

**WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
MAY, 2011**

The cases listed below will be heard jointly in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:
Jefferson
Milwaukee

TUESDAY, MAY 3, 2011

| | | | |
|-------------|----------|---|------------------------------|
| 9:45 a.m. - | 09AP1579 | - | State v. Edwin Clarence West |
| | 10AP1142 | - | State v. Glen D. Nordberg |

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, MAY 3, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a decision by Milwaukee County Circuit Court, Judge Martin J. Donald, presiding.

2009AP1579

[State v. West](#)

In this case, the Supreme Court is asked to review statutory and constitutional issues related to Wis. stat. ch. 980, the state's law that allows civil commitment for persons deemed to be sexually violent.

Some background: Edwin West was committed under ch. 980 in 1997. In April 2008 he filed a petition for supervised release, which was denied by the circuit court in a decision affirmed by the Court of Appeals.

Specifically, West's petition raises the following issue: Does 2005 Wis. Act 434 § 118 (codified at Wisconsin Statutes § 980.08(4)(cg)) shift the burden of proof at a supervised release hearing under Chapter 980 to the civilly-committed respondent?

Prior to the effective date of the new legislation on Aug. 1, 2006, the statutory presumption was to grant a petition for supervised release, and the state clearly bore the burden to show that release was not warranted. West argues that the new statute, which does not explicitly assign the burden of proof, should be similarly interpreted to place the burden on the state. Among other things, he urges that the supervised release provision should be treated like a criminal statute under the rule of lenity and be given a narrow construction in favor of the person whose liberty is at stake. In addition, West argues that the statute as modified cannot be interpreted to shift the burden of proof to the committed person because such a shift would violate constitutional due process and equal protection rights.

West's petition for review essentially asks this court to review the rules of law established by the Court of Appeals in State v. Rachel, 2010 WI App 60, 324 Wis. 2d 465, 782 N.W.2d 443, which decided the burden of proof and constitutionality issues contrary to the position taken by both Rachel and West. However, Rachel never reached the Wisconsin Supreme Court.

After conducting an evidentiary hearing, the circuit court concluded that West had not satisfied the new statutory criteria, and it denied his petition for supervised release.

The court of appeals affirmed, stating that it had already decided these issues contrary to the position of the committed individual in Rachel. Thus, it was bound by the Rachel decision to reject West's arguments that the burden should be on the state and that to place the burden of proof on the committed person would be unconstitutional.

West notes that only approximately 20 of the 350 people committed under Chapter 980 are on supervised release. Thus, he contends that resolution of the statutory interpretation and constitutional issues will have a statewide impact on a significant number of individuals.

WISCONSIN SUPREME COURT
TUESDAY, MAY 3, 2011
9:45 a.m.

In this bypass of the District IV Court of Appeals (Headquartered in Madison), the Supreme Court reviews a decision by Jefferson County Circuit Court Judge Jacqueline R. Erwin. A party may ask the Supreme Court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass is usually one which 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.

2010AP1142

State v. Nordberg

This bypass involves the interpretation of the statutory chapter that permits the civil commitment of sexually violent persons, Wis. Stat. ch. 980, following its revision by 2005 Wis. Act 434. Specifically, Glen D. Nordberg seeks an interpretation of the provision governing petitions for supervised release from such commitments. He has asked the Supreme Court to decide if State v. Rachel, 2010 WI App 60, 324 Wis. 2d 441, 782 N.W.2d 443, erroneously interpreted Wis. Stat. § 980.08(4) to place the burden of persuasion on the committed patient to prove by clear and convincing evidence the criteria for granting supervised release.

Some background: Nordberg was committed under ch. 980 in 2001. In July 2008, he filed a petition for supervised release. Prior to the trial, Nordberg filed a motion that asked the circuit court to rule that the burden of proof remained on the state under the new version of the statute. The circuit court denied Nordberg's motion and concluded that the burden under the new statute was on Nordberg to prove by clear and convincing evidence that he had satisfied five statutory criteria in Wis. Stat. § 980.08(4)(cg).

At the conclusion of the hearing on Nordberg's petition, the circuit court found "that Mr. Nordberg, by clear and convincing evidence, has made significant progress in treatment." The court further found, however, that it was "not satisfied by clear and convincing evidence that it is not much more likely than not that Mr. Nordberg will engage in acts of sexual violence while on supervision." Accordingly, the circuit court denied Nordberg's petition for supervised release.

Nordberg filed a motion for reconsideration, alleging that the circuit court had erred by assigning the burden of proof to the committed person and by making that burden rise to the intermediate level of clear and convincing evidence. Because the Court of Appeals had decided in Rachel that a committed person should bear the burden of proof under the new version of the statute, and that the burden should be clear and convincing evidence, the circuit court denied the reconsideration motion.

Under the previous version of the statute, the burden of proof had been on the state to prove that supervised release was not appropriate. If the circuit court determined that the state had not met its burden, it was obligated to grant the supervised release petition. State v. Brown, 2005 WI 29, ¶12, 279 Wis. 2d 102, 693 N.W.2d 715. To the contrary, if it determined that the state had met its burden, it was obligated to deny the petition.

Nordberg's position is that the new version of the statute should be interpreted to allow a circuit court to make a supervised release decision based on its neutral consideration of all of the evidence and the listed statutory factors. He contends that the language of the statute is indeed silent on who bears the burden of proof. Nordberg asserts that if the legislature wanted to place the burden on the individual, it would have written the statute to say so.

Nordberg's petition also argues that if the court nonetheless determines that the committed individual should bear the burden of persuasion, requiring the individual to meet a clear and convincing evidence standard is too harsh.

The state contends that the issue of the burden of persuasion on supervised release motions under the new version of the statute should require the individual to satisfy all five statutory criteria by clear and convincing evidence, as the court of appeals ruled in Rachel.

Oral argument in this case will be heard together with argument in State v. West, No. 2009AP1579, which raises a similar issue.