WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY 2014

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:

Dane
Kenosha
Monroe
Ozaukee
Rock
Sheboygan
Washington
Waukesha

TUESDAY, FEBRUARY 4, 2014

9:45 a.m.	11AP2548-CR	- State v. Luis M. Rocha-Mayo
10:45 a.m.	12AP580	- Russell Adams v. Northland Equipment Co., Inc.

WEDNESDAY, FEBRUARY 5, 2014

9:45 a.m.	12AP1307-CR	- State v. Jeremiah J. Purtell
10:45 a.m.	11AP2868-CR	- State v. Clayton W. Williams

THURSDAY, FEBRUARY 20, 2014

9:45 a.m.	11AP3007-CR	- State v. Derik J. Wantland
10:45 a.m.	12AP320	- Sharon R. Waranka v. Wadena Ins. Co.
1:30 p.m.	12AP1582-CR	- State v. Andrew J. Matasek

TUESDAY, FEBRUARY 25, 2014

9:45 a.m.	12AP584-AC	- League of Women Voters v. Walker
	12AP1652	- Milwaukee Branch of the NAACP v. Walker
1:30 p.m.	11AP2774	- Attorney's Title Guaranty Fund, Inc. v. Town Bank

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

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

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 4, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Kenosha County Circuit Court decision, Judge Wilbur W. Warren III, presiding.

2011AP2548-CR State v. Rocha-Mayo

This fatal OWI case arises from an accident involving a car and two motorcycles. The Supreme Court examines several issues relating to the introduction into evidence of a preliminary breath test (PBT) for alcohol that is not approved for evidential use in Wisconsin and that was not administered by a law enforcement officer.

Some background: Luis Rocha-Mayo was involved in a collision with two motorcyclists while driving his car home after bar time. One motorcyclist died; the other was injured.

Rocha-Mayo was convicted of first-degree reckless homicide by use of a dangerous weapon; homicide by intoxicated use of a vehicle; first-degree reckless endangerment by use of a dangerous weapon; and operating a motor vehicle without a valid license, causing the death of another person. He appealed those convictions, as well as the order denying his motion for post-conviction relief.

The parties dispute precisely what led to the accident. Rocha-Mayo would contend that the group of motorcyclists was angry because he inadvertently separated them and were threatening him, causing him to become distracted and leading to the accident. The motorcyclists dispute that story.

After the accident an ambulance transported the semiconscious Rocha-Mayo to the hospital. The emergency room (ER) physician directed a registered nurse to perform a PBT to determine whether Rocha-Mayo's confusion was the result of head trauma, suggested by his facial injuries, or intoxication, suggested by the odor of alcohol on his breath. The PBT result was 0.086. Rocha-Mayo admitted consuming a number of beers over several hours.

At trial, Rocha-Mayo tried unsuccessfully to challenge admission of the PBT result. He then entered a guilty plea to operating a motor vehicle without a valid license and causing the death of another person. The remaining three charges were tried to a jury. After several days of deliberations, the jury found him guilty. On appeal, he argued that the trial court erred in admitting his PBT result because Wis. Stat. § 343.303 expressly bars admission of a PBT result in a motor vehicle prosecution. The Court of Appeals disagreed and affirmed.

The Court of Appeals ruled that "[b]y its plain language, Wis. Stat. 343.303 applies to PBTs administered by law enforcement officers for the specified purposes of determining whether probable cause exists to arrest an individual for a motor vehicle intoxication offense, and whether to require or request chemical tests under Wis. Stat. § 343.305(3)."

The court reasoned that "the preliminary breath screening test" in the last sentence of the statute must refer back to the PBTs addressed in the preceding part of the statute. The court decided that this language does not apply to breath alcohol tests performed by medical personnel for diagnostic or treatment purposes. Accordingly, the court ruled that the statute did not bar the PBT's admission. The court thus deemed admission or exclusion of the PBT evidence a decision

committed to the trial court's discretion. *See* State v. Doerr, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999).

Rocha-Mayo says the trial court did not merely allow introduction of the test result, but further gave it a *prima facie* effect. Rocha-Mayo contends this effectively instructed the jury it could convict him on that evidence alone. Rocha-Mayo says that the device used to administer the PBT--the Alco-Sensor IV--is approved for law enforcement use in Wisconsin but it is not, however, certified for evidentiary use in Wisconsin courts.

Moreover, Rocha-Mayo emphasizes that the legislature has established rigid protocol for breath testing that was not met in this case. "For purposes of this section, if a breath test is administered using an infrared breath-testing instrument . . . The test shall consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a second, adequate breath sample analysis." § 343.305(6)(c), Stats.

The legislature went on, subject to this minimum protocol, to authorize the state Department of Transportation to approve techniques or methods of performing chemical analysis of the breath to be used in OWI prosecutions. § 343.305(6)(b).
Rocha-Mayo emphasizes that it is undisputed the PBT administered to Rocha-Mayo did not adhere to this minimum protocol.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 4, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Rock County Circuit Court decision, Judge James Welker, presiding.

2012AP580 Adams v. Northland Equipment Co.

This case examines the standard courts are to use in cases where the plaintiff has received worker's compensation benefits when deciding whether to grant an insurer's motion to compel an injured worker plaintiff to accept a statutory settlement offer and the procedure that they are to use in reaching their decision.

Some background: Russell Adams was an employee of the Village of Fontana. On Feb. 21, 2009, he was plowing snow using a village truck. The plow struck a raised portion of the pavement in the village parking lot. The plow did not release. Instead, the entire truck came to an abrupt stop, causing Adams to be thrown forward and upward. He struck his head against the ceiling of the truck's cab, which resulted in permanent injury to his spinal column.

Northland Equipment Co. (Northland) sold the plow to the village that had been attached to the truck Adams had been driving. It had also repaired the plow just prior to accident.

Adams applied for and received some worker's compensation benefits. His counsel indicated at a hearing that Adams expects to incur additional medical expenses in the future and to make additional compensation claims.

Adams sued Northland and its insurer, Cincinnati Insurance Co. (Cincinnati), on theories of negligence and strict liability to recover damages for his personal injuries. He joined The League of Wisconsin Municipalities Mutual Insurance Company (LWMMIC) as a defendant because of its subrogation interests for the worker's compensation payments it had made to him.

Northland and Cincinnati filed a motion for summary judgment. Although the circuit court apparently believed that Adams may have difficulties with certain parts of his claims, it concluded that he had presented enough evidence to warrant a trial and it denied the motion.

After the denial of the summary judgment motion and just a few weeks prior to trial, however, Northland and Cincinnati made a statutory settlement offer. While Adams rejected the offer out of hand, LWMMIC agreed that it would accept the offer. LWMMIC then filed a motion asking the circuit court to compel Adams to accept the offer pursuant to two cases: Bergren v. Staples, 263 Wis. 477, 57 N.W.2d 714 (1953) and Dalka v. American Fam. Mut. Ins. Co., 2011 WI App 90, 334 Wis. 2d 686, 799 N.W.2d 923.

Bergren held that a worker's compensation insurer could be compelled to accept a settlement because the insurer's right to bring a claim against a tortfeasor was only statutory in nature and therefore the insurer had no state constitutional rights to a jury trial; Dalka held that circuit courts may compel an individual plaintiff to accept a settlement where the plaintiff and the worker's compensation carrier disagree.

The circuit court scheduled a hearing on the motion. In advance of the hearing, the court ordered the parties to provide calculations regarding how the proceeds of the settlement offer, if accepted, would be distributed under Wis. Stat. § 102.29. Adams and LWMMIC filed the requested calculations.

Adams argued that the circuit court could not, as a matter of law, compel him to give up his constitutional right to a jury trial and to accept the settlement over his objection. He also contended that the settlement offer should be rejected because it was far below the value of his claims.

The circuit court concluded that Adams should be compelled to accept the offer in the following terms:

> *"I believe based upon the evidence submitted in support of and in opposition to the motion for summary judgment that the risk of a finding of no liability in this case exceeds the possibility of recovering something beyond $200,000, and for that reason the motion is granted."*

Adams appealed, and the Court of Appeals concluded that the circuit court had reached a decision that "reflected a logical interpretation of the facts surrounding the settlement offer and consideration of the appropriate factors bearing on that decision."

Adams claims that his case raises the question of whether the provision in the worker's compensation law authorizing circuit courts to compel acceptance of settlement offers violates two provisions of the Wisconsin Constitution.

His appeal to the Supreme Court can be boiled down to two issues:

- May a trial court lawfully compel an injured employee who has accepted worker's compensation benefits and is suing an employer to accept a settlement offer from the employer to which the employee objects, but which the employer/worker's compensation insurance carrier wants to accept?
- If the trial court has the authority to compel acceptance of such a settlement offer, what process and standard should apply to the trial court's consideration of a motion to compel acceptance of a settlement offer?

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 5, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Washington County Circuit Court decision, Judge James K. Muehlbauer, presiding.

2012AP1307-CR State v. Purtell

The underlying issue in this child pornography case is whether the search of the contents of the defendant's computers was supported by reasonable grounds to believe the computers contained contraband.

The Supreme Court examines whether the Court of Appeals went beyond the boundaries of an appellate court when it reversed the trial court's decision based on a sua sponte argument – and subsequent appellate factual determinations – that was never presented to the trial court.

The defendant, Jeremiah Purtell, was convicted of two counts of cruelty to animals, one resulting in the death of the animal. He was placed on probation. A condition of probation was that the defendant not own or possess a computer and that he could only use a computer at his place of business or school. The conditions of probation did not actually impose a limitation on the types of images or written materials the defendant could possess.

At a meeting with the probation agent, the defendant complained about the no computer condition. He told the agent he had a working laptop and a desktop computer that did not work at his residence. He also told the agent he had a Myspace account, and he gave the agent the Myspace password. The probation agent subsequently went to the defendant's residence and removed the laptop and desktop computers. The seizure of the computers themselves is not challenged. The agent looked at the contents of one of the computers at her office. She clicked on files and saw the titles of the files did not always match the images in the files. She found files showing females engaged in sexual acts with animals. She said there was concern that some of the females depicted were underage.

Based on information the probation agent gained from looking at the contents of the computers, law enforcement obtained a warrant to search the computers. The resulting search revealed a large volume of still images and videos depicting young children engaged in sex acts.

Purtell was charged with eight counts of possession of child pornography. He moved to suppress the evidence resulting from the search of the computers, arguing that the probation agent performed an illegal warrantless search. At a hearing on the suppression motion, the probation agent testified that before searching the contents of one of the computers, she looked at the defendant's Myspace account and saw pictures of "animals that were partially human," such as a "woman that was half-woman and half-a-cow." The agent testified that, based on what she had seen on the Myspace account, she thought the defendant's computers might have "files regarding cruelty to animals or death and mutilation of animals." She said she was also concerned about the defendant's mental health issues.

The circuit court denied the suppression motion, finding that the agent had legitimate reasons of probation supervision to view the contents of the computers. The circuit court said images the agent saw on the Myspace account gave her reason to believe there was contraband on the computers.

A jury found the defendant guilty of four of the eight counts of possession of child pornography. Purtell appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals said even if it were to be persuaded that there were reasonable grounds to believe the computers contained images depicting cruelty to animals or the mutilation of animals, the state failed to demonstrate such images were in fact contraband. It also said the state failed to point to reasonable grounds supporting the probation agent's belief that the computers contained something that was otherwise illegal to possess.

The state, which asked the Supreme Court to accept the case, says the Court of Appeals exceeded its authority when it engaged in appellate fact finding and decided the case on an argument never presented to the trial court – ineffective assistance of counsel for failing to argue that there was no prohibition on the defendant's possession of images depicting cruelty to animals.

Purtell says the probation agent lacked reasonable grounds to believe the computers contained contraband, noting that the circuit court did not specifically define the nature of the contraband. He says the application of the legal term "contraband" to the historical facts of this case is a legal question that was appropriately reviewed by the Court of Appeals.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 5, 2014
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 Monroe County Circuit Court decision, Judge J. David Rice, presiding.

2011AP2868-CR State v. Williams

This case examines whether Wis. Stat. § 346.65(2)(am)6 imposes a mandatory minimum period of confinement for OWI seventh offense or more and prohibits the imposition of probation in such cases.

Some background: Clayton Williams was convicted, following entry of a negotiated guilty plea, of operating a motor vehicle while under the influence of an intoxicant, seventh offense, contrary to Wis. Stat. § 346.65(2)(g)2. The state agreed to recommend a bifurcated sentence of six years, including three years of initial confinement. Williams was free to argue for a lesser sentence.

Williams argued for probation. The circuit court refused probation, explaining that it read § 346.65(2)(am)6 to preclude probation and require it to impose a mandatory minimum sentence of six years, including three years of initial confinement. Accordingly, the court imposed a six-year bifurcated sentence with three years of initial confinement.

Williams appealed, arguing that the circuit court sentenced him on the basis of the erroneous belief that it was required to impose a mandatory minimum sentence and was prohibited from ordering probation.

A divided Court of Appeals agreed with Williams, concluding that the plain meaning does not mandate the imposition of a bifurcated sentence with a mandatory period of initial confinement. Accordingly, the Court of Appeals reversed and remanded for resentencing.

Court of Appeals Judge Brian W. Blanchard dissented. He agreed that the state's primary argument was incorrect, namely that, by its plain meaning, the statute requires a mandatory minimum sentence in all seventh and subsequent OWI offense cases. However, like the circuit court, he concluded that the language of § 346.65(2)(am)6. is ambiguous. He then observed in some detail that the legislative history demonstrates that the legislature intended to apply the mandatory minimum sentence to all seventh and subsequent OWI offense cases.

The Court of Appeals concluded that there is no ambiguity.

Contrary to its position at the Court of Appeals, the state now argues that the statute is ambiguous such that the Court of Appeals should have examined the statute's legislative history. The state says that history "clearly reveals that the Court of Appeals' interpretation of the statute is wrong."

A decision by the Supreme Court could clarify sentencing requirements under § 346.65(2)(am)6.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 20, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Sheboygan County Circuit Court decision, Judge Timothy M. Van Akkeren, presiding.

2011AP3007-CR State v. Wantland

This case examines whether a driver's general consent to have his vehicle searched became limited when the passenger asked a deputy, "got a warrant for that?" before the deputy opened the passenger's briefcase that was found in the vehicle.

Some backround: A deputy performed a traffic stop on a vehicle in which Derik J. Wantland was a passenger. The driver, Wantland's brother, consented to a search of the vehicle and placed no relevant limitation on the scope of that consent. The driver and Wantland exited the vehicle and remained close to the rear of it for all pertinent aspects of the deputy's search.

After searching the front and center areas of the vehicle, the deputy opened the hatchback and continued the search. When he got to a briefcase, the deputy asked the men what was inside it. Wantland said, "a laptop." Then Wantland said, "Got a warrant for that?" The deputy responded by saying: "I can open up the, uh, laptop." Wantland laughed and remarked that the briefcase also contained Visine and antacid pills.

The deputy opened the briefcase and found Visine, one empty antacid pill bottle, and one antacid pill bottle with two pills in it which appeared inconsistent with the type of pills that belonged in the bottle. The pills were later identified as morphine, and the deputy found documents in the briefcase identifying Wantland as the owner. Wantland was arrested and additional morphine pills were found on him at the jail. The state charged Wantland with possession of a narcotic drug.

Wantland moved to suppress the drug evidence. The trial court denied the motion after finding that the driver properly authorized the search and that Wantland's warrant question did not constitute a limitation on that consent.

Wantland entered a plea and appealed, unsuccessfully. Wantland argued on appeal that the warrantless search of his briefcase was illegal because he limited the driver's consent to search the vehicle as it related to the briefcase by asking "Got a warrant for that?" when the deputy got to that item during the search.

The Court of Appeals disagreed. Citing cases from other jurisdictions, the Court of Appeals held that Wantland would need to have clearly and unequivocally asserted that he, not the driver, was the owner of the briefcase and that he was objecting to the search of it. The Court of Appeals also concluded that given the inherent challenges and dangers involved in roadside vehicle searches, it is unreasonable to expect a searching officer to stop searching and seek clarification when the owner of property located within the vehicle fails to clearly and unequivocally assert his or her ownership of the property and objection to the search of it.

The Court of Appeals conceded that Wantland's question "could be interpreted as an objection to searching the briefcase," but ultimately held that it was not an unambiguous declaration of ownership of the briefcase or an objection to the search of it.

Wantland contends his question to the deputy was not just a general inquiry but a declaration of ownership in the briefcase, given that Wantland did not ask about a warrant when the deputy searched other parts of the vehicle. He claims that when an item in a car is a private item of the passenger, then the driver's consent should not extend to that item.

The state says a defendant may only withdraw consent given by a third party by clearly and unequivocally asserting that he, not the third party, is the owner of the item in question and that he has an objection to the search of the item. The state says Wantland failed to do so, and the officer had no way of knowing whether the briefcase belonged to Wantland or his brother and if Wantland was asking the question on his brother's behalf.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 20, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Ozaukee County Circuit Court decision, Judge Paul V. Malloy, presiding.

2012AP320 Waranka v. Wadena Ins. Co.

This case began with a snowmobile accident in Munising, Mich., which resulted in the death of a Wisconsin man. The central issue is which state's laws regarding the terms and limits of the wrongful death claim should apply. In other words, may a Wisconsin court recognize the validity of a Michigan wrongful death claim, but nonetheless determine that who may bring the claim, and how much may be recovered, is governed by Wisconsin law or the law of some other jurisdiction under prevailing choice of law rules?

Some background: On the morning of Jan. 29, 2009, there was an accident involving six snowmobiles and their operators. One of the individuals involved in the accident was Ozaukee County resident Nicholas Waranka, who had gathered with other snowmobilers for a ride in the Hiawatha National Forest sponsored by a snowmobile dealership. The accident occurred before the organized ride for the day.

Nicholas suffered a serious head injury in the accident and ultimately died. Another rider, Paul Murphy, also died as a result of injuries sustained in the accident.

Waranka's wife, Sharon Waranka, on her own behalf and as the personal representative of Nicholas's estate, filed a lawsuit in the Ozaukee County Circuit Court against individual riders, including some, if not all, Wisconsin residents (Michael Eidenberger, Scott Brewer, Zachary Nelson, Larry Neman, and Mark Jonas), and their respective insurers.

She also named as a defendant the insurance carrier for Murphy under Wisconsin's direct action statute. Sharon alleged that each of the named individual defendants and Murphy had been negligent in operating their snowmobiles, which had been a cause of the accident that ultimately killed Nicholas.

The circuit court concluded that although Sharon could not bring a wrongful death claim under Wis. Stat. § 895.03 because that statute applies only to "a death caused in this state," all of the terms and limitations of Wis. Stat. § 895.04 would still apply to the claim. This meant, among other things, that her recovery would be limited by the noneconomic damage caps contained in Wis. Stat. § 895.04.

Sharon filed a petition for leave to file an interlocutory appeal. She claimed that Wis. Stat. § 895.04 was tied to Wis. Stat. § 895.03. Since Wis. Stat. § 895.03 did not apply by its own terms, then Wis. Stat. § 895.04 also should not apply. On the other hand, the defendants argued that Wis. Stat. §§ 895.03 and 895.04 are separate statutes and that § 895.04 may be applied even when § 895.03 is inapplicable.

The Court of Appeals ultimately affirmed in part, reversed in part and remanded the matter to the circuit court for further proceedings on Sharon's claim.

The Court of Appeals agreed with the circuit court that Sharon could not bring a wrongful death action under the plain terms Wis. Stat. § 895.03 because the accident had occurred in Michigan. The Court of Appeals noted, however, that Wisconsin courts are required by the full faith and credit clause of the federal Constitution to allow plaintiffs to bring suit in a

Wisconsin court based on a claim recognized by the laws of another state where no Wisconsin law provides a cause of action and Wisconsin has no public policy against such a claim.

The Court of Appeals reversed the circuit court's interlocutory order that recognized a wrongful death cause of action under Michigan law but directed that Wisconsin law, including the provisions of Wis. Stat. § 895.04, should apply to all other issues in the case.

Defendants Brewer, Nelson, Jonas and State Farm Mutual Automobile Insurance Company present two specific issues to the Supreme Court:

- May the court apply Wis. Stat. § 895.04 to the Plaintiff's wrongful death action to define the class of beneficiaries, the limitation on non-economic damages, and to determine who can bring an action for wrongful death, where Wisconsin's choice of law rules strongly favor application of Wisconsin law, but where the accident causing death occurred in Michigan?
- Is conflict of law analysis required in a wrongful death action, where the death occurred in Michigan but where almost all of the relevant parties and the relatives of the decedent are domiciled in Wisconsin or brought into the lawsuit under Wisconsin's direct action statute?

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 20, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an Ozaukee County Circuit Court decision, Judge Thomas R. Wolfram, presiding.

2012AP1582-CR State v. Matasek

This case examines whether a circuit court has the discretion under Wis. Stat. § 973.0315 to withhold its judgment on expungement until after a defendant successfully completes probation. Some background: Andrew J. Matasek, pled no contest to one count of manufacture or delivery of THC, as a party to a crime. At the sentencing hearing, defense counsel asked the court to consider allowing Matasek to come back to court to ask for his record to be expunged if "he does everything that is required of him…"

The circuit court denied the request to hold the issue of expunction open until a later date. The court acknowledged that, as a matter of public policy, it might be appropriate for someone to be able to come back into court later to show that his or her subsequent good behavior justified expunction. However, based on the court's reading of the plain language of the expunction statute, the court concluded a decision about expunction must be made at the time of sentencing.

Defense counsel indicated, and the circuit court acknowledged the possibility, that some circuit courts do interpret the statute to allow that, but the court said, "Until someone tells me I can do it differently I have to interpret the statute by what it says."

Matasek argued that the key portion of the statute was the phrase, "the court may order at the time of sentencing that the record be expunged." He appealed, and the Court of Appeals affirmed.

The Court of Appeals held that the statute plainly and unambiguously directs circuit courts to exercise their discretion in ordering expunction "at the time of sentencing." It said if the legislature had intended the interpretation advanced by the defendant, it could have written it to provide that a court may order expunction "at the time of sentencing or after successful completion of the defendant's sentence."

Because the legislature did not include such language, the Court of Appeals said accepting the defendant's interpretation would require adding words to the statutory text. It noted it may not read language into the text of an unambiguous statute. The Court of Appeals went on to say the text of § 973.015(2) also supported its conclusion that § 973.015(1)(a) requires a court to make its decision on expunction at the time of sentencing.

§ 973.015(1)(a) provides that: when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is six years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.

The defendant says under the Court of Appeals' decision, those criminal defendants would apparently not be able to take advantage of the expunction statute. He says the Court of Appeals' decision will severely limit the ability of circuit court judges to decide who is worthy of expunction since they will not be able to watch how a defendant performs on probation before

deciding whether to order expunction. He argues that giving circuit courts the discretion to wait until the end of the probationary period before making an expunction decision will enhance the legislative purpose of the statute since a court will be in a much better position to determine if a defendant will benefit from expunction and if society will not be harmed after the defendant has already successfully completed probation.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 25, 2014
9:45 a.m.

2012AP584-AC League of Women Voters v. Scott Walker and
2012AP1652 Milwaukee Branch of the NAACP v. Scott Walker

These cases, arising from two Dane County Circuit Court decisions, deal with two closely related aspects of a single, overriding issue: the validity of 2011 Act 23's photo identification requirements under the suffrage provisions in Wis. Const. Art. III.

Wis. Const. Art. III, § 1 provides: "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."

Wis. Const. Art. III, § 2 provides that laws may be enacted:

(1) Defining residency.
(2) Providing for registration of electors.
(3) Providing for absentee voting.
(4) Excluding from the right of suffrage persons:
  (a) Convicted of a felony, unless restored to civil rights.
  (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.

Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

Some procedural background: This is the fourth time that voter ID issues have been before this court, but the first time the Court has voted to review the underlying issues.

In March 2012 the Court of Appeals certified 2012AP584-AC, League of Women Voters of Wisconsin Education Network, Inc. v. Scott Walker (LWV). The Supreme Court denied certification on April 16, 2012. On Aug. 21, 2012, the state filed a petition to bypass in LWV and in Milwaukee Branch of the NAACP v. Scott Walker (NAACP). The bypass petition was denied on Sept. 27, 2012. On Nov. 7, 2012, the state filed a petition to bypass in NAACP and also moved this court to take jurisdiction of and consolidate NAACP with LWV. The Supreme Court denied the petition to bypass and consolidation motion on Jan. 14, 2013.

On Nov. 20, 2013, the Supreme Court issued an order granting the petition for review in LWV, and took jurisdiction of NAACP, which was fully briefed and awaiting oral argument in the Court of Appeals. The Supreme Court also ordered that the cases be heard at oral argument on the same day, scheduled for Feb. 25, 2014.

Some general background: Gov. Scott Walker signed Wis. 2011 Act 23 into law on June 6, 2011. Prior to Act 23, an eligible Wisconsin elector voting in person or by absentee ballot was not required to present an identification document, other than proof of residence in some circumstances. Act 23 requires, with certain exceptions, that an elector must present an acceptable form of photo identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that any photograph on the identification reasonably resembles the elector. Section 6.79(2)(a), Stats. An elector must present proof of identification to vote either in person or by absentee ballot. There are various

forms of acceptable photo identification, including a Wisconsin driver's license or state identification card issued by the Wisconsin Department of Transportation.

The LWV case focuses on whether Act 23's photo identification requirements established a new qualification for voters that, under Wis. Const. Art. III, §§ 1 and 2 can only be created by a constitutional amendment, rather than by ordinary legislation, and NAACP focuses on whether the photo identification requirements impose an unconstitutional burden on voting rights under Wis. Const. Art. III, § 1.

In LWV, the circuit court declared the photo ID requirements of Act 23 "unconstitutional to the extent they serve as a condition for voting at the polls." The circuit court ruled that the photo identification requirement provisions of Act 23 were facially invalid under Art. III.

The Court of Appeals' reversed, providing analysis of three cited cases and concluding that the League of Women Voters failed to meet its burden of proving beyond a reasonable doubt that the voter ID is unconstitutional under Art. III, § 2.

The League of Women Voters says in so holding, the Court of Appeals gave short shrift to its analysis of the scope and meaning of Art. III, § 2. The League of Women Voters raises the following issues for Supreme Court review:

- Do the portions of 2011 Wisconsin Act 23 that require constitutionally qualified and registered voters to display a specified form of government-issued photo identification at the polling place as a prerequisite to voting constitute an impermissible additional qualification to vote in violation of Wis. Const. Art. III, § 1?
- Do the portions of 2011 Wisconsin Act 23 that require constitutionally qualified and registered voters to display a specified form of government-issued photo identification at the polling place as a prerequisite to voting exceed legislative authority under Wis. Const. Art. III, § 2?
- Did the League of Women Voters and its president, Melanie G. Ramey, have standing to bring this action challenging the facial constitutionality of the Voter ID provisions?

The NAACP case commenced on Dec. 16, 2011, when the plaintiffs filed a complaint seeking a declaratory judgment and injunctive relief. On July 17, 2012, the Dane County Circuit Court issued an order for judgment and judgment granting declaratory and injunctive relief. Among its 10 conclusions of law, the circuit court found the photo ID requirement creates a substantial burden for potential voters who do not already have photo IDs and impairs the constitutional right to vote.

The permanent injunction issued by the circuit court in NAACP is broader and declared that "the defendants shall cease immediately and permanently all and any effort to enforce or implement the photo identification requirements of 2011 Wisconsin Act 23."

In NAACP, the state argues in briefs filed on behalf of Walker that the circuit court's decision in this case is incorrect for six reasons.

- The court erred as a matter of law by holding that the voter identification requirements are subject to strict scrutiny.
- The court erred by holding that the right to vote should be treated differently under the Wisconsin Constitution than it is treated under the federal Constitution.
- The court erred by facially invalidating the voter identification requirements as to all voters in spite of the undisputed evidence that those requirements do not burden the vast majority of voters.

- The court erred both in accepting the statistical conclusions of Plaintiffs' expert witness and in finding those statistics sufficient to establish a severe burden on the right to vote.
- The court erred in finding the anecdotal testimony of the individual fact witnesses sufficient to establish a severe burden on the right to vote.
- The court erroneously failed to recognize that the voter identification requirements are reasonably calculated to advance the state's compelling interests in preventing electoral fraud and promoting voter confidence in the integrity of elections.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 25, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge J. Mac Davis, presiding.

2011AP2774 Attorney's Title Guaranty Fund v. Town Bank

The Supreme Court scheduled additional oral argument in this case after first hearing the case on Sept. 11, 2013. The Court ordered the parties to brief the following issues:

- whether the potential proceeds from a legal malpractice claim can be lawfully assigned as a security for a contemporaneously incurred debt; and
- if the potential proceeds from a legal malpractice claim are assignable, whether such assignment was future property at the time of the supplemental exam conducted in this case.

As previously summarized, the case involves two issues arising from competing efforts by two banks to recover assets from the same borrower – a Milwaukee landlord who failed to pay back loans, filed for bankruptcy and became entangled in a legal battle with his own lawyer.

At the request of Heartland Wisconsin Corp. (Heartland), the Supreme Court reviews a Court of Appeals' decision affirming a circuit court order granting summary judgment in favor of Town Bank.

More specifically, the Court examines:

- whether an enforceable creditors lien attaches to personal property acquired after a ch. 816, Stats., supplementary proceeding has been held; and
- whether the fact that the supplemental commissioner's order and proof of service were not filed with the clerk of court rendered Town Bank's creditor's lien unenforceable.

Some background: On Feb. 13, 2006, Town Bank obtained and docketed a judgment against Timothy Brophy, Jr., for $1.6 million. Two days later Town Bank obtained a supplemental commissioner's order requiring Brophy to appear at a supplementary proceeding. Town Bank served the order on Brophy on Feb. 17, 2006. However, the order and proof of service were not filed with the clerk of court.

The supplementary proceeding was held on March 9, 2006. In July 2006, Brophy's attorney sued Brophy for unpaid legal fees. Brophy filed counterclaims and a third-party complaint against his attorney and the insurer for legal malpractice. In May or June of 2007, Heartland provided Brophy two loans totaling $222,000 which he said he was going to use to pay a settlement related to a class action lawsuit. As security for the loans, Brophy assigned to Heartland his interest in any potential proceeds that might result from the legal malpractice suit. Brophy subsequently defaulted on both loans.

Brophy filed for bankruptcy in August of 2007. In April of 2008, Town Bank filed a claim in the bankruptcy asserting its rights to the unpaid docketed judgment and its related creditor's lien against Brophy's personal property based on its February 2006 service of the supplemental commissioner's order for Brophy to appear at the supplemental proceeding.

Heartland first became aware of Town Bank's interest in Brophy's property from the claim Town Bank filed in the bankruptcy action. Brophy's bankruptcy action was dismissed in January 2009. In September 2009, Brophy's legal malpractice case settled. Heartland and Town Bank each claimed priority to the settlement funds Brophy received. Brophy's proceeds from the settlement were held in escrow by Attorney's Title Guaranty Fund, Inc. Attorney's Title commenced an interpleader action, and Heartland and Town Bank cross claimed against each other.

Heartland and Town Bank subsequently both moved for summary judgment. Town Bank claimed it had priority over the escrowed funds because it had an enforceable lien against Brophy's personal property and the lien attached to Brophy's proceeds from the legal malpractice suit.

Heartland argued that Town Bank's lien was an unenforceable "secret lien" and that any lien Town Bank might have had did not attach to property Brophy acquired after the 2006 supplementary proceeding. The circuit court granted summary judgment in favor of Town Bank and denied Heartland's motion. Heartland appealed, and the Court of Appeals affirmed.

The Court of Appeals said once Town Bank served Brophy with the order to appear at the supplementary proceeding, it had done all it was legally obligated to do to perfect its lien and at that point Town Bank's lien was valid and enforceable and became superior to any security interest Heartland would subsequently acquire related to the loans it made to Brophy in 2007.

The court reasoned since Town Bank's judgment remained unsatisfied at the time Brophy received the funds that are now in escrow, under § 816.08, Town Bank is entitled to those funds. Heartland argues both that Town Bank's lien is not valid because Town Bank did not ensure that the supplemental commissioner's order and proof of service thereof were filed with the clerk of court and that Town Bank is not entitled to a lien on any of Brophy's property that was acquired after the date of the supplementary proceeding.