

# WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES APRIL 2016

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  
Dodge  
Eau Claire  
La Crosse  
Marathon  
Milwaukee

## **TUESDAY, APRIL 5, 2016**

- 9:45 a.m. 15AP157-CR - State v. Eric L. Loomis
- 10:45 a.m. 14AP157 - Dennis D. Dufour v. Progressive Classic Ins. Co.
- 1:30 p.m. 14AP775 - Yasmine Clark v. American Cyanamid Company

## **THURSDAY, APRIL 7, 2016**

- 9:45 a.m. 14AP2488-CR - State v. Timothy L. Finley, Jr.
- 10:45 a.m. 15AP869 - City of Eau Claire v. Melissa M. Booth
- 1:30 p.m. 14AP827-CR - State v. Rory A. McKellips

**Note:** 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. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented. (Rev. 4-30-16).

**WISCONSIN SUPREME COURT**  
**TUESDAY, APRIL 5, 2016**  
**9:45 a.m.**

*This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in La Crosse County Circuit Court, Judge Scott L. Horne presiding.*

2015AP157-CR

[State v. Loomis](#)

This certification examines whether a court may rely on a pre-sentencing assessment known as COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) in whole or part when fashioning a sentence.

Some background: Eric Loomis pled guilty to attempting to flee or elude a traffic officer, as a repeater, and operating a motor vehicle without the owner's consent, as party to a crime, as a repeater. In addition to the two counts to which he pled guilty, Loomis was originally also charged with first-degree reckless endangering safety, possession of a firearm by a felon, and possession of a short-barreled shotgun or rifle, all as party to a crime and as a repeater. The parties agreed that these three charges would be dismissed and read in for sentencing.

A presentence investigation report was ordered. The Department of Corrections (DOC) agent who prepared the report included an attached COMPAS assessment. At the sentencing hearing, both the state and the trial court referenced the COMPAS assessment and used it as a basis for incarcerating Loomis. The state argued the COMPAS report and its assessments served as the basis for the appropriate sentence and said, "The COMPAS report that was completed in this case show the high risk and the high needs of the defendant. There's a high risk of violence, high risk of recidivism, high pretrial risk; and so all of these are factors in determining an appropriate sentence."

The trial court said, "You're identified, through the COMPAS assessment, as an individual who is at high risk to the community." The trial court imposed consecutive sentences totaling six years of initial confinement and five years of extended supervision.

Loomis filed a motion for post-conviction relief seeking resentencing on two grounds: (1) that the trial court erroneously exercised its discretion in how it considered the read-in charges by declining to consider Loomis's explanation; and (2) Loomis's due process rights were violated by the circuit court relying on the COMPAS assessment in sentencing Loomis. Following two hearings, the circuit court denied the motion. Loomis appealed.

In its certification, District IV Court of Appeals notes that a COMPAS assessment includes a "risk" portion and a "needs" portion. Risk levels are intended to assist corrections professionals in deciding the level of supervision required by an offender. Needs scales are designed to highlight areas in which the offender may need correctional services.

District IV says Loomis argues that the sentencing court's reliance on the COMPAS assessment violates his due process rights for a variety of reasons. District IV believes the most significant arguments are whether the proprietary nature of COMPAS prevents defendants from

challenging the COMPAS assessments' scientific validity and because COMPAS assessments take gender into account.

District IV says there is a compelling argument that judges make better sentencing decisions with the benefit of evidence-based tools such as COMPAS, but if those tools lack scientific validity, or if defendants are unable to test the validity of the tools, then due process questions arise.

District IV notes that Loomis asserts that COMPAS assessments were developed for use in allocating corrections resources and targeting offenders' programming needs, not for the purpose of determining sentence. District IV notes the state does not seem to dispute Loomis's description of the evidence. Instead, the state's position appears to be that Loomis's evidence, when taken at face value, fails to show that a COMPAS assessment contains or produces inaccurate information.

District IV goes on to note that in State v. Harris, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409, this court held that "race and gender are improper factors [and] they may not be relied upon – at all – in the imposition of a sentence." Id., ¶3. District IV says Loomis appears to argue that COMPAS assessments include general scales administered to both men and women, as well as separate scales administered only to women. It says the state concedes that COMPAS has a different automated risk and needs assessment specifically for women offenders. District IV says as far it can tell, the fact that the COMPAS scales are different depending on the offender's gender means that, with all other factors being equal, assessment results will differ between men and women based on gender alone. District IV says whether a sentencing court's reliance on a COMPAS assessment runs afoul of Harris's prohibition on gender-based sentencing is an important question in need of prompt resolution.

District IV notes that this court's resolution of the use of COMPAS assessments may call into question the appellate court's decision in State v. Samsa, 2015 WI App 6, 359 Wis. 2d 580, 859 N.W.2d 149. Samsa filed a petition for review in that case, which was denied.

**WISCONSIN SUPREME COURT**  
**TUESDAY, APRIL 5, 2016**  
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed in part and reversed in part, a Dodge County Circuit Court decision, Judge Brian A. Pfitzinger, Jr. presiding.*

[2014AP157](#)

Dufour v. Progressive Classic Insurance Company

This case involves a dispute over insurance coverage arising from a motorcycle accident. Some background: Dennis Dufour was involved in a motorcycle accident caused by Steven Lucero. Lucero's insurer, American Standard, paid Dufour its \$100,000 policy limit for bodily injuries. Dufour's insurer, Dairyland, also paid Dufour its \$100,000 policy limit for bodily injuries. In addition, pursuant to a settlement agreement, Dairyland paid Dufour \$15,589.85 for his property damage. Dufour's bodily injuries exceed the total amount of insurance proceeds that he received.

Under a subrogation clause in its policy, Dairyland sought and received the property damage funds in subrogation from American Standard. A subrogation clause is a provision in a policy whereby the insurer acquires certain rights upon paying a claim for a loss under the policy, such as taking legal action on behalf of the insured to recover the amount of the loss from the party who caused the loss.

Dufour submitted a claim to Dairyland in which he asserted that he was entitled to the subrogated funds under Valley Forge Ins. Co. v. Home Mut. Ins. Co., 133 Wis. 2d 364, 396 N.W.2d 348 (Ct. App. 1986)], which has been substantially undermined by subsequent case law.

Dairyland denied Dufour's claim. When Dairyland refused to turn over the subrogated funds, Dufour amended his complaint to include breach of contract, bad faith, and punitive damages claims against Dairyland. Dairyland and Dufour filed cross-motions for summary judgment. The circuit court granted Dufour's motion, in part, and awarded him the subrogated property damage funds plus interest. The court also granted Dairyland's motion in part and dismissed Dufour's bad faith and punitive damage claims. Dufour and Dairyland appealed.

The Court of Appeals affirmed in part and reversed in part the circuit court order on summary judgment. The appellate court agreed with the circuit court that Dairyland had no subrogation rights because its insured, Dufour, has not been made whole considering his total loss. While the circuit court declined to find that Dairyland acted in bad faith, the Court of Appeals concluded Dairyland did act in bad faith when it denied Dufour's claim to the funds at issue.

The appellate court noted that subrogation is based on equitable principles, one of which is to prevent an insured from recovering in excess of his or her loss. See Muller v. Society Ins., 2008 WI 50, 309 Wis. 2d 410, ¶23. It said in cases where the insured is unable to fully recover his or her loss, an insurer will have no rights in subrogation. This concept is known as the made whole doctrine, and whether the doctrine applies is dependent on the facts of each case.

The Court of Appeals concluded that Dufour established the necessary elements of a bad faith claim, and it remanded for proceedings on damages with respect to that claim. Dairyland

asks the Supreme Court to determine the applicability of Valley Forge in light of subsequent cases, including Muller. Dairyland continues to argue that Muller dictates that the made whole doctrine does not apply. Dairyland asserts that allowing Dufour to recover the property damage funds that Dairyland received in subrogation not only permits Dufour to obtain a double recovery, which subrogation principles are designed to prevent, but also rewrites insurance law by requiring coverage for property damage to pay for the separate loss of bodily injury.

Dufour says Muller was different because the insured voluntarily settled for less than the policy limits available when the policy limits were sufficient to make them whole for their loss. He says the Valley Forge decision was not based on who was paid the funds by the tortfeasor's insurer but rather who was entitled to the funds under subrogation law.

A decision by the Supreme Court is expected to determine whether Dairyland is obligated to reimburse Dufour under the made whole doctrine and whether Dairyland acted in bad faith.

**WISCONSIN SUPREME COURT**  
**TUESDAY, APRIL 5, 2016**  
**1:30 p.m.**

*This is a certification from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Milwaukee County Circuit Court, Judge David A. Hansher presiding.*

2014AP775

[Clark v. American Cyanamid Company](#)

The Court of Appeals has certified this appeal of a trial court order that denied a summary judgment motion brought by numerous manufacturers and sellers of white lead carbonate (“WLC”), including The Sherwin-Williams Company; Atlantic Richfield Company; American Cyanamid Company; Armstrong Containers, Inc.; and E.I. DuPont de Nemours & Company (hereafter, “WLC defendants”). Specifically, the Court of Appeals certified the following issue: Does applying WIS. STAT. § 895.046 – which prohibits plaintiffs from asserting claims against manufacturers of white lead carbonate under the risk-contribution theory as articulated in Thomas v. Mallett, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 – retroactively deprive a plaintiff of a vested property right in violation of the due process protections guaranteed by Article I, Section I of the Wisconsin Constitution?

Some background: The plaintiff, Yasmine Clark, filed a negligence suit in 2006 through her guardian. Clark alleged she suffered irreversible neurological damage from exposure to lead paint while living at different times in two Milwaukee rental units: one from March 2003 to March 2004 when she was two years old and three years old, and another from February 2006 to June 2006 when she was five. In addition to alleging negligence against the property owners, Clark made a strict liability claim against numerous WLC defendants.

Because Clark cannot identify which manufacturer or manufacturers produced the white lead carbonate to which she was exposed, Clark sued the WLC defendants under the risk-contribution theory first pronounced in Collins v. Eli Lilly Co., 116 Wis. 2d 166, 193-95, 342 N.W.2d 37 (1984), and later extended to cases involving white lead carbonate poisoning in Thomas. Thomas governs situations where a plaintiff claims injuries resulting from exposure to or ingestion of white lead carbonate but cannot identify the entity that produced or sold the white lead carbonate. Generally speaking, Thomas holds that, so long as a plaintiff makes a prima facie showing that the manufacturer produced or marketed white lead carbonate sometime during the house's existence, then the burden is on each manufacturer to prove that it did not produce or market white lead carbonate either during the house's existence or in the geographical market where the house is located.

In February 2011, the trial court stayed Clark's case while the federal courts and the Wisconsin Legislature took various actions involving the Thomas ruling. In 2010, the U.S. District Court for the Eastern District of Wisconsin ruled that Thomas expanded the risk-contribution theory in violation of a white lead carbonate manufacturer's federal due process rights. See Gibson v. American Cyanamid Co., 719 F. Supp. 2d 1031 (E.D. Wis. 2010). The

Eastern District later extended the decision to the other white lead carbonate defendants in that case. See Gibson v. American Cyanamid Co., 750 F. Supp. 2d 998, 999 (E.D. Wis. 2010) (Gibson II). That decision was then appealed to – and reversed by – the Seventh Circuit. See Gibson v. American Cyanamid Co., 760 F.3d 600 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2311 (2015)(Gibson III).

Also during the stay of Clark’s case, the Legislature enacted Wis. Stat. § 895.046 (2011-12), which abrogated Thomas prospectively as of Feb. 1, 2011. Two years later, the Legislature amended § 895.046 to make its abrogation of Thomas retroactive in nature.

The WLC manufacturers in Clark’s case then filed a motion to lift the stay on her case and dismiss it. Clark opposed the motion, arguing that the 2013 amendment to § 895.046 was unconstitutional.

The trial court converted the defendants’ motion to a summary judgment motion. In March 2014, the trial court ruled against the defendants, saying the retroactive amendment was unconstitutional and violated Clark’s right to due process.

About four months later, the Seventh Circuit issued Gibson III, 760 F.3d 600 (7<sup>th</sup> Cir. 2014). Generally speaking, the Seventh Circuit ruled in Gibson III that § 895.046 cannot be retroactively applied in light of the Wisconsin Constitution’s guarantee of due process.

The WLC defendants appealed the trial court’s March 2014 decision. The WLC defendants argued that § 895.046 is constitutional because it does not impair a vested right of Clark. The WLC defendants claimed that because Clark’s injuries did not allegedly occur until 2003 and 2004, and because Thomas did not expand the risk-contribution theory until issuance of the decision in 2005, Clark has no vested right to pursue her claims. The WLC defendants also argued that the public’s interest in abrogating Thomas retroactively outweighs Clark’s private interest in her claims.

Clark countered that she does have a vested right to pursue her claims that arose in 2003 because Thomas applies retroactively. Clark also argued that, by the time of her initial injury in 2003, Wisconsin law had already adopted the risk-contribution theory in Collins, which left the door open for expansion in similar situations. Clark further argued that whatever public purpose supports § 895.046’s retroactive application is greatly diminished by depriving her and other similarly-situated children poisoned by lead paint of their causes of action.

On Sept. 29, 2015, the Court of Appeals certified the case to this court, providing the following reasons in support of certification:

- Whether Wis. Stat. § 895.046 is constitutional is currently unsettled and the question of its validity is likely to recur.
- This litigation has been delayed for many years, and a certification prevents further delay.

If the Court of Appeals were to hold that § 895.046 is in fact constitutional, this holding would directly conflict with the Seventh Circuit’s recent decision in Gibson III.

**WISCONSIN SUPREME COURT**  
**THURSDAY, APRIL 7, 2016**  
**9:45 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.*

2014AP2488-CR

[State v. Finley](#)

This case examines what remedy may be available when a defendant who pleads no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get.

More specifically here, the Supreme Court reviews whether the defect may be remedied by reducing the sentence to the maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea.

Some background: In 2011 Timothy L. Finley, Jr. was charged with first-degree reckless endangerment with use of a dangerous weapon, substantial battery, strangulation and suffocation, and false imprisonment, all charged as acts of domestic abuse. A charging document filed later added a habitual criminality penalty enhancer.

Finley subsequently reached an agreement with the state whereby he would plead no contest to first-degree reckless endangerment as domestic abuse, with penalty enhancers for habitual criminality and use of a dangerous weapon. The maximum penalty for the offense, with the enhancers, was a term of imprisonment not to exceed 23 years and six months. The plea questionnaire/waiver of rights form completed by Finley's attorney erroneously identified the maximum penalty as 19 years and six months of imprisonment.

At the plea hearing, Finley said that he understood the elements of the offense of first-degree reckless endangerment. The circuit court identified each aspect of the penalty structure and explained that the repeater allegation would increase the incarceration period by not more than an additional six years and the enhancement provision for using a dangerous weapon would increase the term of imprisonment by not more than five years. The court then erroneously said, "So, the maximum you would look at then [is] nineteen years six months confinement. Do you understand the maximum penalties?" Finley said that he did, and the court accepted the plea.

At the sentencing hearing, the state recommended a total sentence of 15 years of imprisonment, consisting of 10 years of initial confinement and five years of extended supervision. The circuit court concluded the maximum penalty was appropriate and imposed the maximum authorized by law, 23 and one-half years, consisting of 18 and one-half years of initial confinement and five years of extended supervision.

Finley filed a post-conviction motion asking to be allowed to withdraw his plea because it was not entered knowingly, intelligently, and voluntarily. Finley alleged that the plea colloquy was deficient because he was not correctly informed of the maximum penalty. He also alleged he was not aware the circuit court could impose a total of 23 and one-half years of imprisonment.

In the alternative to plea withdrawal, Finley asked that the sentence be commuted to 19 and one-half years of imprisonment under State v. Taylor, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482. The circuit court denied Finley's motion without an evidentiary hearing.

The Court of Appeals reversed and remanded. It concluded that Finley established a Bangert [State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)] violation as a matter of law, and it remanded to allow the state the opportunity to prove that in spite of the misinformation provided at the plea hearing Finley nevertheless knew the maximum penalty he faced at the time he entered the plea.

The circuit court essentially followed the state's suggestion, concluding without making specific factual findings, that the state met its burden of establishing Finley knew the maximum penalty he faced at the time he entered the plea. However, the court also concluded that, under § 973.13, Stats., and Taylor, the proper remedy in the case, "in the interest of justice," was to commute the sentence "to the maximum represented to him at the time of [the plea hearing]."

Thus, the court ordered that Finley's judgment of conviction be amended to reflect a total sentence of 19 and one-half years of imprisonment, consisting of 14 and one-half years of initial confinement and five years of extended supervision.

The Court of Appeals noted that its opinion in Finley's prior appeal concluded Finley had established a Bangert violation as a matter of law, at least in the sense he made the requisite prima facie showing that he did not know or understand certain information that should have been provided at the plea hearing. It said the purpose for the remand ordered in the earlier appeal was to give the state an opportunity to show by clear and convincing evidence that Finley's plea was in fact entered knowingly, intelligently, and voluntarily, despite the circuit court's failure to advise Finley of the applicable maximum penalty.

The state argued it was not required to show that Finley knew the correct maximum penalty for the offense to which he entered a plea, and that it proved that Finley's plea was sufficiently knowing to meet the manifest injustice test because the sentence was subsequently commuted to the maximum Finley thought applied.

The Court of Appeals disagreed, saying even after "commuting" the sentence, the circuit court did not sentence Finley only to the 12 and one-half years of imprisonment maximum for the underlying offense of reckless endangerment as domestic abuse.

The court pointed out Finley's sentence was commuted not to "the amount authorized by law" or "the maximum term authorized by statute," but rather to the amount Finley misunderstood to be his maximum exposure based on errors surrounding his plea.

The state argues that the appropriate remedy is a reduction of Finley's sentence to the maximum penalty he was informed and believed he could receive. The state says it has never been authoritatively decided whether reduction of a sentence could be a proper remedy where a defendant was misinformed that the maximum penalty was lower than it really was. The state says several prior cases have suggested that sentence reduction is an appropriate remedy. A decision in this case may clarify how the law applies under these circumstances.

**WISCONSIN SUPREME COURT**  
**THURSDAY, APRIL 7, 2016**  
**10:45 a.m.**

*In this bypass of the District III Court of Appeals (headquartered in Wausau), the Supreme Court reviews a decision by Eau Claire County Circuit Court, Judge William M. Gabler presiding. A party may ask the Supreme Court to take jurisdiction of an appeal or other pending Court of Appeals' proceeding by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass usually meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the Court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.*

2015AP869

City of Eau Claire v. Booth

In this bypass of the Court of Appeals, the city of Eau Claire has raised two issues in a case that may resolve an apparent conflict in lower court decisions.

- Does a circuit court lack subject matter jurisdiction to enter an OWI first offense civil judgment if a defendant has a prior unknown out-of-state OWI conviction?
- Is a municipality legally precluded from pursuing a civil OWI citation if the defendant could also be charged criminally?

Some background: The defendant, Melissa Booth, was convicted of a civil first-offense OWI in Eau Claire County Circuit Court in 1992. The case was prosecuted by the Eau Claire City Attorney's office. The defendant had previously been convicted of OWI in Minnesota in 1990. Following her 1992 first offense OWI conviction, the defendant was subsequently convicted of four more OWI offenses which counted both the 1992 Eau Claire first offense conviction and the 1990 Minnesota conviction as prior OWI offenses. Booth was represented by an attorney in all of her subsequent OWI convictions.

In November 2014, while a seventh offense OWI charge was pending in Douglas County, the defendant filed a motion to vacate her 1992 Eau Claire first offense OWI civil judgment. She argued that the circuit court lacked subject matter jurisdiction over the case due to the existence of the 1990 Minnesota conviction. Her request for relief cited § 806.07(1)(d), Stats., which provides that the court may relieve a party from a judgment if the judgment is void.

The city responded to the defendant's motion to vacate by arguing that any alleged loss of court authority to enter the 1992 OWI first offense civil judgment was a loss of court competency, not a loss of subject matter jurisdiction, and that the defendant had waived the right to challenge a loss of court competency. The city also argued that municipalities are not legally precluded from pursuing OWI citations if an unknown out-of-state prior OWI conviction exists.

The circuit court granted the motion to reopen, vacate and dismiss with prejudice the 1992 OWI first offense citation. The circuit court agreed with the defendant that the Eau Claire County Circuit Court lacked jurisdiction to find the defendant guilty of an OWI first offense based on this court's decision on Walworth County v. Rohner, 108 Wis. 2d 713, 721, 324 N.W.2d 682 (1982). The circuit court said Rohner points out that the Legislature intends that

only the state has the power to prosecute crimes and since a second offense OWI charge in Wisconsin, by necessity, is criminal, only a district attorney's office can prosecute such an offense.

The city says this case presents the court with an opportunity to provide needed clarity regarding Wisconsin Const. Art. VII § 8's grant of subject matter jurisdiction to circuit courts. The city says this provision is being interpreted inconsistently across the state, leading to inequitable and unpredictable results.

The city points out that the Court of Appeals recently issued two unpublished opinions on this issue that directly contradict one another. In City of Stevens Point v. Lowery, 2015 WI App 28, 361 Wis. 2d 285, 862 N.W.2d 619, the Court of Appeals concluded that a circuit court lacked subject matter jurisdiction to enter judgment on an OWI civil first offense when the defendant had prior OWI convictions. The Court of Appeals relied on Rohner in support of its determination. The circuit court in Lowery had denied the defendant's motion to vacate his first offense drunk driving conviction.

The city says a few months after Lowery was released, the Court of Appeals issued State v. Navrestad, 2014AP2273 (Wis. Ct. App. July 2, 2015) which concluded that subject matter jurisdiction was not revoked when a circuit court allegedly improperly entered an OWI civil first offense conviction when a defendant had a prior OWI conviction. Navrestad determined that court competency, not subject matter jurisdiction, was implicated. Navrestad also concluded that this court's decision in Mikrut superseded Rohner.

**WISCONSIN SUPREME COURT**  
**THURSDAY, APRIL 7, 2016**  
**1:30 p.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a portion of a Marathon County Circuit Court decision, Judge Michael Moran presiding.*

2014AP827-CR

[State v. McKellips](#)

This case examines Wis. Stat. § 948.075, entitled “Use of a computer to facilitate a child sex crime.” The Supreme Court is asked to interpret the term “computerized communication system” under the statute, to determine how it applies to the facts of this case, to determine whether it is unconstitutionally vague as applied to those facts, and whether the Court of Appeals should have engaged in a harmless error analysis.

Some background: Rory A. McKellips, a high-school basketball coach, was convicted of using a computerized communication system to facilitate a child sex crime and obstructing an officer. He was sentenced to 10 years in prison and five years of extended supervision. McKellips was in his mid-50s when the offenses occurred; the female victim was a freshman basketball player.

During the 2010-2011 school year, the girl and McKellips had conversations outside of basketball practice and games, although the conversations were generally focused on basketball. At the end of one such conversation, McKellips said, “I love you.”

During a jury trial, the girl testified that her communications with McKellips increased after the basketball season ended. When the girl’s mother found out that the girl had incurred roaming charges while talking on her cell phone to McKellips, the mother told her that she could no longer have cell phone conversations with him. When McKellips learned of this, he purchased a Motorola-made flip-phone with a pre-paid “TracFone” contract for the girl without her parents’ knowledge. McKellips also purchased a similar cell phone for himself.

The state alleges that phone records showed that the cell phone given to the girl and the one used by McKellips contacted each other more than 8,300 times between Dec. 18, 2010, and July 27, 2011, with most of the communications being text messages. There is question as to whether 10 photos sent by the girl to McKellips were actually downloaded.

The day after McKellips gave the phone to the girl she severely injured her knee in an off-season tournament for a club team. McKellips subsequently increased their communication and began to call her “baby doll” and “sweetheart.” He also started giving gifts to both the girl and her family. According to the girl, over the course of the summer of 2011, she and McKellips engaged in sexual activity, including oral sex.

Ultimately, the girl’s father found the phone McKellips had given to her and notified the police. Based on the girl’s description of these events and the fact that McKellips falsely told police that his phone had fallen into a coal pit, the state charged McKellips with four crimes: (1) repeated sexual assault of a child, (2) exposing his genitals to a child, (3) use of a computerized communication system to facilitate a child sex crime, contrary to Wis. Stat. § 948.075 and (4)

obstructing an officer. McKellips filed a motion to dismiss the computerized communication system charge. The circuit court denied the motion, and the case proceeded to trial.

The court gave a jury instruction that combined the pattern jury instruction for the offense, Wis JI-Criminal 2135 (Apr. 2013), with a definition of “computer” that was taken from a different statute entitled “Computer Crimes,” Wis. Stat. § 943.70. According to the state, McKellips did not object to the instruction.

McKellips was convicted of using a computerized communication system to facilitate a child sex crime and obstructing an officer; he was acquitted of sexual assault and exposure.

McKellips appealed. The Court of Appeals reversed, concluding that the circuit court had improperly used a jury instruction that asked whether McKellips’ TracFone had constituted a computerized communication system. The Court of Appeals concluded that a new trial was required because a cell phone or other device can never, of itself, constitute a computerized communication system. The Court of Appeals said the circuit court should have asked the jury whether McKellips’ various uses of his TracFone had constituted communications on a computerized communication system.

Further, the Court of Appeals asserted that when the circuit court added the statutory definition of a computer, the jury was certain to find that the cell phone was a computer because the cell phone clearly met the broad definition of a computer.

In taking the case to the Supreme Court, the state contends that the Court of Appeals vacated McKellips’ conviction because of one sentence in the jury instruction, which directed the jury to determine “whether the phone constitutes a computerized communication system.”

The state also contends that the Court of Appeals’ decision conflicts with the Wisconsin Supreme Court’s decision in State v. Avery, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60, that the power to reverse a conviction in the interest of justice should be exercised only in exceptional cases where such an exceptional remedy is warranted.

The state says that the real controversy was fully tried, and the Court of Appeals’ ruling was erroneous because it failed to consider whether the allegedly erroneous jury instruction was a harmless error.

McKellips argues that the state improperly attempts to require harmless error review in an interest of justice analysis. McKellips contends that there is already clear case law stating that harmless error analysis is inappropriate when the reversal of a conviction is premised on an appellate court’s statutory power to reverse in the interest of justice.

McKellips implies that in order for the phone to have used a computerized communication system, it must have engaged the “data” side of the cellular network. Then he points to the fact that no witness for the state testified that he actually used the data side of his TracFone when communicating with the girl.

In addition to interpreting language in § 948.075, a decision by the Supreme Court may clarify whether the circuit court’s jury instruction was truly erroneous in light of that interpretation, whether the statute is unconstitutionally vague, and whether harmless error analysis applies in this context.