

**Recent Supreme Court (Wisconsin) Cases of Interest-and a couple of court of appeals case and one statute)**

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**Public Defender Conference**

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**Missouri v. McNeely**

**Decided by the United States Supreme Court- April 17, 2013**

**Issues:**

Whether the police can lawfully perform a warrantless blood draw in all OWI cases where there is a refusal. The United States Supreme Court rejected the automatic exigent circumstance doctrine for a warrantless blood draw in all OWI cases. Instead the court requires a search warrant for the blood unless the police can show an exigent circumstance for their particular case, over and above the scientific fact of alcohol dissipation. This United States Supreme Court case effectively overruled the Wisconsin Supreme Court case of *State v. Bohling*, which allowed for warrantless blood draws in all OWI related cases.

**Facts:**

The police stopped the defendant's truck after it was observed speeding and repeatedly crossing the centerline. The police observed that the defendant had bloodshot eyes, slurred speech, and the smell of alcohol on his breath. After the defendant performed poorly on field sobriety tests he was placed under arrest for OWI.

The defendant refused to provide a breath sample and the officer did a forced blood draw under the doctrine of probable cause and exigent circumstances. The blood sample measured at 0.154, well above the legal limit of .08.

**The Missouri Supreme Court Holding:**

The Missouri Supreme Court held that the blood test should be suppressed since it was obtained without a warrant and that the state had failed to show sufficient exigent circumstances.

**Missouri's Argument to the United States Supreme Court:**

The state of Missouri appealed its Supreme Court ruling to the United States Supreme Court. Missouri argued that it is an automatic exigent circumstance that alcohol dissipates quickly in the blood stream.

### **The United States Supreme Court Holding:**

In a 4-1-3-1, opinion the United States Supreme Court affirmed the Missouri Supreme Court holding. The high court held that while it is true that alcohol dissipates quickly in the blood stream, it would not endorse this fact as an automatic exigent circumstance to justify a warrantless blood draw in OWI cases. Instead the court ruled that in most instances the police should get a search warrant before seizing the blood. The court reasoned that the only time the police could make a warrantless blood draw in an OWI case is when there are sufficient exigent circumstances in the particular case, above the fact of dissipation that would demonstrate that it would be too difficult to get a warrant in time.

### **Impact for Wisconsin:**

This case has a big impact for Wisconsin since it overrules the *Bohling* rule, which had been the law in Wisconsin for approximately 20 years. *Bohling* had allowed for a warrantless forced blood draw in all OWI cases where a defendant refused to take a test, but now under *McNeely* this is no longer true and the police will need to get a search warrant.

### **State v. Padley**

**Decided by the Court of Appeals 5/22/14**

**Issue:** The court of appeals dealt with the constitutionality of 343.305(3) (ar) 2 allowing the police to proceed with Implied Consent protocol for a person involved in a crash causing death or great bodily harm, and for whom the police have a reasonable suspicion the subject committed a traffic infraction. The court of appeals upheld the constitutionality of this statute.

### **Facts:**

The subject was involved in a crash with a motorcycle. The crash caused death. The defendant told the police that the crash happened after the car she was driving missed a turn and then used a driveway to attempt a U-turn. As the subject was attempting the u-turn it crashed with a motorcycle killing a passenger on the motorcycle and injuring the motor cycle driver. The subject showed no overt signs of impairment but still the police went through the Implied Consent protocol and the defendant consented to the blood draw. The blood test revealed that the defendant was operating a motor vehicle with a detectable amount of a restricted controlled substance.

### **The Defendant's argument:**

The defendant argued that the Implied Consent statute as it related to her incident is unconstitutional as she had no signs of impairment. She argued that Implied Consent forces her to submit to a test, when the police did not have any suspicion that the blood contained evidence. The court rejected the argument because she had a choice- to give consent to a blood draw or to withdraw consent and suffer implied consent law sanctions. The court conceded that the choice might be designed to

induce consent, but it is a choice nonetheless. The defendant made several other arguments, but the gist of the court opinion is that ultimately this blood draw was the product of a voluntary consent, and that since the statute does not force the defendant to consent it is constitutional.

**State v. Goss**  
**Decided by the Wisconsin Supreme Court**  
**12/23/11**

**Issue:**

This case deals with the use of the PBT in an OWI investigation. Previously the Supreme Court held in *County of Jefferson v. Renz*, that the police needed probable cause to administer a PBT, thought the probable cause is less than what you would need to justify an arrest. For OWI cases with a .08 threshold the court ruled that the probable cause necessary for a PBT requires more than the odor of an intoxicant. However, in this case, the court dealt with the probable cause necessary when the police are investigating a driver with a .02 threshold.

**Facts:**

The police stopped the defendant's vehicle for minor infractions, none of which implicated possible impairment. The police ran a check on the defendant revealing that the defendant was revoked and had been convicted for OWI four previous times. The police arrested the defendant for OAR and in doing so noticed, for the first time, a mild odor of an intoxicant emanating from the defendant's person. Based on the odor and based on the fact that the defendant had 4 prior OWIs and therefore was subject to a .02 threshold the police administered a PBT to the defendant. The PBT revealed a score of .084. Ultimately the defendant was convicted of OWI fifth offense.

**Defendant's Argument:**

The defendant argued that the PBT should not have been administered, since the police only had an odor of an intoxicant to go on, and the Supreme Court had previously held in *County of Jefferson v. Renz*, that odor alone is not sufficient to trigger a PBT. The defendant then argued that without the PBT the police had no basis to arrest him for violating the OWI law.

**The State's Argument:**

The state argued that *County of Jefferson* dealt with a then .10 threshold and not the de minimus .02 threshold. The state reasoned that using the *Renz* principle that the probable cause necessary to administer the PBT is less than the probable cause necessary for an arrest, odor plus knowledge that defendant had a .02 threshold was sufficient justification for the lawful administration of the PBT.

**The Court's Holding:**

The Wisconsin Supreme Court agreed with the state and held that the PBT was lawfully administered to the defendant. The Court held that when there is only a .02

threshold, it is likely that there might not be other factors present than an odor. The Court ruled that they were not overruling *Renz* but merely applying its principles to a new .02 threshold. The Court further ruled that knowledge that the defendant had four priors is another factor in the formulation of the probable cause necessary for administering the PBT.

**Note:**

It is interesting to note that the high court reprised its reasoning in *State v. Lange* that prior convictions are an arrow for the quiver of probable cause, albeit a small one. It is also important to remember that for more traditional OWI investigations, .08 cases, the police will need more than an odor before utilizing the PBT.

**State v. Ramon Lopez Arias**  
**Decided by the Wisconsin Supreme Court**  
**July 9th 2008**

**Issue:**

This case involved a canine sniff during a routine traffic stop. Two issues were involved. 1) Whether a dog sniff of the exterior of an automobile is a “search” within the meaning of the Wisconsin Constitution, and 2) Whether a brief delay in the traffic stop to accommodate a dog sniff is an unlawful extension of the traffic detention. The Wisconsin Supreme Court held that a dog sniff of the exterior of a car is not a “search” and held that a brief deviation from a traffic stop to accommodate a dog sniff is permissible.

**Facts:**

The police stopped a car as the driver was a minor transporting an intoxicant. Four minutes into the stop the officer, who was also a canine officer and had a drug sniffing canine in his squad, ran the dog around the exterior of the vehicle. The dog alerted and the consequent probable cause search of the vehicle uncovered narcotics, which proved to belong to the passenger, Ramon Lopez Arias. The dog sniff itself took approximately 78 seconds to perform.

**The Defendant’s argument:**

The defendant argued that the dog sniff was impermissible as it was a search within the meaning of the 4<sup>th</sup> amendment and the Wisconsin Constitution and the police officer did not have consent or reasonable suspicion of drug activity. Secondly, the defendant argued that even if a dog sniff is not a “search” it was impermissible in this case because it unduly lengthened the traffic stop.

**The State’s argument:**

The state argued that a dog sniff of the exterior of a car is not a search as it is a minimal intrusion and people do not have an expectation of privacy in the air space around their vehicle. The state further argued that a brief delay to accommodate a dog sniff does not transform a reasonable traffic stop into an unreasonable one.

**The Wisconsin Supreme Court holding:**

The Wisconsin Supreme Court held that a dog sniff of the exterior of a vehicle in a public place is not a search within the meaning of the 4<sup>th</sup> Amendment and the Wisconsin Constitution. Therefore, the police do not need consent or reasonable suspicion of drug activity in order to perform a dog sniff. The Court also held that under the totality of the circumstances a 78 second deviation from the purpose of the traffic stop to perform a dog sniff was reasonable. The key was that the police officer worked quickly and efficiently to minimize the delay and that the intrusion was minimal when balanced against the public interest in curtailing drug trafficking.

**Note:**

While this is a good case for law enforcement it should not be exploited. The more substantial the delay is to accommodate a dog sniff the more problematic it will become. So 78 seconds is OK but perhaps 5 to 10 minutes would not be. So if you make a stop, and need to call for a canine, keep working the stop and if the canine arrives in a reasonable time so that the stop is not unduly extended everything should be O.K. If you are a canine officer and the canine is already present you can take a few seconds away from working the stop to perform the dog sniff.

This case does not change the existing protocol for asking consent to search a vehicle in the absence of reasonable suspicion. The safe move remains to first end the traffic stop and then ask for consent. Remember consent to search is different than a dog sniff as a consensual search is a search within the meaning of the 4<sup>th</sup> amendment.

However, if you have reasonable suspicion of drug activity you can delay a traffic stop for awhile, in some instances for many minutes, to wait for a canine. This case just gives the police a little latitude for doing a dog sniff during a traffic stop without reasonable suspicion.

If a traffic stop results in an arrest it is possible for the police to ask for consent for a strip search even though the police could not conduct an involuntary strip search under the statute. However, consent to a strip search is not consent to a body cavity search. *State v. Wallace*, 2002 WI App 61, 251 Wis.2d 625, 642 N.W.2d 549

**State v. Kenneth House****Decided by the Wisconsin Court of Appeals- 8/14/13****Issue:**

This case involved a dog sniff subsequent to a traffic stop; the officer did not have a reasonable suspicion of drug activity, though he had a hunch. The court ruled that the sniff was impermissible as it was conducted after the traffic stop was completed.

**Facts:**

The police stopped the defendant for a suspended registration. When the officer ran the defendant's driver license he learned that the defendant was on probation for a drug offense. The officer decided to have his canine perform a sniff of the car. The officer issued a warning to the defendant and ended the traffic stop. Even though the stop was concluded the officer told the defendant to stand on the side of the road and then in a one minute time period the dog performed a sniff and alerted. Eventually, 281 grams of marijuana was found in the defendant's vehicle.

**The Defendant's Argument:**

The defendant argued that the dog sniff unlawfully extended his traffic stop and thus any evidence generated by the sniff should be suppressed.

**The State's Argument:**

The state argued that the sniff only took one minute and therefore did not unreasonably extend the traffic stop.

**The Court's Holding:**

The court sided with the defendant and suppressed the evidence. The key to the decision was not the time it took to perform the sniff but rather that it was performed after the traffic stop was concluded.

**Key Point:**

In ruling for the defendant the court did affirm the earlier Supreme Court ruling in *State v. Arias* where the high court held that 77 seconds was not an unreasonable extension of a traffic stop to run a dog sniff. However the sniff in *Arias* occurred during the traffic stop and the sniff in this case took place after the stop had been concluded. Accordingly, if you want to run a canine sniff, and you don't have reasonable suspicion of drug activity, you must do it during the stop, and the sniff must not unreasonably extend the stop. If you end the traffic stop first, then no amount of time to run a dog sniff will be considered reasonable, in the absence of reasonable suspicion of drug activity.

**Hint:**

The rules governing a dog sniff of a vehicle without reasonable suspicion are exactly the opposite of the rules governing a request for consent to search a car without reasonable suspicion. The dog sniff must be performed before the original traffic stop has been concluded. On the other hand, a request for consent must be performed after the traffic stop has been completed and the defendant has been told that he/she is free to go.

**“Burnt out Bulb Does not Mean the Taillights are not in Good Working Order”  
State v. Antonio Brown  
Decided by the Wisconsin Supreme Court 7/16/14**

**Issue:**

The police stopped a vehicle for an alleged violation of Wisconsin Statute 347.13(1) –tail lamp violation. Specifically the police noted that one of the tail light bulbs was burned out. The statute requires the taillights to be in good working order and to emit a red light plainly visible from a distance of 500 feet. The police made the stop reasoning that a burnt out bulb means the tail lamp was not in good working order. The court rejected this notion, opining that good working order means that the light is clearly visible from 500 feet, even if one the bulbs were burnt out.

**Key to Case:**

The key to the case is what is meant by the term “good working order”. The high court determined that the phrase “good working order” does not mean perfect working order- rather it means that the lamp, whatever its defects, fulfills its statutory requirement of emitting a light clearly visible for a distance 500 feet to the rear. Since that was the case here, the stop was deemed improper.

**Key Distinction:**

The reason this case went the way it did, is because of the murky nature of the phrase “good working order”. Some statutes are clearer cut. For example, 347.07(2) (b) prohibits any color of light other than red being emitted from the rear; the statute is clear. Therefore, if an officer notes white light coming from the rear they can make a lawful stop regardless of visibility of 500 feet.

**Interesting Remaining Point:**

The Supreme Court felt the officer made a mistake of law; mistakenly believing that one burnt out bulb automatically meant the lamp was not in good working order. To date, in Wisconsin, a police officer stop can be based on a reasonable mistake of fact, but cannot be based on a reasonable mistake of law. This issue is before the United States Supreme Court right now, and it might be that this principle could change in the future.

**County of Grant v. Vogt**

**Decided by the Wisconsin Supreme Court 7/18/14**

**Issue:**

Does a police officer seize a defendant when he/she approaches a parked vehicle and knocks on the car window and asks the driver to roll down the window? Calling it a close case, the Wisconsin Supreme Court held that the police did not seize the defendant, since the defendant could have driven away and the police did not engage in authoritative behavior. The court reiterated the notion that determining

whether a person is seized for 4th amendment purposes or merely engaged in a consensual encounter with the police is based on the totality of the circumstances.

**Facts:**

In the early morning hours of December 25, around 1 am, the police observed a vehicle pull into a parking lot next to a closed park and boat landing on the Mississippi. The officer did not notice any traffic infractions, and all parties conceded that the officer did not have a reasonable suspicion upon which to base a Terry contact. Nevertheless, the officer was curious about the situation and so he drove his squad into the parking lot and parked the marked squad behind the defendant's vehicle. The squad's headlights were on but its red and blue emergency lights were not.

The defendant's vehicle was running, though stopped, and had its lights on. The police squad was not blocking the defendant's vehicle from leaving the scene. The officer got out of his squad; the officer was wearing his full uniform and had a pistol in his side holster. The officer rapped on the window and motioned for the driver to roll down the driver's window. The officer then made contact with the defendant, and eventually the defendant was arrested for O.W.I,

**The Defendant's Argument:**

The defendant argued that the officer made a 4<sup>th</sup> amendment seizure when he rapped on the door window and motioned for the defendant to roll down the window. The defendant then argued that the seizure was unlawful as the police did not have the requisite reasonable suspicion to make a "Terry" contact.

**The County's Argument:**

While conceding that the police did not have the necessary reasonable suspicion to make a Terry stop, the county argued that there was no 4<sup>th</sup> amendment seizure as the officer's were merely trying to engage in a consensual encounter.

**The Supreme Court Holding:**

Calling it a very close case, the Wisconsin Supreme Court agreed with the county and held that there was no seizure. The court reasoned that the mere fact that a uniformed officer raps on a window and asks the driver to roll down a window does not automatically a seizure has taken place. Instead the court looks at the totality of the circumstances to determine whether the police are seizing the defendant or alternatively merely trying to make contact for a consensual encounter. The court looks at whether the police used any authoritative tactics, and also whether a reasonable person in the defendant's position would feel they were free to go. In this case, the court noted that the police officer did not draw his gun, did not raise his voice, did not block the defendant's vehicle, and did not have his emergency lights on. Accordingly, the court held that the police did not seize the defendant when they first made contact with him.

**Cautionary Note:** In many cases a police officer rapping on a parked car window would constitute a seizure. If the police have reasonable suspicion then they need not concern themselves about utilizing authoritative measures as they would be making a valid 4<sup>th</sup> amendment seizure. However, if the police do not have reasonable suspicion but wish to make contact with the driver of a parked vehicle they should do the following to set up a consensual encounter; 1) Not block the vehicle, so that the defendant could drive away if he/she wished to, 2) Not turn on their squad's red and blue emergency lights, 3) Not use commands, 4) Not brandish a weapon, and 5) use a normal speaking voice.

### **2013 Wisconsin Act 79**

An Act relating to searches by law enforcement of a person on probation, or a person released on parole or extended supervision

#### **Purpose of Act:**

The purpose of this act is to set a new reasonableness standard when law enforcement can search a person who is on probation for a felony; or for a misdemeanor under chapters 940, 948, and 961; or for a person released on parole, or extended supervision. Specifically, this act will allow law enforcement to search people, their property and their residences, at a reduced level of justification when compared to searching others; the police would need reasonable suspicion that the subject has committed a crime or a violation of his condition of probation, parole, or extended supervision to conduct a search under this law.

#### **Operational Date of Act:**

This Act became effective on December 14, 2013. (See Cautionary Points below)

#### **Statute numbers for new Act:**

This Act is codified in these newly created statutory subsections: 302.043(4), 302.045(3m)(e), 302.05(3)(c)4., 302.11(6m), 302.113(7r), 302.114(8g), 304.02(2m), 304.06(1r) and 973.09(1d)

#### **What This Act Allows the Police to Do:**

This Act allows the police to search the person, the residence, or the property under his/her control, of anyone placed on probation for a felony; or for a misdemeanor under chapters 940, 948, and 961; or released on parole, or extended supervision IF: 1) the police have reasonable suspicion the subject is committing, is about to commit, or has committed a crime **OR** the police have a reasonable suspicion that the subject is committing, is about to commit, or has committed a violation of his/her conditions of probation or release; 2) the person is currently supervised by the Wisconsin Department of Corrections on probation for a felony; or for a misdemeanor under chapters 940, 948, and 961; or parole, or extended supervision related to a Wisconsin conviction; and 3) that period of supervision began on or after December 14, 2013. In other words, the same standard that permits a *Terry*

stop of any person allows for a search under this Act if the supervision requirement is met.

**What This Act Requires the Police to Do:**

A law enforcement officer who conducts a search under this Act, must as soon as practicable, notify DOC of the search.

DOC wants this notification to be made via E-mail. The procedure to employ this E-mail notification is as follows:

Make a QPP (Query Probation/Parole). When this Query is conducted an agent five digit number is displayed. The first number determines the region to which the agent is assigned. For example, Agent 58233 is assigned to Region 5. Consequently, the e-mail would be sent to Region 5. Also, DOC wants law enforcement to put "Act 79 Search Notification" in the subject line of the notification e-mail. In the body of the e-mail, indicate the offender's name and DOB as well as a brief description of the search and its results. The e-mail address for each region is listed below.

- Region 1- [DOCDCCReg1RevocationPackets@wisconsin.gov](mailto:DOCDCCReg1RevocationPackets@wisconsin.gov)
- Region 2- [DOCDCCReg2DOC44@wisconsin.gov](mailto:DOCDCCReg2DOC44@wisconsin.gov)
- Region 3- [DOCDCCReg3Intake@wisconsin.gov](mailto:DOCDCCReg3Intake@wisconsin.gov)
- Region 4- [DOCDCCReg4@wisconsin.gov](mailto:DOCDCCReg4@wisconsin.gov)
- Region 5- [DOCDCCReg5WorkFolder@wisconsin.gov](mailto:DOCDCCReg5WorkFolder@wisconsin.gov)
- Region 6- [DOCDCCReg6@wisconsin.gov](mailto:DOCDCCReg6@wisconsin.gov)
- Region 7- [DOCDCCReg7@wisconsin.gov](mailto:DOCDCCReg7@wisconsin.gov)
- Region 8- [DOCDCCReg8DOC44@wisconsin.gov](mailto:DOCDCCReg8DOC44@wisconsin.gov)

Any search conducted under this Act must be conducted in a reasonable manner and may not be arbitrary, capricious, or harassing.

**Cautionary Points:**

1. This Act is only applicable to subjects who, pursuant to a Wisconsin conviction, are placed on probation for a felony; or for a misdemeanor under chapters 940, 948, and 961; or released on parole, or extended supervision, on or after December 14, 2013. It is not applicable to people who are placed on probation or released on parole or extended supervision before December 14, 2013.
2. This Act does not change anything else in reasonable suspicion law; you still cannot move a subject a great distance, you still cannot hold them for an unreasonable time or arrest them without probable cause, and you still cannot compel identification if they do not identify themselves or you do not otherwise know who they are.
3. Law enforcement should continue to work in partnership with DOC.

## **United States v. Lyons**

**Decided by the 7<sup>th</sup> Circuit Court of Appeals- 10/28/13 (Case took place in Illinois)**

### **Issue:**

The issue in this case is whether the police had the requisite reasonable suspicion to frisk the defendant, who was a passenger in an automobile that was lawfully stopped by the police. The frisk ultimately resulted in the seizure of a firearm leading to the defendant being charged and convicted for being a felon in possession of a firearm.

### **Facts:**

Four police officers were on patrol in an unmarked squad. The police spotted a blue vehicle driven by James White. The defendant was in the passenger seat. One of the police officers recognized the driver, White, from numerous previous contacts. During those previous contacts White fled police contact, once by fleeing and crashing his vehicle, and another time by fleeing into a home and barring the door shut. This contact had led to a search warrant resulting in the discovery of two firearms and a substantial amount of cocaine in White's apartment. Aside from the two incidents the officer had pulled White over several times for various traffic infractions and this officer knew that White's driving license was suspended.

Based on White's suspended status the police activated their unmarked squad's emergency lights and attempted to pull White over. Instead of pulling over, White accelerated his car, drove for at least two blocks and ran a solid red light. Finally White pulled his vehicle over to the curb. The police, based on White's prior history, suspected that he had originally taken off in an attempt to conceal contraband, or to retrieve a weapon, or to give himself a head start in a foot race. Once the vehicle came to a stop White was asked to get out of the car and was frisked. Meanwhile another officer approached the defendant and noticed immediately that the defendant's hands were shaking when he was asked to exit the vehicle. The officer also noted that the defendant avoided eye contact when asked questions. The officer asked the defendant if he had any weapons and the defendant said that he did not. The officer then frisked the defendant but as he started the process the defendant admitted that he had a gun on his person.

### **The Defendant's Argument:**

The defendant argued that the police did not have the requisite reasonable suspicion to frisk him. The defendant said that though the police had reasonable suspicion to frisk White they had no such cause to frisk him. The defendant referenced the landmark case of *Ybarra v. Illinois*, 444 U.S.85 (1979), where the United States Supreme Court held that just because the police had probable cause to arrest a tavern bartender it did not generate reasonable suspicion about all the barroom patrons. Similarly, the defendant argued that just because the police had reasonable suspicions about White it did not transfer reasonable suspicion to him.

### **The State's Argument**

The state argued that they had reasonable suspicion because of the defendant's nervous behavior and demeanor, because the defendant had willingly associated himself with White, and because during the two block chase White could have conveyed a weapon to the defendant.

### **The 7<sup>th</sup> Circuit Court of Appeals Holding:**

The court of appeals agreed with the state and found the police had the requisite reasonable suspicion that the defendant might be armed and therefore a frisk was permissible and lawful. The court recognized nervousness, and the possibility that the short flight might have facilitated a weapon transfer, but also held that the suspicions the police had about White could be imputed to the defendant because of his willingness to associate with White. In this manner the court distinguished this case from *Ybarra*; in *Ybarra* it was unfair to impute the sins of the bartender to patrons who presumably were there by random chance, while in this case such imputation made sense since the defendant knowingly and willingly associated himself with White, a person with a very checkered criminal history including fleeing, possession of narcotics, and possession of firearms.

### **Note:**

This case reminds us that the frisk analysis is based on the totality of the circumstances. The interesting point in this case is that in a vehicular context it a legitimate factor in a frisk analysis that a person is a passenger in a vehicle being driven by a person for whom the police had ample reasonable suspicion to believe was armed and or otherwise dangerous.

### **State v. Price G. Turner III**

**Decided by the Wisconsin Court of Appeals**

**8/26/14**

### **Issue:**

Whether or not a 15 year old can consent to an interception of her telephone conversation so as to trigger Wisconsin's One Party Consent rule.

### **Facts:**

The police responded to a request from a High School Guidance based on a female student's report that her father had been sexually assaulting her for several years. The girl was fifteen years old at the time of the report. The girl had described inappropriate touching which had started when she was around seven and had eventually evolved into intercourse when she turned thirteen.

The child continued to advise that she tried to resist the assaults but was unsuccessful until she told her father that if he continued to assault her, she would run away. After her ultimatum, the assaults stopped until four weeks before her

report to the guidance counselor; she had woken up with her father on top of her and he proceeded to have intercourse with her.

The child agreed to wear a wireless recording device, with which the police could listen to her conversations with her father. During the overheard conversation the father admitted to the intercourse within the context of attempting to reassure his daughter that she could not get pregnant. The police then entered the residence, arrested the father, Turner, and eventually interrogated him. Turner confessed.

**The Defendant's Argument:**

The defendant moved to suppress his recorded statements to his daughter, and consequently all the derivative evidence the recording had generated. Turner argued that because his daughter was under the age of 16, she lacked the capacity to consent to the interception as a matter of law.

**The State's Argument:**

The state argued that the girl was old enough to give consent and thus the statements were admissible under Wisconsin's one-party consent rule.

**The Court of Appeals Holding:**

The Wisconsin Court of Appeals agreed with the state. The court reasoned that while Turner was correct in his contention that as a matter of legislative judgment, a minor cannot provide consent in many situations, there is no such prohibition for consenting to an intercept of a phone conversation. The one party consent statute is silent as to any age limitation on consent. The court related the consent issue to how it is handled in Fourth Amendment jurisprudence, where issues such as the child's age and relative maturity are in play. Minors may consent to a search of a home, and the court in evaluating this situation look at age, intelligence, maturity, and the scope of the search or seizure to which the child consents. In deciding with the state the court noted that the daughter was well into her teens, was taking regular high school classes and there was no indication that she required remedial course work. She was not coerced into agreeing to the intercept and she was told that she did not have to comply if she did not wish to. The court agreed with the trial court's denial of the defendant's motion to suppress.

**Cautionary Note;**

Whether or not a child can consent to an intercept is a fact intensive inquiry. The police should take a cautious approach in requesting a child to consent in an intercept, and it would be wise to reassure the child that they do not have to do it, if they are uncomfortable with the process.

**State v. Edler**

**Decided by the Wisconsin Supreme Court- July 12<sup>th</sup>, 2013**

**Issues:**

Whether the Shatzer rule, allowing the police to re-contact a person who had previously invoked their Miranda right to a lawyer but had been released from custody for 14 continuous days, should be the law in Wisconsin under the Wisconsin Constitution. The Wisconsin Supreme Court held that the Shatzer rule is to be adopted by Wisconsin. The second issue is whether the statement “can my lawyer be present for this”, is a clear invocation of the Miranda right to counsel. The court held that it was.

**Facts:**

The police had previously arrested the defendant and the defendant had invoked his Miranda right to counsel during a custodial interrogation. The defendant hired a lawyer and was then released from custody. Nineteen days after the defendant’s release from custody, the defendant was arrested on a new charge. During transport to the police station for an interrogation on the new charge, the defendant asked the police; “Can my lawyer be present for this?”, and it is understood by all the parties that “this” referred to the upcoming custodial interrogation. The police told the defendant that his attorney could be present and nothing more was said about the subject.

At the police station the police read the defendant his Miranda rights; the defendant waived his rights and made several incriminating statements. Ultimately the trial court threw out these statements reasoning that the police should not have interrogated the defendant since he had invoked his Miranda right to an attorney during transport to the interrogation.

**The State’s Position:**

The state appealed arguing that the defendant’s statements about counsel were too ambiguous to count as an invocation. Consequently, the police were free to read the defendant his rights and to question him upon waiver.

**The Defendant’s Position:**

The defendant argued that he had invoked his right to counsel during transport to the interrogation. The defendant also argued that the police should not have even considered an interrogation in the first place since he had clearly invoked his right to counsel 19 days earlier; the defendant urged the court to reject the Shatzer 14 day rule for Wisconsin.

**The Wisconsin Supreme Court Holding:**

The Wisconsin Supreme Court first embraced the Shatzer 14 day rule as compatible with the Wisconsin Constitution. Therefore, since the police arrested the defendant nineteen days after the defendant’s release from custody, the police were free to again try to interrogate the defendant. However, the high court agreed with the defendant that his statement, “can my lawyer be present for this” was sufficiently clear to constitute a new invocation of his Miranda right to counsel and blocked the police from seeking to interrogate him, once they arrived at the station. A key for the

court was the defendant's young age, 18 and the fact that the defendant already had an attorney, so asking whether that attorney could attend the new interrogation was the same as saying that he wanted his attorney present.

**Impact for Wisconsin:**

This is what we now know for sure; 1) the Shatzer 14 day rule is now also the Wisconsin 14 day rule. This gives clarity to the police on the issue, 2) a defendant can invoke his Miranda right to counsel even before being read the rights if he/she is in custody and an interrogation is imminent, and 3) whether a defendant clearly invokes his Miranda right or not, is based on the totality of the circumstances.

**State v. Carlos Cummings**  
**Decided by the Wisconsin Supreme Court**  
**7/24/14**

**Issue:**

Whether or not Cummings invoked his Miranda right to silence during a custodial interrogation? The Wisconsin Supreme Court opined that Cummings did not assert his right to silence and the police were free to continue with their questioning.

**Facts:**

The police responded to a reported shooting and upon arriving at the scene found the victim conscious and responsive, despite having been shot a number of times in the head and upper body. The victim told the police that he had been shot by a woman named Linda. The victim further explained that Linda had called him and asked him to meet her at the park. Linda further told the victim that she wanted to repay the 600\$ she had previously borrowed from him. Linda also advised that she had video evidence of an affair between the victim's wife and a man named Carlos.

The victim went to the park to meet up with Linda. Linda was there and handed the victim the videotape, and then pulled out a .22 caliber pistol, and shot him. Before fleeing the scene Linda told the victim that she was sorry for shooting him but that it was his wife's fault.

As part of their investigation of the shooting the police interviewed Carlos Cummings on the afternoon of the shooting. During the interview Cummings denied any knowledge of involvement in the shooting. Cummings was not in custody during this interview and was subsequently released.

Later the police arrested Linda, the alleged shooter. Linda admitted to shooting the victim but said it was Cummings idea to meet the victim at the park. Linda advised that Cummings had driven her to and from the shooting and that she had left a backpack containing the pistol used in the shooting in Cummings's vehicle. The police also obtained surveillance footage of a vehicle similar to Cummings's dropping Linda off at a gas station near her apartment after the shooting.

The police returned to Cummings's home and asked whether he would be willing to go to the police station for further questioning. Cummings agreed. At the police station, Cummings was advised of his Miranda rights and Cummings waived his rights and agreed to speak with the police. The police then questioned Cummings and told him that Linda had contradicted a lot of what he had told the police earlier. Cummings asked what Linda had told the police and they said they weren't going to tell him. Cummings, frustrated, then said "Well then take me back to my cell. Why waste your time." Cummings and the police continued to spar and eventually things settled down and the interrogation continued and ultimately Cummings admitted to his involvement in taking Linda to and from the shooting. The police conducted a search of Cummings home and uncovered a case and a magazine for a .22 caliber Smith and Wesson pistol, and a subsequent search of the garage revealed the .22 caliber Smith and Wesson pistol used by Linda to shoot the victim.

**The Defendant's Argument:**

Cummings sought to suppress everything he said to the police after saying "Well then take me to my cell-Why waste your time?" Cummings argued that his statements were a clear indication that he no longer wanted to talk and that he was asserting his Miranda right to silence.

**The State's Argument:**

The state argued that Cummings remarks were merely part of a back and forth dialogue with the police and not a clear invocation of his Miranda rights.

**Supreme Court Holding:**

The Wisconsin Supreme Court agreed with the state and held that Cummings's remarks were not a clear invocation of his Miranda right to silence. The court reasoned that in the context of the statements, Cummings's remarks could be interpreted in a least two different ways. One way could be that Cummings no longer wanted to talk to the police; another possibility is that his statement was merely a rhetorical device intended to elicit additional information from the police. The court opined that the statements seemed liked an invitation for the officer to end the interview if he didn't give Cummings some insights on what Linda had told the police. In any event the court held that the statements were not a clear invocation of Cummings Miranda right to silence, but rather just part of a back and forth exchange between the police and Cummings.

**Key Point:**

It is important to note that Cummings's comments were post-waiver, and in a post waiver context the burden is on the defendant to show that his/her invocation is clear and unambiguous. Also, in the post waiver context there is no obligation for the police to seek clarification of an ambiguous statement, which could be, or just as easily could be not an assertion of a Miranda right.