a seller sells or "*accepts an offer which creates an enforceable contract* for the sale of all or any part of the Property."

The Court of Appeals agreed with Re/Max's assertion that an enforceable contract existed because Ash Park sought, and received, a judgment for specific performance, notwithstanding the fact that it could not compel specific performance.

Ash Park appealed to the Supreme Court, presenting the following issue for review:

> Is a vacant land offer to purchase an "enforceable contract" so as to require a seller to pay three hundred seventy-eight thousand dollars ($378,000) in commission under a real estate listing contract when the seller obtained a judicial order for specific performance, but the buyer (who the realtor found) lacked the funds to purchase and could not be compelled to honor that order?

A decision in this case could affect many real estate transactions throughout the state.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 4, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Racine County Circuit Court decision, Judge Gerald P. Ptacek, presiding.

2013AP1715 *The Journal Times* v. Racine Bd. of Police and Fire Commissioners

This case involves competing petitions for review arising from a dispute over the state's Open Records Law.

Some background: The Court of Appeals reversed the circuit court's order dismissing a mandamus action filed by *The Journal Times* and remanded for a determination of whether the Newspaper was entitled to attorney fees and costs.

The City of Racine's police chief retired in May of 2011, and the Police and Fire Commission (PFC) began a search for his replacement. Twenty-three applications were received. The PFC determined that 11 applicants met the minimum requirements for the job and interviewed five of them.

In early Feb. of 2012, three finalists were announced to the public. Two of the finalists were minorities, one was not. On Feb. 17, 2012, the non-minority finalist notified the PFC that he was withdrawing his application. On Feb. 20, 2012, the PFC called a closed meeting to address the withdrawal. At that meeting, a motion was made to reopen the search to review a "broader pool of candidates." The motion was seconded and passed by a three-to-two vote.

The PFC issued a press release describing its decision but refused to identify the motion's sponsor or how each commissioner voted. On Feb. 22, the Newspaper made a written request upon the PFC "for the recorded motions and votes of each PFC commissioner at the closed meeting on [February 20], including who made the motion and who seconded it."

The city denied the request and several subsequent requests from the newspaper, citing several different reasons for refusal. The city also offered as a potential compromise to release the results of the vote after the hiring process was complete, but the newspaper declined to accept.

On March 17, 2012, the Newspaper filed a mandamus action under the Open Records law. Six days later, on March 22, the PFC provided the requested information in e-mail to the Newspaper.

Nearly two months later, in its initial response to the mandamus suit, the PFC asserted for the first time that no record responsive to the newspaper's Feb. 22 request "ever existed." The PFC later argued it did not even begin to create a record of the Feb. 20, 2012 vote until May of 2012 when it drafted the minutes for the Feb. 20, 2012 meeting.

The PFC moved for summary judgment, arguing that because no record existed at the time of the newspaper's request, there was no violation of the Open Records Law. The newspaper argued that the PFC was estopped from making any argument that a record did not exist.

The circuit court agreed with the PFC and granted summary judgment, finding that as of Feb. 22, 2012, "There wasn"t any written recording to be supplied." The newspaper appealed. The Court of Appeals reversed and remanded.

The PFC says it is important to note that no records were ever released – because no records existed. It argues that the newspaper sought information and the PFC's response was in terms of information, not records. The PFC argues the Open Records Law applies only to records, and not to information and for that reason a lawsuit brought under the Public Records Law could never cause a custodian to release information.

The newspaper agrees that review of the Court of Appeals" decision should be granted in order to help develop, clarify, or harmonize the law on novel issues of statewide impact.

The newspaper says this case is not about the failure to produce a non-existing record, it is about the PFC's failure to truthfully respond to the newspaper's request for a record that the Open Meetings Law required PFC to create and the Open Records Law required it to produce. The Newspaper argues where there is a statutory duty to create and disclose the record requested, its absence can never excuse non-disclosure.

The PFC presents the following issues to the Supreme Court:

- If a record does not exist, can a custodian nonetheless be liable for failing to release the information in response to a public records request?
- Does [Newspapers, Inc. v. Breier, 89 Wis. 2d 417. 279 N.W.2d 179 (1979)] preclude a custodian from asserting a statutory exception in its initial denial?
- Does equitable estoppel allow a requester to recover under the public records law based on the custodian's failure to assert the correct exception in its initial denial?
- May a requester use a mandamus action under the public records law to enforce an alleged violation of the open meetings law?

The Journal Times raises two issues:

- Does the custodian's obligation "to provide sufficient notice of the basis for the denial to enable [the requester] to choose a course of action," Mayfair Chrysler-Plymouth, Inc. v. Baldarotta, 162 Wis. 2d 142, 162, 469 N.W.2d 638 (1991), apply to all requests under the Open Records Law?
- When a records custodian abandons its stated reason for denial and attempts to defend against a mandamus action on other grounds, is the party challenging the denial entitled to an award of attorney fees, as a matter of law, for having prevailed "in substantial part"?

WISCONSIN SUPREME COURT
TUESDAY, MARCH 10, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Jean A. DiMotto, presiding.

2013AP557-CR State v. Kucharski

This case involving a double homicide examines the standards for granting a new trial in the interest of justice. The Supreme Court reviews a Court of Appeals" decision reversing a judgment convicting the defendant, Corey Kucharski, of two counts of first-degree intentional homicide with the use of a dangerous weapon.

Some background: It is undisputed that in February of 2010 the defendant, Corey R. Kucharski, shot and killed both of his parents. He called police and turned himself in. He entered a special plea of not guilty and not guilty by reason of mental disease or defect (NGI) and later pled no contest during the first phase of the NGI trial. He elected to have a court trial on the criminal responsibility phase.

At the court trial, Kucharski introduced reports from two psychiatrists, who testified that he was suffering from schizophrenia when he killed his parents and that he lacked substantial capacity to appreciate the wrongfulness of his acts and to conform his behavior to the requirements of law. The psychiatrists testified that Kucharski reported having heard voices telling him what to do, and that he was unable to distinguish between real voices and those heard only in his head.

The circuit court concluded that the defendant met his burden to prove that he had a mental disease or defect at the time of the offense. Although the court termed it a "close call," it concluded the defendant failed to meet his burden to prove that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offenses.

The circuit court said the defendant did appear to understand that his actions were illegal and at one point he mentioned that he would be "rotting in jail." The court concluded that doctors who testified were "speculating" when they opined that the defendant was in a state of psychosis before, during and after the shootings.

The court found Kucharskie guilty and sentenced him to two terms of life in prison with eligibility for extended supervision in 30 years. Following denial of a post-conviction motion, the defendant appealed.

The Court of Appeals granted a discretionary reversal under § 752.35, Stats. It held that the defendant was entitled to a new trial in the interest of justice on the issue of his mental responsibility because there was a substantial probability that a new trial could produce a different result. A divided Court of Appeals reversed and remanded for a new trial on the mental responsibility phase.

The court noted that it may grant a discretionary reversal "if it is likely for any reason that justice has miscarried." State v. Murdock, 2000 WI App 170, ¶31, 238 Wis. 2d 301, 617 N.W.2d 175. It may conclude that justice has miscarried if it determines there is a substantial probability that a new trial would produce a different result.

The appellate court agreed with the defendant that there was a substantial probability that a new trial would produce a different result. It said the evidence showing he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was very strong and "certainly comprised "the greater weight of the credible evidence.

In brining the case to the Supreme Court, the state raises the following issues:

- In granting Kucharski a new trial on the issue of mental responsibility under the miscarriage-of-justice prong of Wis. Stat. § 752.35, did the Court of Appeals substitute its judgment for that of the trial court on issues that are within the sole province of the finder of fact, so that the appellate court's decision conflicts with this court's decision in State v. Sarinske, 91 Wis. 2d 14, 280 N.W.2d 725 (1979)?

- Should a defendant ever be entitled to a new trial on the affirmative defense of insanity under the miscarriage-of-justice prong of Wis. Stat. § 752.35 where the Court of Appeals does not find any error or unfairness at his trial, but determines that there is a substantial probability of a different result on retrial only by substituting its judgment for that of the fact-finder on issues that are the province of the fact-finder alone?

WISCONSIN SUPREME COURT
TUESDAY, MARCH 10, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Waushara County Circuit Court decision, Judge Guy D. Dutcher, presiding.

2013AP1023 Mayhugh v. State

This civil suit examines the relationship between the doctrine of sovereign immunity and Wis. Stat. § 301.04, which provides that the Department of Corrections (DOC) "may sue and be sued."

Some background: Adam Mayhugh was an inmate at Redgranite Correctional Institution when he was hit in the head by a foul ball while watching a softball game. Correctional officers had instructed Mayhugh to sit on the bleachers to watch the game on the baseball field in the prison recreation yard. The impact of the ball resulted in serious injuries to Mayhugh.

DOC is the only remaining defendant after Mayhugh initially sued the DOC, its secretary, the warden, and various unnamed parties. The state moved to dismiss the complaint on certain grounds, including sovereign immunity. The trial court granted the motion.

Mayhugh appealed, unsuccessfully. The court concluded that even though Wis. Stat. § 301.04 provides that DOC "may sue and be sued," this language does not constitute a waiver of DOC's sovereign immunity. The Court of Appeals also held that the DOC is not an independent political body or independent state agency, such that it is subject to suit in tort.

A decision by the Supreme Court is expected to clarify whether sovereign immunity protects the DOC in the face of the language in Wis. Stat. § 301.04.

WISCONSIN SUPREME COURT
TUESDAY, MARCH 10, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Timothy G. Dugan, presiding.

2013AP1753-54-CR State v. Guarnero

The central issue in this appeal is whether the circuit court improperly used a prior federal guilty plea and conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, to count as a prior offense in this case. A decision by the Supreme Court could determine how Wisconsin law characterizes certain prior convictions.

Some background: The state charged Rogelio Guarnero in state court with a second or subsequent offense of possession of a controlled substance, based on a prior federal conviction under RICO. The parties disputed in the trial court and on appeal whether Guarnero's prior federal RICO conviction was a felony "relating to controlled substances."

In the federal case, Guarnero had pled guilty to count two of the indictment as part of a plea agreement. That count alleged that Guarnero and others were members or associates of the Latin Kings, a criminal racketeering organization that "engaged in acts of violence, including murder, attempted murder, robbery, extortion, and most relevant here – distribution of controlled substances . . . ."

The count further alleged that Guarnero conspired with others to violate 18 U.S.C. § 1962(c) and (d) by participating in the affairs of an enterprise "through a pattern of racketeering activity involving . . . multiple acts involving the distribution of controlled substances including cocaine, cocaine base in the form of "crack" cocaine and marijuana . . . ."

Guarnero contends the federal complaint "did not specify *which* defendant allegedly committed *which* acts, nor did count two specify that Guarnero himself had committed any particular violation of any controlled substance law." Although Guarnero acknowledged in the plea agreement that he had conspired with other Latin Kings members to commit at least two qualifying criminal acts, the plea agreement also did not specify which acts he had committed.

Guarnero notes that nowhere in the federal plea agreement did he admit that he had committed a violation of any narcotics statute and argues "the overwhelming majority of the specific acts detailed in the plea agreement concerning Guarnero pertain to activities unrelated to narcotics."

Guarnero's state case was tried to the court on the basis of stipulated facts regarding the possession charge. Having determined that the RICO conviction was a prior conviction for purposes of Wis. Stat. § 961.41(3g)(c), the circuit court found him guilty of the cocaine possession charge as a second offense. Because that charge was for a felony offense, the court also found Guarnero guilty of felony bail jumping, based on his guilty plea to that offense. The court imposed concurrent sentences requiring Guarnero to serve nine months in the House of Correction. It then denied Guarnero's postconviction motion.

The Court of Appeals affirmed his convictions.

In interpreting the phrase "relating to controlled substances" in Wis. Stat. § 961.41(3g)(c), the Court of Appeals looked to how the U.S. Supreme Court had resolved a

similar issue under federal law in two relatively recent decisions: United States v. Castleman, 572 U.S. ___, 134 S. Ct. 1405 (2014), and Descamps v. United States, 570 U.S. ___, 133 S. Ct. 2276 (2013).

In those two cases the Supreme Court differentiated between the "categorical approach" and the "modified categorical approach" in analyzing whether a prior conviction constituted a predicate or prior offense under a federal crime. Under the categorical approach, a court looks only at the fact of the prior conviction and whether the elements of that prior offense satisfy the requirements of the new crime. This approach is used when the prior offense can be committed in only one way.

On the other hand, the modified categorical approach is used when the prior offense is "divisible," that is, it could have been committed via one of several alternative means. In such circumstances, a court looks not only at the elements of the prior offense, but also at a small group of documents relating to the facts of the crime, such as charging documents, plea colloquy transcripts, and jury instructions. If those documents show that the prior offense was actually committed by the means identified in the pending charge, then the earlier crime counts as a prior or predicate offense. See, e.g., Evans v. Wisconsin Dep"t of Justice, 2014 WI App 31, ¶18, 353 Wis. 2d 289, 844 N.W.2d 403.

Because RICO convictions can be based on various types of underlying criminal conduct, the Court of Appeals relied on the modified categorical approach in this case. Guarnero argues that a court should look only to the elements of the statute under which the prior conviction occurred to determine whether that conviction constitutes a prior offense—here, whether the federal RICO Act elements relate to controlled substances. Guarnero bases this argument on the difference between the phrasing of the Wisconsin statute at issue in this case, § 961.41(3g)(c), and the federal acts at issue in Descamps and Castleman.

Guarnero argues that under the Court of Appeals" rationale, a defendant could be found to have committed a prior offense "relating to controlled substances" as long as someone tied to the prior crime did something connected with drug activities, even though the specific defendant did not. Because the Court of Appeals" analysis was not tied to the elements of the statute, Guarnero argues that any crime could potentially be characterized as a prior offense relating to controlled substances.

A decision by the Supreme Court could determine whether the modified categorical approach should be used in this state, and if so, how it should be applied.