WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2022

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

Brown
Dane
Juneau
Kenosha
Milwaukee
Oconto
Pierce

TUESDAY, MARCH 1, 2022

9:45 a.m.	19AP1876-CR	State v. Donald P. Coughlin
10:45 a.m.	20AP192-CR	State v. Chrystul D. Kizer

WEDNESDAY, MARCH 2, 2022

9:45 a.m.	18AP942-CR	State v. Robert Daris Spencer
10:45 a.m.	20AP925	James Cobb v. Gary A. King

TUESDAY, MARCH 8, 2022

9:45 a.m.	21AP1343 / 21AP1382	Jeffrey Becker v. Dane County
10:45 a.m.	19AP2150-CR	State v. Valiant M. Green

WEDNESDAY, MARCH 9, 2022

9:45 a.m.	19AP1565-CR	State v. Ryan Hugh Mulhern
10:45 a.m.	21AP419	State v. X.S.

THURSDAY, MARCH 10, 2022

9:45 a.m.	19AP2065-CR	State v. Richard Michael Arrington
10:45 a.m.	21AP1673	Joshua L. Kaul v. Frederick Prehn

Note: The Supreme Court calendar may change between the time you receive it and when a case is 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 type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
Tuesday, March 1, 2022
9:45 a.m.

2019AP1876-CR State v. Donald Coughlin

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed in part, reversed in part and remanded the judgment and order of the Juneau County Circuit Court, Judges James Evenson and Stacy Smith, presiding, convicting Coughlin of multiple counts of sexual assault of a child.

Donald Coughlin was charged with multiple counts of sexual assault of three boys in certain specified time periods from 1989 to 1994. At the time of the assaults, the victims' ages ranged from 7 years old to 12 or 13 years old; at the time of the criminal complaint and trial, the three male victims were middle-aged adults.

The victims testified at trial that Coughlin would take them out hunting or shining for deer, either individually or as a group and would pull his truck into a secluded location where the sexual assaults would take place. Coughlin testified at trial and categorically denied he ever assaulted any of the three boys.

The jury verdict form tracked the criminal complaint and information filed by the State and stated that Coughlin was charged only with sexually touching the victims. The circuit court gave jury instructions that defined "sexual assault" as including either Coughlin intentionally touching the victims or Coughlin intentionally causing or allowing the victims to touch him.

The jury found Coughlin guilty of 21 counts of 1st and 2nd degree sexual assault and repeated sexual assault relating to all three victims. The circuit court sentenced Coughlin to combined sentences on the 21 counts of conviction, which constituted 48 years in prison. In a postconviction motion, Coughlin argued that there was an insufficient factual basis for each of the 21 counts of conviction. The circuit court denied the postconviction motion stating it was required to accept the jury's credibility determinations and concluded, "the jury acted reasonably and could be convinced beyond reasonable doubt by the evidence that was presented . . . "

Coughlin filed an appeal to the Court of Appeals, again challenging the sufficiency of the evidence on each of the 21 counts of conviction and arguing he was entitled to a new trial. Coughlin argued that each of the victims testified that he had engaged the victim in various "sexual activities" over the years, and although the victims described the "sexual activity," when the prosecutor sought to elicit testimony about specific conduct, he did not have the victims describe what specific sexual conduct took place.

The Court of Appeals recognized the distinction between the charge on the verdict form and the definition of "sexual assault" in the jury instructions. The Court of Appeals decided to measure the evidence against the crimes described in the verdict form, and not on the jury instructions, and affirmed six convictions attributed to one of the victims and reversed the 15 convictions attributed to the other two victims. In a footnote at the end of its opinion, the Court of Appeals said its conclusions about the sufficiency of the evidence would not have changed

even if it had measured the sufficiency of the evidence against the instructions rather than the against the verdict forms.

The State filed a petition for review raising the following issues:

1. How does a court consider the theory of guilt in an evidence sufficiency claim when an inconsistency exists between a jury instruction and verdict?
2. Must a court accept a jury's resolution of any vagueness in testimony as jury credibility and weight determinations, and must a court then adopt the reasonable inferences that a jury may have drawn from the evidence?
3. Has Coughlin, as the defendant challenging the sufficiency of the evidence, met his heavy burden to overcome the great deference this court gives to the jury and its verdict to satisfy that the evidence, viewed most favorably to the State and the convictions, was insufficient to sustain the 15 guilty verdicts relating to his sexual assaults of two of the victims.

WISCONSIN SUPREME COURT
March 1, 2022
10:45 a.m.

2020AP192-CR State v. Chrystul D. Kizer

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed the Kenosha County Circuit Court, Judge David P. Wilk presiding, non-final order denying Chrystul Kizer's request to invoke an affirmative defense for victims of human trafficking and child sex trafficking per Wis. Stat. § 939.46(1m).

Chrystul Kizer is facing charges of first-degree intentional homicide, use of a dangerous weapon, operating a motor vehicle without the owner's consent, arson of a building, felony bail jumping and possession of a firearm by a felon.

On June 4, 2018, Chrystul Kizer, then age 17, allegedly took an Uber from Milwaukee to Kenosha that was paid for by Randall V. to his home. According to police investigators, Kizer said upon arriving at Randall's home, she told him to sit in a chair and told him that she had a gun. She pointed the gun at Randall, told him, "I'm going to do it" and proceeded to shoot him in the head. Kizer then allegedly started a fire using liquor and paper towels and left the residence in Randall's vehicle which she drove back to Milwaukee.

Kizer claimed she was in a sexual relationship with Randall, who was 34, and that she had intended to kill him so he would stop "touching on her." The State and Kizer disagreed whether Randall had paid Kizer for sex acts and/or whether she was or had been trafficked by Randall. Randall was under investigation at the time for numerous crimes against children, including Kizer, but had not yet been charged when killed.

During the final pretrial conference, Kizer sought to invoke the affirmative defense for victims of human trafficking and child sex trafficking permitted by Wis. Stat. § 939.46 (1m) that provides that a victim of trafficking has an affirmative defense for any offense committed as a direct result of trafficking. The parties agree that there are insufficient facts, as yet, to determine whether Kizer would even be entitled to invoke the affirmative defense. If she is entitled to the defense, the question is whether the statute provides a complete defense to a charge of first-degree intentional homicide or whether it is only subject to the charge if mitigated down to second-degree intentional homicide.

The circuit court ruled that the affirmative defense set forth in § 939.46(1m) was available only if Randall was charged with a trafficking offense, which he was not. Kizer filed a petition for leave to appeal the circuit court's non-final order.

The Court of Appeals concluded that circuit court was incorrect and that § 939.46(1m) does provide for a complete defense, not just the affirmative defense, to a charge of first-degree intentional homicide so long as it is a "direct result" of trafficking.

The State disagreed with the Court of Appeals and filed a petition for Supreme Court review, raising one issue:

Does the defense set forth in section 929.46 (1m) – for crimes committed as a "direct result" of trafficking – provide a complete defense to a charge of first degree intentional homicide?

WISCONSIN SUPREME COURT
March 2, 2022
9:45 a.m.

2018AP942-CR State v. Robert Daris Spencer

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed in part and reversed in part the Milwaukee County Circuit Court, Judge Stephanie Rothstein presiding, order denying Spencer's postconviction motion.

On September 28, 2014, Milwaukee police responded to a report of shots fired. When police arrived, they found T.M. lying on the sidewalk with a gunshot wound to the head. An investigation showed that prior to any shots being fired, Robert Daris Spencer and T.M. approached a friend, R.S., and attempted to rob R.S. to settle a debt; R.S. ran away. The police investigation showed there were two shooters: one who shot at J.S. as he ran away and one who fired shots at Spencer and T.M. from a kitchen window at R.S.'s house. Spencer was charged with felony murder and possession of a firearm by a felon, based on the State's theory that Spencer attempted to rob R.S., shot at R.S. as R.S. ran away, and as a result of the robbery, caused T.M.'s death.

The case was tried to a jury. On the last day of the trial, the proceedings began with a discussion about jury instructions. A bailiff advised the court that one of the jurors was ill. After a 45-minute recess, the trial resumed and the circuit court announced its decision to dismiss the ill juror for cause. After the parties were allowed to make any motions they deemed appropriate and state their positions on the record in response to the court's decision, the court dismissed the juror. Spencer's attorney objected to the dismissal of the juror and moved for a mistrial pursuant to Swain v. Alabama, 380 U.S. 202 (1965), overruled in part by Batson v. Kentucky, 476 U.S. 79 (1986), given the fact that the dismissed juror was the only African-American member of the jury. (Spencer is African-American). The proceedings continued with closing arguments with the remaining 12 jurors. The jury returned a guilty verdict on both counts. Spencer was sentenced to 23 years of initial confinement and 15 years of extended supervision.

Spencer filed a postconviction motion alleging that he was entitled to a new trial. Spencer argued that he was denied his 6th Amendment right to counsel at a critical stage of the proceedings because the circuit court questioned the dismissed juror about her illness without his counsel being present. Spencer also argued that he was entitled to a new trial because his attorney performed deficiently when she failed to object to hearsay testimony indicating that R.S.'s roommate saw him being dragged across the street and fired shots from the kitchen window to protect R.S.

The circuit court denied Spencer's motion without a hearing. It found that Spencer's right to counsel was not violated because the period of time after the close of the evidence and the beginning of jury deliberations was not a critical stage of the proceedings for which Spencer "needed assistance with a legal problem and where counsel's presence was essential." The circuit court also found that any error in its questioning of the juror about her illness outside the

presence of Spencer's counsel was harmless. The court also rejected Spencer's ineffective assistance claim, concluding that Spencer suffered no prejudice since, even if counsel had objected, "there is simply not a reasonable probability [Spencer] would have been acquitted of the crimes with which he was charged because there was absolute overwhelming evidence of his guilt."

Spencer appealed his conviction. The Court of Appeals concluded that Spencer forfeited his right to claim that the circuit court's decision to dismiss a juror for cause (due to her illness) violated his right to due process and equal protection and was an erroneous exercise of the circuit court's discretion. The Court of Appeals then concluded that Spencer alleged sufficient material facts in his postconviction motion to warrant a Machner hearing on his ineffective assistance of counsel claim, and it remanded the matter in order for the circuit court to conduct such a hearing.

Spencer filed a petition for review, raising two issues:

1. Was the Court of Appeals correct that the trial court's assumed unconstitutional ex parte communication with, and dismissal of, the only African-American on the defendant's jury, was subject to harmless error analysis; and, if so was the Court of Appeals correct that the dismissal of the juror constituted harmless error?
2. Did the trial court violate the defendant's constitutional rights and/or erroneously exercise its discretion when it considered the race of the defendant and of trial participants when justifying the juror's dismissal?

The State filed a cross-petition for review, raising two issues:

1. If Spencer's right to counsel was denied at a critical state, was that error harmless?
2. Did the circuit court's decision dismissing the sick juror violate Spencer's rights to due process and equal protection, or constitute an erroneous exercise of discretion?

WISCONSIN SUPREME COURT
March 2, 2022
10:45 a.m.

2020AP925 James Cobb v. Gary A. King

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), affirming the Oconto County Circuit Court order, Judge Jay N. Conley presiding, granting summary judgement in favor of Gary A. King enforcing his use of an ingress and egress easement over the Cobb's property.

In 1969, Herbert and Jean Hessil, Gary King's predecessors in title, acquired their property. In 1978, Barbara Rierdon and others, predecessors in title to James and Judy Cobb, granted a roadway easement over their property to the Hessils. The easement was recorded with the Oconto County Register of Deeds and provided that the grantors – Rierdon – "grant, convey, give over and allow to HERBERT HESSIL and JEAN HESSIL, his wife, a right of ingress and egress for the purpose of vehicular traffic only" to part of the current Cobb property. Rierdon sold the real estate to the Cobbs by land contract in 1981. The legal description of the property contained in the land contract included language that the sale was "subject to an easement." In 1987, Rierdon conveyed the property to the Cobbs by warranty deed, which again stated that the property was subject to an easement. In 2009, the Hessil property was conveyed to King and Melissa Hermes, with no mention of the easement. Hermes conveyed the property to King in 2011. Again, with no mention of the easement

The Cobbs sued King, seeking a declaration that the easement benefitting what was now King's property was personal to the Hessils and that King had no rights to it and should be enjoined from using it. King sought a judgment declaring that the easement ran with the land and was freely transferable. The parties mediated the dispute in November 2018 during which King agreed to sell his property to the Cobbs. However, the terms of the agreement were not fulfilled because several material terms were not agreed upon. King then filed a motion for summary judgement to enforce his right to use the easement. The Cobbs filed a motion to enforce the mediation agreement requiring King to sell his property to them. King objected to the enforcement of the mediation agreement, saying it was indefinite since the basic terms of the proposed transaction were uncertain.

The circuit court held a hearing and ordered the parties to participate in a second mediation. This resulted in a second mediation agreement. The terms of this agreement were also not fulfilled. King moved the circuit court to enforce the second agreement. The circuit court scheduled a hearing and when the Cobbs appeared a half hour late, the circuit court granted the Cobb's attorney's request to withdraw as counsel, granted a default judgement against the Cobbs, and ordered that the second mediation agreement be enforced. The Cobbs retained a new attorney and filed a motion to vacate the default judgement. After another hearing, the circuit court granted the Cobbs motion to reopen the case. It also determined that the second agreement was unenforceable because the legal description of the parcel at issue was reasonably in dispute. The circuit court issued a written decision granting the Cobb's motion to vacate the default

judgement; denying the Cobb's motion to enforce the first mediation agreement; denying King's motion to enforce the second mediation agreement; and granting King's motion for summary judgement.

The Cobbs appealed the grant of summary judgement in favor of King. King cross-appealed the denial of his motion the second mediation agreement. The Court of Appeals affirmed the circuit court granting summary judgment in favor of Gary King enforcing his use of the easement.

James and Judith Cobb filed a petition for Supreme Court Review, raising three issues:

1. Did the circuit court misconstrue Wis. Stat. § 706.10 (3), which provides:

   > In conveyances of lands words of inheritance shall not be necessary to create or convey a fee, and every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in terms of such conveyance . . .

   when it concluded that an easement, which mentioned only the grantees and no one else, nonetheless ran with the land by virtue of the statute?
2. Did the passage in the same statute that provided, "In conveyances of land words of inheritance shall not be necessary to create or convey a fee . . ." apply to easements, when a century of this Court's cases hold that easements involve a limited right to use another's property but do not involve a fee interest in the land and when Wis. Stat. § 700.02 (1) defines a fee interests in real property but does not include easements.
3. Did the passage in the statute that "every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance" mean that the easement ran with the land, when nothing in the easement's terms indicated that was the case; in other words, did the terms of the statute supersede the terms of the easement?

WISCONSIN SUPREME COURT
March 8, 2022
9:45 a.m.

2021AP1343 & 2021AP1382 Jeffrey Becker, et al. v. Dane County, et al.

This case is before the Wisconsin Supreme Court on a petition to bypass the District IV Wisconsin Court of Appeals (headquartered in Madison). The petitioners, Jeffrey Becker, Andrea Klein and A Leap Above Dance, LLC, appealed the order of the Dane County circuit court, Judge Jacob Frost, presiding, denying their request for a temporary injunction and granting summary judgment dismissing their lawsuit against Dane County, Janel Heinrich, and Public Health of Madison & Dane County.

Janel Heinrich, in her capacity as the Public Health Officer and Director of Public Health of Madison and Dane County, issued a series of orders in response to the COVID-19 pandemic, including limitations on indoor gatherings, capacity limits, and mask mandates.

In November 2020, petitioners Becker and Klein, two parents with children engaged in youth sports (and another party, Gymfinity) filed a petition for original action with the Wisconsin Supreme Court, raising, among other issues, the two questions presented in this case. This court denied the original action petition. Gymfinity, Ltd. v. Dane County, No. 2020AP1927, unpublished order (Wis. Dec. 21, 2020).

In January 2020, Becker and Klein filed their case in Dane County Circuit Court. They requested (1) a declaration that any orders Heinrich has or will issue are unenforceable unless adopted by the county board, and (2) an injunction against enforcement of any past or future orders. Shortly after Becker and Klein filed their complaint, Public Health of Madison & Dane County filed an enforcement action against A Leap Above Dance, LLC (A Leap Above), seeking nearly $24,000 in fines for an event that allegedly violated the indoor gathering ban in place in November–December 2020. Public Health Madison & Dane County v. A Leap Above Dance, Dane County Circuit Court Case No. 21CV177. Shortly thereafter, A Leap Above joined this action as a plaintiff alongside Becker and Klein. Public Health Madison & Dane County then dismissed its enforcement action; Dane County re-filed the enforcement action as a counterclaim in this case, which remains pending in the circuit court.

The petitioners (Becker, Klein and A Leap Above) filed a motion asking the circuit court for a temporary injunction against enforcement of any past or future orders issued or to be issued by Heinrich, and also for summary judgment. The circuit court denied the temporary injunction motion and ruled that Wis. Stat. § 252.03's general provisions to "do what is reasonable and necessary" and to "take all measures necessary" give local health officials "broad authority" to "control conduct" and "to do so forcefully" through enforceable general orders. The court also held that the combination of Dane County Ordinance § 46.40(2) and Wis. Stat. § 252.03 does not present a non-delegation problem. At the petitioners' request, the circuit court granted summary judgment to Dane County, Heinrich, and Public Health Madison & Dane County, and dismissed the petitioners' claims so they could pursue an appeal of a final order.

While briefing was in progress in the Court of Appeals, the petitioners filed their first petition to bypass the Court of Appeals, which this court denied in large part because the briefs had not yet been filed in the Court of Appeals and it is the court's general practice to dismiss such bypass petitions as premature. When the briefing was completed in the Court of Appeals, the petitioners renewed their request to the Wisconsin Supreme Court to bypass the Court of Appeals.

The Supreme Court granted the petition to bypass on the following issues:

1. Whether state law permits local health officials to unilaterally issue enforceable restrictions on otherwise lawful activity without adoption by the local governing body (e.g., county board)?
2. Whether Dane County Ordinance § 46.40(2) and/or Wis. Stat. § 252.03, violate Article IV, § 22 of the Wisconsin Constitution and the non-delegation doctrine?

WISCONSIN SUPREME COURT
March 8, 2022
10:45 a.m.

2019AP2150-CR State v. Valiant M. Green

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), affirming the Kenosha County Circuit Court, Judge Bruce Schroeder presiding, order summarily affirming a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), as a fourth offense with a prior offense within the past five years, and resisting an officer.

On May 25, 2014, a concerned citizen called 911 to report that Valiant M. Green, who was her neighbor, appeared to be drunk and was driving his vehicle in the neighborhood. When police responded, they found Green in the driver's seat of his vehicle, which was located in his driveway. Green admitted to drinking alcohol, and he showed classic signs of intoxication. He refused to perform field sobriety tests or provide a preliminary breath test.

Police arrested Green and applied for a search warrant to obtain a blood draw. The affidavit in support of the search warrant noted Green's admission to drinking and detailed the indicators of intoxication, but failed to mention that the concerned citizen had told police she had seen Green operating his vehicle in the street. A judge signed the warrant and police conducted the blood draw, which showed Green's blood alcohol concentration to be well over the legal limit. The State filed a criminal complaint charging Green with operating a motor vehicle while intoxicated – 4th offense with a prior in the past 5 years, and resisting an officer.

Green moved to suppress the results of the blood draw, arguing that the affidavit in support of the search warrant did not state probable cause because it failed to say that Green had operated his vehicle on a public highway or roadway, as is required for the offense. The circuit court held a hearing on the motion, and denied it. The case proceeded to a jury trial where Green was found guilty of operating with a prohibited alcohol concentration, as a 4th offense, and resisting an officer. A charge of 4th offense operating while intoxicated was dismissed on the prosecutor's motion. Green was sentenced to two years of initial confinement and seven months of extended supervision. He received 724 days of sentence credit.

Green appealed the circuit court's denial of his motion to suppress. The Court of Appeals summarily affirmed the circuit court decision, concluding (1) that a search warrant may issue only upon a finding of probable cause by a neutral and detached magistrate, (2) that "probable cause for a search warrant is not a technical or legalistic concept, but rather, is a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior,'" and (3) that elaborate specificity is not required, and that probable cause may be supported by reasonable inferences as well as facts.

Green filed a petition for review raising one issue:

Mr. Green was arrested for operating while intoxicated and his blood was taken pursuant to a search warrant. Did the affidavit in support of that search warrant fail to state probable cause to believe that Mr. Green had committed a crime and thus require suppression of the blood test result?

WISCONSIN SUPREME COURT
March 9, 2022
9:45 a.m.

2019AP1565-CR State v. Ryan Hugh Mulhern

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), reversing a Pierce County Circuit Court, Judge Joseph D. Boles, presiding, judgment of conviction for second-degree sexual assault entered against Ryan Hugh Mulhern and remanding for a new trial.

Wisconsin's rape shield statute, Wis. Stat. § 972.11(2), bars admission of any evidence of the victim's prior sexual conduct. This case asks, what about the less common, but not infrequent, situation where the victim testifies about lack of sexual conduct in the days prior to the alleged sexual assault to support allegations of assault?

Ryan Hugh Mulhern was charged with one count each of second-degree sexual assault by use of force, strangulation and suffocation, and misdemeanor bail jumping. These charges arose from an allegation that Mulhern sexually assaulted Alyssa (a pseudonym), a friend, in her home in the early morning hours of November 22, 2016. Mulhern had earlier called Alyssa begging to come over and be consoled about some personal issues. Alyssa agreed that he could come over. They talked for a while and then she told Mulhern she needed to go to bed and that he should sleep on the futon. Instead, Mulhern followed her into the bedroom and laid down next to her. She said at first Mulhern tried to cuddle, which she did not object to, but then he tried to kiss her and despite her trying to shove him off and repeatedly telling him to "stop," he became more forceful and angry, using his hands to keep her from moving. He undressed, put his arm around her neck, and sexually assaulted her, covering her nose and face when she tried to scream.

The next morning, Alyssa showered without soap and contacted a local sexual assault resource team. The nurse who examined her testified that her various injuries were consistent with her allegation of sexual assault.

At trial a State Crime Lab analyst testified about DNA tests performed on samples from Alyssa's sexual assault examination kit which revealed the presence of both her DNA and Mulhern's DNA, and the presence of amylase (a protein found in saliva) from her neck. The remaining evidence revealed that foreign male DNA was present in the vaginal swab, but the amount was insufficient to allow identification of the contributor of the DNA. The analyst explained that when foreign DNA is deposited on a person's body, the body will eventually "slough cells or cleanse itself." The State asked how long foreign DNA remains, and the analyst answered, "five days after an assault, we generally would not see any evidence of foreign DNA remaining . . . ." The analyst also said showering can remove foreign DNA from a person's body.

The State asked Alyssa whether she had sexual intercourse or sexual contact with anyone during the week leading up to the reported assault. She testified that she did not. Mulhern's counsel objected on the ground that the testimony violated Wisconsin's rape shield statute which

prohibits testimony concerning a victim's prior sexual contact. The circuit court overruled the objection, reasoning that the State sought to elicit testimony on "lack of conduct."

The jury found Mulhern guilty of second-degree sexual assault, and acquitted him of strangulation and suffocation. Mulhern appealed.

The Court of Appeals reversed the conviction, finding that the circuit court erroneously exercised its discretion when it allowed the victim to testify about her lack of sexual activity in the days preceding the alleged assault. The Court of Appeals said that the error was not harmless because the erroneously admitted evidence was paramount since it corroborated the victim's version of events, and the jury's decision to acquit Mulhern on the strangulation and suffocation count suggested that the jury had a reasonable doubt as to whether the victim's testimony accurately described Mulhern's actions.

The State filed a petition to review, arguing that to read the statute to bar the evidence offered here prevents victims from offering relevant evidence to corroborate their claims of sexual assault, which is the opposite of what the statute was designed to do.

The State's petition presented the following issues for review:

1. Given [the] purpose [of Wisconsin rape shield statute to bar evidence that is generally irrelevant and that otherwise operates to harass or humiliate sexual assault victims or to prevent them from reporting these crimes and participating in prosecutions], must the rape shield bar relevant evidence of the victim's lack of sexual conduct that the victim offers to corroborate her claim of sexual assault, that is not prejudicial to her or to the defendant, and that causes none of the harms that the statute protects against?
2. Assuming that the rape shield law barred the victim's statement, is the error harmless, given that the admitted evidence was relevant, non-prejudicial, and admitted in violation of a statute designed to protect victims?

WISCONSIN SUPREME COURT
March 9, 2022
10:45 a.m.

2021AP419 State v. X.S.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), reversing a non-final juvenile court order, the Milwaukee County Circuit Court, Judge Brittany C. Grayson presiding, denying the State's petition for waiver of jurisdiction in order to have X.S. waived into adult court.

This case stems from a shooting at Mayfair Mall in November 2020. A confrontation broke out between X.S., X.S.'s 17- year old friend E.G., and a group of juveniles. E.G. punched one of the juveniles and the remainder of the group appeared to converge on E.G. X.S., then 15 years old, fired several shots and wounded eight people.

The State filed a delinquency petition charging X.S. with eight counts of first-degree reckless injury with use of a dangerous weapon, contrary to Wis. Stat. §§ 940.23(1)(a) and 939.63(1)(b), as well as a single count of possession of a dangerous weapon by a person under 18, contrary to Wis. Stat. § 948.63(2)(a). The State then filed a petition for waiver of juvenile jurisdiction, arguing X.S. "will not benefit from further prosecution in the Juvenile Justice System." A human service worker with the Division of Youth & Family Services filed a report opposing waiver. X.S. also asked the juvenile court to retain jurisdiction and filed, among other things, a psychological assessment also recommending non-waiver.

At the waiver hearing, X.S. presented the testimony of the psychologist who performed the assessment. The doctor testified at length that he believed X.S.'s risk to reoffend was moderate and could be reduced with treatment in the juvenile justice system. He reiterated what X.S. had told him about the shooting: that X.S. had closed his eyes and fired at random into the crowd. The doctor said he believed that X.S.'s PTSD diagnosis played a role in his actions and that X.S. had "felt threatened" that day at the mall.

The circuit court denied the State's waiver petition. The State was permitted to pursue an interlocutory appeal. The Court of Appeals reversed and remanded for a new waiver hearing, concluding that the juvenile court erroneously exercised its discretion. X.S. filed a motion for reconsideration in which X.S. stated that numerous perceived errors were identified. The motion for reconsideration was denied, without explanation, less than 24 hours later in a one sentence order.

X.S. filed a petition for Supreme Court review, raising two issues:

1. Did the Court of Appeals erroneously exercise its discretion in denying the motion for reconsideration less than 24 hours after it was filed in a written order that contained no explication?
2. Did the juvenile court err when it permitted X.S. to introduce an explanation of the underlying offenses that mitigated, but did not negate probable cause for, the offense(s) alleged in the delinquency petition?

WISCONSIN SUPREME COURT
March 10, 2022
9:45 a.m.

2019AP2065-CR State v. Richard Michael Arrington

This is a review of a published decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), reversing and remanding further proceedings the Brown County Circuit Court, Judge Timothy A. Hinkfuss, presiding, judgment entered after a jury trial convicting Richard Michael Arrington of first-degree intentional homicide with use of a dangerous weapon and of being a felon in possession of a firearm, both as a repeater, and an order denying Arrington's postconviction motion.

Richard Michael Arrington was taken into custody in the county jail after the State filed a criminal complaint charging him with first-degree intentional homicide and felon in possession of a firearm, both as a repeater. Arrington had made an initial appearance in his case with counsel. Sometime prior to Arrington's arrival at the jail, Brown County detectives had given a small digital recorder to Jason Miller, another inmate in the county jail. Miller was able to tuck the recorder in his waistband and use it to secretly record his conversations with other inmates. Miller told the detectives that Arrington was talking about his case, and Miller believed Arrington would talk with him about the pending charges against him. Miller asked the detectives if he should record his conversations with Arrington, and the detectives said he could. Miller proceeded to secretly record several conversations with Arrington. The detectives knew that Miller was seeking consideration in his own pending cases in exchange for his work as an informant, and the detectives told Miller the information he gathered would be used as part of that consideration. Miller understood the more helpful the information, the more consideration an informant may receive.

The State used these recorded conversations at trial. Miller testified to corroborate the recordings he made. Arrington's trial counsel did not move to suppress the secretly recorded statements and never objected to Miller's testimony. The jury found Arrington guilty on both counts. The circuit court sentenced Arrington to life in prison for the conviction of first-degree homicide, and a concurrent sentence of three years with three years of extended supervision for the possession of a firearm conviction.

With new counsel, Arrington filed a postconviction motion alleging that the State violated his right to counsel at trial when it used statements that Miller had obtained in recorded conversations with Arrington after Arrington had been formally charged and represented by counsel. In the alternative, Arrington sought a new trial, asserting that his trial counsel was ineffective by failing to object to the recordings and Miller's testimony. After conducting a hearing on the motion, the circuit court denied it, concluding that Miller was not acting as an agent for the State when he recorded the conversations and therefore Arrington's 6th Amendment right to counsel was not violated and his trial counsel did not provide ineffective assistance by failing to object to the recordings.

Arrington appealed, renewing his argument to the Court of Appeals that his 6th Amendment right to counsel was violated. The Court of Appeals sided with Arrington, holding that Miller was acting as an agent of the State during his recorded conversations with Arrington. The Court of Appeals noted that once the right to counsel has attached, "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." In addition, the Court of Appeals held that Arrington's trial counsel performed deficiently by failing to seek suppression of, or otherwise object to, the admission of the recordings and Miller's testimony. The Court of Appeals reversed and remanded the matter for a new trial on the homicide charge without the use of the recordings or Miller's testimony about the jailhouse conversations with Arrington. The Court of Appeals noted that reversal is not warranted on Arrington's felon in possession of a firearm charge, as Arrington did not dispute his guilt on that charge.

The State filed a petition for review presenting the following issues:

1. Did Arrington prove that his counsel was ineffective for failing to move to suppress the confidential informant's recordings and testimony on Sixth Amendment grounds?
2. Did Arrington prove that the State violated his Sixth Amendment right to counsel?

WISCONSIN SUPREME COURT
March 10, 2022
10:45 a.m.

2021AP1673 Joshua L. Kaul v. Frederick Prehn

This case is before the Wisconsin Supreme Court on a petition to bypass the District IV Wisconsin Court of Appeals (headquartered in Madison). The petitioner, Attorney General Joshua Kaul, appealed the order of the Dane County Circuit Court, Judge Valerie Bailey-Rihn, presiding, dismissing his petition for a writ of quo warranto or a declaratory judgment seeking removal of Dr. Frederick Prehn from the appointed position of a member of the Natural Resources Board or alternatively for a declaration that Prehn is subject to immediate removal by the Governor.

Dr. Frederick Prehn, a dentist in Wausau, Wisconsin, was appointed to the Natural Resources Board (the Board) in May 2015 for a six-year term that expired on May 1, 2021. In anticipation of the expiration of Prehn's term, Governor Evers announced he would be appointing Sandra Nass to fill the Board position as of May 1. Naas took the oath of office on April 30, 2021.

Prehn, however, refused to vacate the Board position and he has continued to preside over the Board meetings and to vote on matters that come before the Board. He has taken the position that he remains a member of the Board until a new appointee is confirmed by the Senate. And, since Prehn continues to act as a member of the Board, Naas has not been able to join the Board, even on a temporary basis as an appointee awaiting a confirmation hearing.

Attorney General Joshua Kaul filed a petition for a writ of quo warranto or for declaratory judgment in Dane County Circuit Court. Quo warranto means: "by what authority"; a writ of quo warranto can be issued against the holder of a public office to act, or abstain from acting, in some way. Attorney General Kaul argued that the seat held by Prehn had become "vacant" upon the expiration of Prehn's term, which authorized the Governor to appoint a new person. Kaul relied on Wis. Stat. § 15.07(1)(c) which states that "fixed terms of members of boards shall expire on May 1 and, if the term is for an even number of years, shall expire in an odd-numbered year." Kaul also argued that while appointees may only be removed "for cause" under Wis. Stat. § 17.07(3) during their terms, that "for cause" protection ceases upon the expiration of the term. Finally, Kaul argued under the principles of separation of power found in the Wisconsin Constitution, Prehn was an officer within the executive branch and therefore, as head of the executive branch, the Governor must have authority under the state constitution to remove him.

Prehn filed a motion to dismiss the petition for a variety of reasons. The circuit court granted Prehn's motion and dismissed the Attorney General's complaint with prejudice. The circuit court concluded it was bound by State ex rel. Thompson v. Gibson, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), in which the Wisconsin Supreme Court determined that the expiration of a fixed term of a gubernatorial appointee did not create a vacancy because there was no subsection in Wis. Stat. § 17.03(3) that specified that the expiration of a term of office creates a vacancy.

Attorney General Kaul filed a notice of appeal to the Court of Appeals and shortly thereafter filed a petition to bypass for the Supreme Court to review the case.

Attorney General Kaul petition to bypass asked the Supreme Court to decide the following legal issues without a decision from the Court of Appeals:

1) Whether the expiration of Prehn's fixed term of appointment on the Wisconsin Natural Resources Board created a vacancy subject to gubernatorial provisional appointment.
2) Whether the expiration of Prehn's fixed term ended any "for-cause" protection that Prehn enjoyed, so that after his term expired he was removable by the Governor at pleasure.