WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
NOVEMBER, 2009

Please note, 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:

Dane
La Crosse
Milwaukee
Wood

TUESDAY, NOVEMBER 3, 2009

9:45 a.m.	08AP1868	-	William C. McConkey v. J. B. Van Hollen
10:45 a.m.	07AP2767-CR	-	State v. John A. Wood
1:30 p.m.	08AP1185-CR	-	State v. Michael J. Carter

TUESDAY, NOVEMBER 10, 2009

9:45 a.m.	08AP967-AC	-	Karen Schill, et al. v. Wis. Rapids School Dist., et al.
10:45 a.m.	08AP552-CR	-	State v. Scott R. Jensen

WEDNESDAY, NOVEMBER 11, 2009

9:45 a.m.	07AP2827-CRAC	-	State v. Corey Kleser

In addition to the cases listed above, the following case will be decided by the court based upon the submission of briefs without oral argument:

08AP1872-D - Office of Lawyer Regulation v. Sandra Glodowski

The Supreme Court calendar may change between the time you receive this synopsis 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.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 3, 2009
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. The case originated in Dane County Circuit Court, Judge Richard G. Niess, presiding.

2008AP1868 McConkey v. Van Hollen

In this certification, the District IV Court of Appeals asks the Supreme Court to review issues arising from a state constitutional amendment passed by voters on Nov. 7, 2006. The ballot measure read, in part, "that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

Some background: William McConkey filed suit in Dane County Circuit Court, seeking to have the marriage amendment declared invalid on multiple substantive and procedural grounds, including an allegation that it violated the single-subject rule set forth in Art. XII, Section 1 of the Wisconsin Constitution.

McConkey asserts that the first part of the referendum question limiting marriage to only one man and one woman was a separate subject from the second part of the question addressing any similar legal status to marriage for unmarried individuals. McConkey argues that if the propositions had been put forth separately, a significant number of voters may have voted yes on one question and no on the other.

The circuit court held that the plaintiff lacked standing to challenge the substantive constitutionality of the marriage amendment, but further held that McConkey did have standing to challenge the amendment on the grounds it may violate the single-subject rule.

The circuit court ultimately held that the ballot question properly complied with the single-subject requirement because it "properly included two propositions that both related to the same subject matter and were designed to accomplish the same general purpose."

McConkey appealed, contending the amendment should be null and void. Wisconsin Attorney General J.B. Van Hollen cross-appealed, arguing McConkey lacks standing because he personally did not suffer a real and direct, actual or threatened injury. McConkey has said he would have voted "no" on each question if they were listed separately.

A decision by the Supreme Court could clarify the proper formulation of the single-subject test and provide guidance on the purpose of a proposed amendment.
In certifying the case, the Supreme Court acquires jurisdiction of "the entire appeal, which includes all issues, not merely the issues certified or the issue for which the court accepts the certification."

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 3, 2009
10:45 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. The case originated in La Crosse County Circuit Court, Judge Michael J. Mulroy, presiding.

2007AP2767-CR State v. Wood

In this certification, the Supreme Court is asked to examine the constitutionality of Wis. Stat. § 971.17(3)(c) (2005-06). The statute authorizes the involuntary medication of persons who have been committed to the custody of the Department of Health and Family Services after being found not guilty of a crime by reason of mental disease or defect, and who are further determined to be incompetent to refuse medication or treatment.

Some background: John A. Wood, the appellant, is a criminally committed person who has been found incompetent to refuse medication. Wood contends that the statute violates due process in two respects: (1) by allowing involuntary medication without a finding of dangerousness; and (2) by failing to provide a mechanism for periodic review of the medication order.

Wood was committed to the state Department of Health and Family Services in 1999 under Wis. Stat. § 971.17, after being found not guilty by reason of mental disease or defect following a trial on charges of having non-consensual sexual contact with a resident of a hospital in 1998. Wood was remanded to the care of the Department for a period not to exceed 160 months. He has been confined at Mendota Mental Health Institute ever since and has unsuccessfully petitioned for supervised release on a number of occasions.

Wood had previously been diagnosed with paranoid schizophrenia. In 1978, he was found not guilty of second-degree homicide by reason of mental disease and committed until his conditional release in 1991.

In 2006, Mendota moved for an order finding Wood incompetent to refuse medication and authorizing the involuntary administration of medication. The circuit court issued the order following a hearing, without determining whether Wood was a danger to himself or others and without making any provision for periodic review of the medication order.

Wood filed a motion challenging the constitutionality of the involuntary medication statute for criminally committed persons, § 971.17(3)(c). Wood's post-conviction motion was denied and Wood appealed.

The certification involves the interpretation of § 971.17(3)(c) and the application of Wis. Stat. § 971.16(3), which provides the standard to determine whether a criminally committed person is not competent to refuse medication or treatment. The Court of Appeals said that these statutes do not require any finding with respect to dangerousness and do not contain any provision for automatic review of medication orders.

A decision by the Supreme Court could clarify law as it relates to people found not guilty by reason of mental defect who may be in need of medication and not competent to make medication decisions.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 3, 2009
1:30 p.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 Patricia D. McMahon, presiding.

2008AP1185-CR State v. Michael J. Carter

This child sexual-assault case examines whether a defendant's claims of ineffective assistance of counsel were sufficient to have the case sent back to the trial court as directed by the Court of Appeals.

Some background: Michael James Carter was convicted by jury of sexually assaulting a five-year-old girl. He received a 27-year prison sentence, comprised of 12 years initial confinement and a maximum of 15 years of extended supervision.

Carter filed a post-conviction motion, claiming that his defense counsel was ineffective because counsel failed to present evidence of a possible prior sexual assault of the girl. Carter argued that counsel should have done more to investigate and should have offered evidence of the possible prior assault to provide an alternative explanation for the child's detailed sexual knowledge expressed in her testimony.

The circuit court denied the motion, and Carter appealed, raising the same claim. The Court of Appeals reversed, determining that until further investigation was completed, neither the circuit nor appellate court could determine whether Carter was prejudiced by counsel's deficient performance.

The state asks the Supreme Court to review: "(1) if the Court of Appeals improperly sent the case back to the circuit court; (2) whether Carter failed to show exactly what counsel should have done to uncover evidence of a prior incident; and (3) whether such evidence would have been admissible."

The state contends that the Court of Appeals' decision conflicts with precedent and that Carter was obliged to show during post-conviction proceedings what would have been revealed by an investigation of the prior incident.

The post-conviction court found that counsel had reasonably weighed the pros and cons of his legal strategy and that it could not see how the defense counsel could be criticized for not introducing evidence that he concluded would not benefit his legal strategy.

Counsel testified extensively as to his reasons for not seeking to introduce evidence of the possible prior sexual assault. He hired an investigator to try to interview the girl, but her mother did not want the girl to speak with him, counsel said.

Carter contends evidence would have been admissible, and without it, there would be no credible alternative explanation for the child's knowledge of adult male anatomy and sexual behavior.

A decision by the Supreme Court would clarify the legal standard to be applied in this situation.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 10, 2009
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. The case originated in Wood County Circuit Court, Judge Charles A. Pollex, presiding.

2008AP967-AC Schill v. Wisconsin Rapids School District

This certification from District IV Court of Appeals asks the Supreme Court to determine whether the personal e-mails of public employees that are maintained on publicly owned computers are subject to disclosure under the public records law.

Some Background: In April 2007, a private citizen, Don Bubolz, filed a request with the Wisconsin Rapids School District under the public records law, Wis. Stat. §19.31 et seq., for all e-mails sent from the computers assigned to five teachers for the period of March 1, 2007, through April 13, 2007.

Bubolz later said he was making the request as a "fishing mission" to determine if the teachers had been using their district e-mail accounts for more than just occasional personal messages. The district's computer-use policy allowed its teachers and other employees to use the district's e-mail for occasional personal use. District employees are advised that the district owns not only the computers, but the e-mail accounts used by the employees.

The district informed the teachers that it intended to release all of the requested e-mails. It concluded that the e-mails constituted public records, in large part because they were maintained on a public computer network.

The teachers filed an action seeking an injunction to block the release of their personal e-mails. They did not object to the release of any e-mails regarding their work. The circuit court denied the injunction and affirmatively ordered the district to release all of the personal and work-related e-mails. The court did direct the district to delete personal information, including home addresses, medical information, bank account numbers, etc.

The Court of Appeals' certification memorandum notes that the first issue to be decided is whether the personal e-mails are "records" under the public records law. According to the parties and the Court of Appeals, there is no published case in Wisconsin that addresses whether purely personal e-mails kept on a public computer constitute public records under the statute.

If the e-mails are found to constitute records under the public records law, the Supreme Court will be called upon to perform a balancing test in deciding whether the presumption favoring disclosure of public records is overcome by the public interest in protecting the privacy and reputational rights of its citizens.

WISCONSIN SUPREME COURT
TUESDAY, NOVEMBER 10, 2009
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge David T. Flanagan III, presiding.

2008AP552-CR State v. Scott R. Jensen

In this case, the Supreme Court has been asked to review venue provisions of Wis. Stat. § 971.19(12). The statue, enacted in 2007, provides that defendants charged with certain election and campaign violations, are to be tried in the county where the defendant resides.

Some background: In October 2002, Scott R. Jensen was charged in Dane County Circuit Court with misconduct in public office for allegedly using state resources for political campaign purposes in violation of Wis. Stat. § 946.12(3). Jensen, a Republican who represented the 32nd Assembly District, was Assembly Speaker at the time.

Jensen moved to dismiss the charges against him, arguing that the misconduct in public office charge was unconstitutionally vague because the statute does not define Jensen's duties as a public officer.

The Court of Appeals affirmed the order denying Jensen's motion, explaining that the duties Jensen had been charged with violating in his capacity as a public officer were found in various places, including in the elections and ethics statutes under Wis. Stat. chs. 11, 12 and 19. See State v. Jensen, 2004 WI App 89, ¶¶1-2, 10, 29, 272 Wis. 2d 707, 681 N.W.2d 230.

Following a jury trial, Jensen was convicted of misconduct in public office. He appealed, and the Court of Appeals reversed and remanded for a new trial, based on the trial court's erroneous jury instruction and wrongful exclusion of part of Jensen's testimony. State v. Jensen, 2007 WI App 256, ¶1, 306 Wis. 2d 572, 743 N.W.2d 468.

In February 2007, while Jensen's appeal was pending, the Wisconsin Legislature enacted legislation to create the Government Accountability Board (GAB) and set out its responsibility for administering laws related to elections and campaigns. It also created Wis. Stat. § 971.19(12), which provides that defendants charged with certain election and campaign violations are to be tried in the county where the defendant resides.

Based on the newly created venue statute, Jensen moved the circuit court to transfer his case from Dane County, where the misconduct is alleged to have occurred, to Waukesha County, his place of residence. The court denied the motion, concluding that § 971.19(12) does not apply to the charges pending against Jensen. Jensen appealed, and the Court of Appeals affirmed.

The Court of Appeals concluded, in part, that while the elections and ethics chapters provide one source of Jensen's overall duties as a public officer, Wis. Stat. § 946.12(3) is a criminal statute found under an entirely separate chapter. The Court of Appeals concluded that if the legislature had intended to include misconduct in public office charges within the final category of § 971.19(12), it could have easily done so by including that statute in the enumerated statutes.

Jensen has argued that his case is a matter involving elections and ethics and falls under § 971.19(12). He also contended that the terms “the investigation” in the statute is not limited to GAB investigations, but rather must mean any investigation, because there is no limiting language in the statute. He asserts that to interpret “the investigation” to mean only investigations authorized by the GAB improperly inserts “GAB” into the statute, to make it read “the GAB investigation.”

A decision by the Supreme Court could clarify venue provisions of Wis. Stat. § 971.19(12) as applied to the facts of this case.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 11, 2009
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 Mary E. Triggiano, presiding.

2007AP2827-CRAC State v. Kleser

This case, involving a first-degree intentional homicide, examines the proper scope and nature of a preliminary examination and reverse-waiver hearing in a juvenile original jurisdiction case.

Some background: Corey Kleser was 15 years old when charged with first-degree intentional homicide for allegedly beating a 57-year-old man with a hammer and stabbing him in the neck with a pair of scissors.

First-degree intentional homicide is one of the offenses in which an adult criminal court has exclusive jurisdiction, absent a reverse waiver. While being held on the homicide charge, Kleser also was charged with substantial battery and battery by a prisoner after allegedly hitting a fellow inmate at a juvenile detention center – another offense that is assigned to an adult criminal court absent a reverse waiver.

Kleser waived his right to a preliminary hearing on all three charges, and the judge bound him over for trial. During a lengthy reverse-waiver hearing, a defense psychologist testified that, in his opinion, Kleser had killed the victim out of rage in response to sexual advances. The state's psychological expert was not allowed to question Kleser about the facts of the incidents.

The circuit court concluded that Kleser had met the requirements in Wis. Stat. § 970.032 (2) (a-c) for transferring the matter to juvenile court. The court's findings included comments from the defense psychologist beyond information in the criminal complaint, such as that Kleser was possibly protecting himself in both the homicide and battery incidents.

The state asked the Court of Appeals to determine if the reverse-waiver hearing had been proper. The Court of Appeals reversed, concluding that a reverse waiver hearing should be limited to facts already found at the preliminary examination or set forth in the criminal complaint. The Court of Appeals sent the case back to the circuit court for another reverse-waiver hearing to be a "summary proceeding," not a trial of the merits.

The Court of Appeals reasoned that it would be "absurd" to allow the juvenile to challenge the facts of the offense as alleged in the criminal complaint after the juvenile had just stipulated to those facts by waiving a preliminary hearing held before the reverse-waiver hearing. The proper place for the juvenile to challenge the facts as alleged by the state is at the preliminary examination so that the circuit court does not end up making contradictory findings, the Court of Appeals concluded.

Kleser asks the Supreme Court to reinstate the circuit court's order transferring his two criminal cases to juvenile court. He contends the Court of Appeals' decision alters the summary nature of preliminary examinations. Although juvenile defendants,

like other defendants, have historically not presented evidence of mitigating facts or affirmative defenses at preliminary examinations, they will now be forced to do so in order to avoid a possible determination that their desired evidence contradicts the allegations of the criminal complaint and may not be admitted at the reverse waiver hearing.

In particular, Kleser asks the Supreme Court to review two questions: (1) did the Court of Appeals correctly interpret Wis. Stat. § 970.032 to require that any evidence concerning the facts of the crime can be introduced only at the preliminary hearing, and (2) did the trial court abuse its discretion in considering evidence introduced by Kleser's expert that contradicted the state's version of the facts, or when it substantively relied upon the expert's testimony?

The state asserts that the Court of Appeals correctly interpreted the reverse waiver statute. It nonetheless asks the Supreme Court to consider two additional questions: (1) did the defense psychologist's testimony constitute an improper opinion regarding the truthfulness of the juvenile's statements concerning the facts of an alleged offense, and (2) may a circuit court consider the full testimony of a defense psychologist regarding a juvenile's statements concerning the facts of an alleged offense, after prohibiting the state's psychological expert witness from interviewing the juvenile defendant regarding the facts of the relevant incidents?