



Milwaukee Bar Association

Improving Access to Justice for 150 Years

MBA Bench/Bar Court of Appeals Committee
and the Office of the Wisconsin State Public Defender
present

Appeals from Start to Finish

Friday, April 18, 2008
Milwaukee Bar Association
424 East Wells Street, Milwaukee, WI
7.5 CLE Credits

Appeals from Start to Finish Agenda

- 7:30 - 8:00 a.m. **Registration/Continental Breakfast**
- 8:00 - 8:15 a.m. **Welcome**
Atty. Amelia L. Bizzaro,
Bench/Bar Court of Appeals Committee Co-Chair
- 8:15 - 10:15 a.m. **Criminal Appeals from Verdict to Notice of Appeal**
Atty. Melinda Swartz and Atty. Andrea Cornwall,
SPD - Milwaukee Appellate Division
- 10:15 - 10:30 a.m. **Break**
- 10:30 - 11:00 a.m. **Civil Appeals from Verdict to Notice of Appeal**
Atty. Barbara Janaszek, Whyte Hirschboeck Dudek SC
- 11:00 - 11:45 a.m. **Motion Practice in the Court of Appeals**
Atty. Tom McGregor and Atty. Deborah Moritz,
District I Staff Attorneys
- 11:45 - 12:45 p.m. **LUNCH**
- 12:45 - 1:15 p.m. **Petition for Leave to Appeal: Keys to Success**
Atty. Randy Paulson, SPD - Milwaukee Appellate Division
- 1:15 - 2:00 p.m. **Writing a Persuasive Brief**
Hon. Lisa Neubauer, District II Court of Appeals¹
- 2:00 - 2:15 p.m. **Break**
- 2:15 - 3:00 p.m. **Getting Your Petition for Review Granted**
Atty. Ellen Henak, SPD - Milwaukee Appellate Division
Commissioner Julie Rich, Wisconsin Supreme Court
- 3:00 - 3:30 p.m. **Supervisory Writs**
Atty. Robert Henak, Henak Law Office, S.C.
Atty. Colleen Ball, Appellate Counsel, S.C.
- 3:30 - 4:00 p.m. **Panel Discussion Q & A,**
Atty. Amelia L. Bizzaro, Moderator

¹ Materials prepared by the Hon. Joan Kessler, District I Court of Appeals

Appeals from Start to Finish Speaker Biographies

Colleen Ball began her litigation practice in 1991 at Reinhart Boerner Van Deuren s.c. in Milwaukee. She became a shareholder of the firm, served as chairperson of the firm's Appellate Practice Group, and has worked on appeals in state and federal courts. She has argued cases to the Seventh Circuit Court of Appeals, the Wisconsin Supreme Court, the Wisconsin Court of Appeals, and the Minnesota Court of Appeals. In October 2002, Colleen founded Appellate Counsel, S.C., a firm focusing exclusively on litigation strategy and appellate advocacy.

With the help of several colleagues, Colleen formed the Appellate Practice Section of the Wisconsin State Bar in 1999 and served as chairperson of the section from July 1, 2003 to June 30, 2004. She created and has served as coordinator or co-coordinator of the pro bono appeals program since its inception in 1998. The program supplies pro bono appellate counsel for cases in the Wisconsin Supreme Court, the Wisconsin Court of Appeals, and the Seventh Circuit Court of Appeals.

Colleen received her undergraduate degree in political science from Marquette University and her graduate degree in Russian history from the University of North Carolina at Chapel Hill. After spending nine months studying Russian at Moscow State University, she attended the University of Wisconsin Law School. She served as associate editor for the Wisconsin Law Review and received her law degree cum laude in 1991. She clerked for Judge John W. Reynolds of the United States District Court for the Eastern District of Wisconsin.

Amelia L. Bizzaro, Marquette 2003, is an associate attorney at Henak Law Office, S.C., Milwaukee, a firm dedicated solely to criminal appeals and post-conviction work. Prior to joining Henak Law Office in 2005, she was the Director of the statewide Legal Services Program at the AIDS Resource Center of Wisconsin, Inc., and a staff attorney at Centro Legal por Derechos Humanos, Inc. She is a member of the state bar's Appellate Practice Section, and is co-chair of the Milwaukee Bar Association's Bench/Bar Court of Appeals Committee.

Andrea Taylor Cornwall graduated from UW Law School in 1991, and has been representing clients as an Assistant State Public Defender with the Wisconsin State Public Defender's office ever since. In her first 7 years of practice, Ms. Cornwall worked in the Milwaukee Trial Office, representing criminal defendants in Milwaukee County circuit courts. For the last 10 years, Ms. Cornwall has been with the Milwaukee Appellate Office of the State Public Defender, representing clients in postconviction proceedings and on appeal of criminal convictions and termination of parental rights.

Ellen Henak has been a staff attorney in the Milwaukee Appellate Office of the Wisconsin State Public Defender's Office since 1991 where she handles postconviction hearings and motions as well as appeals in criminal cases and mental health commitment cases. She graduated from New York University School of Law in 1983. Following graduation, she was a judicial law clerk for the Hon. Marie L. Garibaldi of the New Jersey Supreme Court. She also is a former Assistant Corporation Counsel for the City of New York and has been in solo private practice.

Robert R. Henak is proud to have defended the Constitution and those charged with criminal offenses for the past 25 years. After graduating from New York University School of Law in 1982 and clerking for the Hon. James E. Doyle, Sr. in the U.S. District Court for the Western District of Wisconsin, he spent four years with the Legal Aid Society, representing criminal defendants in the trial courts of New York City. He then spent the next 12½ years focusing on motions work and criminal appeals with Shellow, Shellow & Glynn, S.C. in Milwaukee before founding his own firm, Henak Law Office, S.C., with a practice limited almost exclusively to state and federal post-conviction work, criminal appeals, federal habeas, and federal sentencing issues.

Mr. Henak has handled hundreds of state and federal appeals. He performed all or a significant part of the briefing for a party or amicus in cases resulting to date in more than 80 published decisions. He also is Amicus Chair, and serves on the board of directors, of the Wisconsin Association of Criminal Defense Lawyers.

Barbara J. Janaszek is a shareholder with the law firm of Whyte Hirschboeck Dudek S.C. in Milwaukee, concentrating in appellate advocacy and commercial, accountant liability and intellectual property litigation. In her 25 years of practice, Ms. Janaszek has handled dozens of appeals, including successfully briefing and arguing, on behalf of the taxpayers, two of the most significant state and local tax ("SALT") cases decided by the Wisconsin Supreme Court in the last 20 years -- *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*, 160 Wis. 2d 53, 465 N.W.2d 800 (1991); 502 U.S. 807, 112 S. Ct. 2447 (1992); 171 Wis. 2d 35, 489 N.W.2d 915 (1992) and *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, 299 Wis. 2d 561, 729 N.W.2d 396. Ms. Janaszek received her J.D. degree from Marquette University. She began her legal career as an appellate clerk for District I of the Wisconsin Court of Appeals and currently chairs the State Bar Appellate Practice Section Board.

Joan F. Kessler was elected Judge on District I of the Wisconsin Court of Appeals in 2004. She sits on that court in Milwaukee. Prior to her election, she was a litigation partner with Foley & Lardner for twenty three years, and the United States Attorney for the Eastern District of Wisconsin, appointed by

President Jimmy Carter. She has taught Professional Responsibility at both University of Wisconsin and Marquette Law Schools. Her leisure activities include painting, cooking, reading, and travel. She and her husband, State Representative Fred Kessler, live on the northwest side of Milwaukee. They have two adult daughters.

Tom McGregor has been a staff attorney for the District I court since 1990. He received his undergraduate and law degrees from the University of Wisconsin-Madison. Prior to joining the Court of Appeals, he was in private practice where his areas of concentration were bankruptcy and family law.

Deb Moritz has been a staff attorney for Districts I and II since 1998. She also is an adjunct lecturer in Legal Writing at the University of Wisconsin. Before joining the court, Deb was in private practice with Stafford Rosenbaum in Madison and Sullivan & Cromwell in New York, taught legal writing at New York University and Brooklyn Law Schools, and was a motions law clerk for the United States Court of Appeals for the Second Circuit.

Lisa S. Neubauer serves as a judge on the Wisconsin Court of Appeals, District II. Prior to joining the court Judge Neubauer was a partner at Foley and Lardner LLP, chair of the firm's Insurance Dispute Resolution Practice and, since 1989, a member of the Litigation Department. Her practice focused on general commercial litigation with an emphasis on insurance litigation. Judge Neubauer was also vice chair of the firm-wide Recruiting Committee.

Prior to joining Foley, Judge Neubauer was a law clerk for the Hon. Barbara B. Crabb, the chief judge of the United States District Court, Western District of Wisconsin. A graduate of the University of Chicago Law School with honors, Judge Neubauer received her degree in 1987. She is a member of the Order of Coif. While at the University of Chicago Law School, Judge Neubauer was president of the Law Students Association. In 1979, Judge Neubauer received her B.A. from the University of Wisconsin – Madison, where she majored in political science. From 1979 to 1982, she worked as a legislative aide for the president of the Wisconsin State Senate. Judge Neubauer also worked as a staff member in the United States Senate.

Judge Neubauer is a recipient of the 2005 Lynford Lardner Community Service Award in recognition of her volunteer work and civic involvement. In 2004, Judge Neubauer was the recipient of the Association for Women Lawyer's Community Service Award. For six years she was a board member of the Racine Area United Way, and has also served as Vice-President, Racine Area United Way Marketing and Resource Development Committee, aboard member of the Equal Justice Coalition n/k/a Wisconsin Equal Justice Fund and of Legal Action of Wisconsin.

Randall E. Paulson is an Assistant State Public Defender in Milwaukee, handling post-conviction matters and appeals. He received his bachelor's degree from UW-Eau Claire, and graduated from the UW Law School. He spent a year in private practice and five years as a trial-level public defender in Stevens Point before moving to Milwaukee and the public defender's appellate division, where he has worked since 1993. He was the first public defender to represent his agency at meetings of the Wisconsin Criminal Jury Instructions Committee, working on that committee for five years. From 1999-2003, he was a liaison to the private bar. He conducted training for private bar attorneys handling public defender cases, investigated performance complaints, and audited bills. Over the years, he has been called upon to make presentations for continuing legal education seminars on topics such as interlocutory appeals (he maintains an outline on this subject on the public defender's website), the law of sentencing (he handled both *State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197, and *State v. Brown*, 2006 WI 131, 298 Wis.2d 37, 725 N.W.2d 262), jury instructions, and judicial disqualification.

Julie Anne Rich is a Wisconsin Supreme Court Commissioner. She assists the court with petitions for review, attorney and judicial disciplinary cases, and the court's administrative rules matters, including the Ethics 2000 petition. She received her B.S. from the University of Wisconsin-Madison in Geology & Geophysics in 1988, attended graduate school in geology at the University of California, and received her J.D., magna cum laude, from the University of Minnesota Law School in 1994. After clerking for the Minnesota Supreme Court, Julie was an associate at Dorsey & Whitney LLP in Minneapolis, practicing in the areas of complex commercial litigation and commercial finance. She worked briefly for the court of appeals and has been a supreme court commissioner since 2001.

Melinda Swartz is an attorney in the Milwaukee Appellate Office of the Wisconsin State Public Defender. She graduated from Carleton College in 1985 and from the University of Minnesota Law School in 1990. She worked in the Milwaukee Trial Office of the Wisconsin State Public Defender from August 1990 until transferring to the Appellate Division in August of 1996.

CRIMINAL APPEALS FROM VERDICT TO NOTICE OF APPEAL

I. INITIATING A CRIMINAL APPEAL

A. The Decision to Appeal: Statutory [Wis. Stat. Rule 809.30(2)] and ethical [SCR 20:1.16] duty to advise client of postconviction or appeal rights

1. Advise client:
 - a. Right to seek postconviction/appellate relief - CR-233
- Notice of Right to Seek Postconviction Relief
 - b. Merits of appealing issue
 - c. Length of time (SPD has 30/50 days to appoint, court reporters have 60 days to prepare transcripts, appellate attorney have 60 days to file pcm/noa)
 - d. Fee:
 - i. No trial - \$480/\$60 prepay
 - ii. Trial - \$1200/\$120 prepay
2. **Ultimately it is the client's decision whether to file NOI.**

B. Notice of Intent (NOI) – Rule 809.30(2)

1. Notice of Intent to Pursue PostConviction Relief starts statutory process for postconviction or appeal process for criminal cases.

[Sample Notice of Intent](#)

2. Mandatory NOI contents: Rule 809.30(2)(b) 1 through 6.
3. **NOI must be filed in the circuit court** and served on the prosecutor and any other party.
4. Deadline for filing NOI
 - a. Within 20 days after date of sentencing. Wis. Stats. Rule 809.30(2)
 - b. Time limit may be enlarged upon showing of “good cause.” Wis. Stat. Rule 809.82.
 - c. If past 20 days or if later discover NOI filed past 20 days you need to file motion to extend time to file NOI in court of appeals (COA).

[Sample Extension Motion](#)

- d. COA – Need to identify correct District at top of motion.
- e. Original plus 4 copies to COA, serve one copy on DA and one copy on clerk of circuit court.

- f. COA address: P.O. Box 1688, Madison, WI 53701-1688.
 - g. File Notice of Intent (NOI) with clerk of court prior to or at same time as motion to extend.
- C. If your client is requesting SPD representation on appeal, send to SPD Appellate Division Intake Unit, P.O. Box 7862, Madison, WI 53707:
- 1. Copy of file stamped NOI
 - 2. Completed [SPD Appellate Questionnaire](#)
 - 3. Copy of all transcripts obtained during the course of representation
 - 4. Motion for Release Pending appeal or Stay of sentence pending appeal (if applicable) (see below)

II. BEGINNING APPELLATE REPRESENTATION

A. ORDERING TRANSCRIPTS AND COURT RECORD:

- 1. Within 5 days of the filing of the NOI, the clerk of court shall send a copy of the NOI, the judgment and the judgment roll to:
 - a. To the SPD appellate intake, if the client is seeking SPD representation. 809.30(2)(c) 1.
 - b. To the person's retained counsel or to the person, if the person is not seeking appointed counsel. 809.30(2)(c) 2.
- 2. If you are appointed, SPD appellate intake will order the transcripts and court record to be sent to you:
 - a. Deadline for ordering – 30 days, or 50 days if indigency needs to be redetermined. 809.30(2)(e)
- 3. If you are retained, the deadline for ordering the transcripts and court record is:
 - a. 30 days after the filing of the NOI, if the person has not requested representation by the SPD. 809.30(2)(f).
 - b. 90 days after the filing of the NOI, if the person has been denied representation by the SPD. *Id.*
- 4. Presentence Investigation report (PSI):
 - a. In some counties, the PSI is provided as part of the court record request.
 - b. In Milwaukee County, PSIs are part of the circuit court record but are not maintained in the case file in the clerk's office. The PSIs will be sent to SPD appointed counsel by DOC pursuant to a standing order of the (former) Chief Judge Michael Sullivan entered on March 12, 2004. The following procedure should be used to obtain the PSI:
 - i. Identify the agent who prepared the PSI. The agent's name, DOC # and FAX # may be

- obtained from the Probation and Parole Office for Milwaukee County 414-227-4544.
- ii. Fax the agent a request for the PSI which includes the agent's name, DOC number, phone and fax #, and the client's name, date of birth and case number. The request should indicate that it is being made pursuant to Judge Sullivan's standing order and should, as an attachment, include the order appointing counsel.
- iii. Any problems with the process should be referred to the Milwaukee Appellate Office Attorney Supervisor, 414-227-4805.
- c. Note: Other counties may also require court orders to obtain the PSI and/or have a different procedure for obtaining them.
- d. Note: Counsel may keep a copy of the PSI and review PSI with client, however, copying PSI to give to client requires court order. See § 972.15 (4m).

B. UPON OPENING YOUR FILE

1. Read Wis. Stats. (Rules) 809.30, .31 and .32. Review other rules of appellate procedure in chs. 808, 809 and 974
2. Review the "Appellate Division's Minimum Attorney Performance Standards" at <http://www.wisspd.org/html/appellate/AppAttyPerfStan.asp>
3. Review the Direct Appeal Timetables available at <http://www.wisspd.org/html/appellate/appellate2.asp>. Review the rules governing the calculation of time limits in Rule [801.15 \(1\) and \(5\)](#)
4. Check file:
 - a. Was NOI timely filed? If not, file motion to extend deadline.
 - b. Check Judgment. Is the judgment appealable under 809.30?
 - c. Were all the necessary transcripts ordered? If not, order transcripts and file a motion with the COA to extend the deadline for ordering transcripts.
5. Notify client of your appointment and briefly outline appellate process. Ask what you should be looking for when you review the record and why client wants to appeal. Establish how and when communication will occur in the future: find out how to contact client and advise client how to contact you.
6. Contact trial counsel (and review SPD Appellate Questionnaire from trial counsel, if available): Potential issues? Discovery, investigation and expert reports available?

C. IS A MOTION FOR RELEASE PENDING APPEAL WARRANTED?

1. No longer presumptive in misdemeanor cases
2. The trial court has the discretion to grant release pending appeal in both misdemeanor and felony cases. The relevant statutory provisions are Wis. Stats. § 809.31, 969.01, 969.08 and 969.09.
3. Once motion is filed, court shall hold a prompt hearing. § 809.31(2)
4. §809.31(3) outlines what a court must find to grant release:
 - a. No substantial risk of failure to appear to answer the judgment after completion of appeal;
 - b. Defendant not likely to commit serious crime, intimidate witnesses, or otherwise interfere with administration of justice;
 - c. Defendant will promptly prosecute postconviction proceedings; and
 - d. Postconviction proceedings are not taken for purposes of delay.
5. §809.31 (4) list considerations for court in determining the motion:
 - a. Nature of crime;
 - b. Length of sentence;
 - c. Other factors relevant to pretrial release.
6. Merits of appeal can be considered by circuit court in considering release pending appeal. *See State v. Salmon*, 163 Wis. 2d 369, 471 N.W. 2d 286 (Ct. App. 1991)
7. District Attorney must be served with copy of motion for release pending appeal.
8. Copies of the motion and the order deciding the motion should be provided to the client.
9. If circuit court grants release and schedules review date:
 - a. Be prepared to inform court of anticipated deadlines, receipt of transcripts, etc.
 - b. Notify client of Court Review date and location.**
10. 809.31(5) outlines procedure for filing a motion seeking appellate review of a circuit court's grant or denial of motion for release pending appeal.
11. In probation case – consider motion to stay sentence pending appeal. See 808.07(2) and 809.12; Criteria - *See State v. Gudenschwager*, 191 Wis. 2d 431 (1995)
12. If defendant has condition time – consider stay of condition time pending appeal

D. COMPIATION OF COURT RECORD AND TRANSCRIPTS

1. TRANSCRIPTS

- a. Track receipt of the transcripts
- b. Deadline to file a notice of appeal (NOA) or motion for postconviction or postdisposition relief (PCM) is 60 days from date of service of last transcript or court record, whichever is later. (If mailed, 63 days from the postmark.) 809.30 (2) (h) & 809.10 (1) (b) 5
 - i. Definition of service, and computation of time. 801.14 & 801.15
- c. Wrong transcript ordered or ordered from incorrect court reporter – you must order transcript and file motion with the COA to extend deadline to order transcript
- d. Late transcript – It is counsel's responsibility to monitor production of the transcripts to ensure that the case proceeds in a timely manner. Follow-up with reporters by phone or letter. If no response, file a motion for sanctions against reporter in court of appeals. Reporter may file motion to extend time to file transcript and must serve copy of same on the parties, the clerk and the District Court Administrator. 809.11 (7) (c) & (d); *State v. DeFilippo*, 2005 WI App 213; *State v. Raflik*, 2001 WI 129.
- e. Missing or defective transcript:
File motion to supplement, correct or reconstruct record. If omissions are significant and irreparable, reversal warranted. 809.11 (5), 809.14 (3) (b), 809.15 (3) & (5), *State v. Perry*, 136 Wis. 2d 92 (1987); *State v. DeFilippo*, 2005 WI App 213.

2. COURT RECORD

- a. Check record to make sure you have received all documents.
- b. Check judgment roll to see if any hearings occurred after the transcripts were ordered (e.g. restitution hearings or a motion for bail pending appeal). If so, order transcript and file motion in the COA to extend deadline for ordering transcripts.
- c. In Milwaukee County, to view Exhibits, call Jim Wilson at 414/278-4592 with Case No. and when you need to view exhibits. Please give him 24 hours notice. If the exhibit is a videotape, CD or DVD, you must bring your own equipment to view in clerk's office.

- d. If exhibits were returned to police, call DA to make arrangements to view exhibits.

III. REVIEW, INVESTIGATION, ANALYSIS AND ADVISING CLIENT

A. REVIEW

1. entire court record, transcripts, exhibits, and PSI
2. Review the "Issues Checklist" at <http://www.wisspd.org/html/appellate/isscheck2.asp>
3. Initial research: statutes, caselaw, SPD website case summaries

B. INVESTIGATION

1. Consult with your client in person

- a. **You cannot determine all the issues which may merit post conviction or appellate litigation without consulting with your client.**
- b. Locate client:
 - i. If in custody locate via Vinelink www.vinelink.com/vinelink/initMap.do or via DOC: 608/266-2097 (have your client's DOB and DOC # available)
- c. Client can provide facts **outside of record**
- d. **Establish relationship**
- e. Necessary to investigate guilty, Alford or no contest plea cases
 - i. Need to appraise client's understanding of charges, punishment and other issues related to entering a plea.
 - ii. You cannot determine whether a plea is knowing, voluntary and intelligent without direct consultation with the client.
- f. Need to assess client's level of functioning and competency
 - i. **Incompetent client.** A defendant unable to assist counsel or make decisions committed by law to the defendant with a degree of rational understanding is incompetent to pursue postconviction relief. *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994).
 - ii. Need to assess if there are any mental health issues not previously recognized by court or counsel

2. Consult with trial counsel about possible issues and facts outside record
3. If necessary, investigate additional facts outside of the record:
 - a. Obtain police records from DA, trial counsel or additional police reports from open records.
 - b. Interview witnesses
 - c. Obtain client medical, institution or other records.
 - i. Need release of information from client
 - d. Review trial counsel's file
 - i. May need signed release of information from client
 - ii. If want to review trial counsel's SPD voucher (if appointed counsel) – you need to obtain a signed release of information from the client and submit it to the SPD Assigned Counsel Division
 - e. Consider retaining an expert where appropriate
 - f. Post conviction discovery –
 - i. Defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence. A party who seeks post-conviction discovery must first show that the evidence is consequential to an issue in the case and that the result of the proceeding would have been different had the evidence been discovered. *State v. O'Brien*, 225 Wis. 2d 247, 327, 591 N.W.2d 846 (1999); *State v. Robertson*, 2003 WI App 84.

C. ISSUE ANALYSIS

1. Completely research all issues
2. Analyze all relevant facts
3. Conflict between client and trial counsel regarding their discussions or other facts not in the record:
 - a. Is there an actual conflict?
 - b. Does the conflict matter to the legal issue at hand?
 - c. If there is a conflict, is there objective evidence in the record or outside of the record which resolves conflict?
 - d. **IF THERE IS A CONFLICT ON A MATERIAL ISSUE – YOU MUST FILE A POST CONVICTION MOTION**
 - i. You cannot make a credibility determination between your client and trial counsel – a circuit court must make that determination.

D. ADVISING THE CLIENT

1. After review, investigation, research and analysis, counsel must confer with client regarding the client's right to appeal, the potential merit or lack thereof and the risks and benefits of pursuing either a post conviction motion or an appeal and if applicable, the defendant's right to a no merit report, to self-representation and to retain counsel.
2. Explain merits of issues, including all issues raised by the client
 - a. Use language that client can understand
 - b. Make sure that client understands
 - c. May need to explain again
 - d. Best practice – both in writing and orally
3. Explain remedy and benefits of each meritorious issue
 - a. Obtaining relief in most cases does not make the case “go away” (e.g. new trial or resentencing)
 - b. Obtaining evidence suppression may not result in dismissal of case
 - c. Explain interplay between various issues and potential outcomes (e.g. relief on only one issue)
 - d. Remedy for breach of plea agreement may not be plea withdrawal, but rather resentencing. A defendant can request plea withdrawal, but the court may decide to grant resentencing instead. – See *State v. Smith*, 207 Wis. 2d 259 (1997); *State v. Howard*, 2001 WI App 137, ¶¶36-37.
4. Explain risks of winning appeal
 - a. New Jury Trial –
 - i. potential for additional charged counts?
 - ii. Risk of longer sentence if convicted?
 - b. Plea Withdrawal – may result in loss of benefit of plea bargain including reinstatement of dismissed charges and filing of charges not previously issued. See *State v. Carter*, 208 Wis. 2d 142 (1997, See, also, *State v. Lange*, 2003 WI App 2, ¶¶36-37 (grant of partial relief works repudiation of *entire* bargain)
 - c. Resentencing risks–
 - i. Client may receive longer sentence if reconvicted, or at a re-sentencing hearing, if justified by new objective factors. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *State v. Naydibor*, 2002 WI App 272; *State v. Church (II)*, 2003 WI 74
 1. Ask and advise client re:institutional conduct

2. Consider potential for new information re: defendant and/or impact on victim
- ii. Relief on one count may expose defendant to resentencing on all counts.
 1. If the vacated count did not affect the overall dispositional scheme, resentencing on remaining counts is unnecessary and therefore not required. *State v. Holloway*, 202 Wis.2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996) (“when a sentence is commuted pursuant to § 973.13, STATS., the sentencing court may, in its discretion, resentence the defendant if the premise and goals of the prior sentence have been frustrated”)
 2. But *cf.*, *State v. Volk*, 2002 WI App 274, ¶¶46-49 (remedy for unsupported enhancement is resentencing rather than § 973.13 commutation of ES excess: “When a crucial component of such a sentence is overturned, it is proper and necessary for the sentencing court to revisit the entire question”).
 3. But see *State v. Schwebke*, 2001 WI App 99, ¶¶25-31, *affirmed on other grds.*, 2002 WI 55 (remedy for sentence which exceeded the permissible maximum—multiple counts of probation running consecutive to one another—is automatic commutation to total allowable term of probation).
5. If client choose to close file without action, make sure client understands that by taking this action, they are waiving their right to appointed counsel and their right to a direct appeal. Absent extraordinary circumstances, they will not be able to appeal from the judgment in the future.
6. Make sure client has a reasonable amount of time to make a knowing and voluntary decision about how to proceed.

E. DISAGREEMENT WITH CLIENT ON WHICH ISSUES TO APPEAL

1. **It is the client’s decision whether to appeal or not and what remedy to seek**
2. **It is counsel’s decision which issues to raise on appeal and how to raise those issues.** Counsel is not required to raise every non-frivolous issue on appeal and may winnow

out weaker issues for strategic advocacy purposes. *Jones v. Barnes*, 463 U.S. 745 (1983)

3. Disagreement in appointed cases without meritorious issues
 - a. Governed by [Wis. Stats. Rule 809.32](#),
 - b. Counsel must explain the no merit procedure under [Wis. Stats. Rule 809.32](#) to the client as specified in 809.32(1)(b). (see Section VII of this outline below)
 - c. The client must be informed and choose from among the following three options: 1) to have the attorney file a no merit report; 2) to have the attorney close the file without an appeal; or 3) to have the attorney close the file and to proceed without an attorney or with another attorney retained at the client's expense.
 - d. **If the client does not make a decision or choose one of the three options – you must file a no merit report.**
4. Disagreements in cases with meritorious issues:
 - a. Client has four choices:
 - i. Proceed with appointed counsel.
 1. SPD will not appoint successor counsel merely because client disagrees with appointed counsel's assessment of the merits.
 - ii. Discharge counsel and represent self *pro se*
 - iii. Discharge counsel and retain counsel to represent them.
 - iv. Discharge appointed counsel and not appeal. *See State ex rel. Ford v. Holm (Ford II)*, 296 Wis. 2d 119 (2006)
 - b. If client choose to proceed *pro se*:
 - i. Counsel should inform client of consequences of self representation, including:
 1. will be solely responsible for:
 - a. complying with all rules of appellate procedure
 - b. timely filing briefs and motions in proper form
 - c. securing witnesses appearance in court
 - d. presenting all evidence and legal arguments
 2. that SPD will not reappoint counsel if the client later changes their mind about going *pro se*.
 - ii. If client chooses to proceed *pro se* and you have made an appearance in the case, you must file a motion to withdraw.

1. If prior to filing NOA, motion to withdraw is filed in the circuit court.
2. If after filing NOA, motion is filed in the circuit court. *See* Rule 809.30(4)
3. Motion to withdraw should also request an extension of time for the client to prepare the next required pleading

- c. A client who has strategically declined a potentially meritorious challenge to his conviction or sentence is not entitled to the option of a “partial” NMR that discusses the remaining aspects of the case. *See State ex rel. Ford v. Holm (Ford II)*, 296 Wis. 2d 119 (2006).

F. EXTENSION OF RULE 809.30 TIME LIMITS

1. If you need additional time to file the NOA or a PCM, file a motion in the court of appeals to extend the 60-day Rule 809.30 (2) (h) time limit
2. **Practice note:** With sufficient grounds (investigation, workload, illness, office staffing problems, etc.) the court of appeals will grant a reasonable extension request. Second extensions are granted if diligence and need are shown. Requests for a third extension are disfavored.
 - i. If you need the time to complete the necessary work or for the client to make a decision, ask for an extension of time.
 - ii. Be careful not to include confidential information
3. **Caution:** Extensions are available *only* for cases falling within Rule 809.30 and only for the time limits set forth in Rule 809.30. **The time limit for filing a Petition for Review in the Wisconsin Supreme Court can never be extended.**

V. DECIDING HOW TO APPEAL – IS A MOTION REQUIRED FIRST?

Wis. Stat. §809.30(2)(h) and §974.02(2)

A. WHEN TO FILE A NOTICE OF APPEAL (NOA)

1. if the only issue to be appealed is sufficiency of the evidence;
2. if all issues to be appealed have been *properly raised* by the trial attorney and have been previously decided by the circuit court.
Practice Note: consider whether all issues you intend to raise have been adequately preserved in the trial record through proper objections or motions. If they have not, you may face a “waiver” argument from the state on appeal. You should therefore consider

whether you need to first raise a claim of ineffective assistance of trial counsel in a postconviction motion for failing to properly raise the issue before proceeding with a notice of appeal.

B. WHEN TO FILE A POSTCONVICTION MOTION (PCM)

1. if the trial court has not had an opportunity to rule on the precise issue you intend to raise on appeal, you must file a PCM
2. PCM that raises or renews a substantive legal claim:
 - a. provides an opportunity to present issues to the trial court that were not previously raised;
 - b. allows the trial court further opportunity to consider issues that were previously raised;
 - c. provides the opportunity to make a more complete record for issues you intend to raise on appeal.
3. issues that must be raised in a PCM include:
 - a. a request to withdraw a guilty or no-contest plea;
 - b. a request for resentencing or plea withdrawal based upon a violation of the plea agreement by the state;
 - c. a request for sentence modification or resentencing;
 - d. a request for a new trial due to newly-discovered evidence;
 - e. a request for a new trial in the “interest of justice”;
 - f. an ineffective assistance of counsel claim – trial counsel must testify regarding the reasons for the challenged action or omission.

C. GUILTY PLEA CASES

1. Must file PCM seeking plea withdrawal unless trial counsel moved to withdraw the plea before the sentencing. Elements of claims, pleading requirement, procedures, burdens and standards of proof for plea withdrawal are discussed in *State v. Bangert*, 131 Wis. 2d 246 (1986); *State v. Hampton*, 274 Wis. 2d 379 (2004); and *State v. Brown*, 293 Wis. 2d 594 (2006).
2. The guilty plea waiver rule: The general rule is that a guilty, no contest or *Alford* plea waives all nonjurisdictional defects, including constitutional claims. *See State v. Kelty*, 294 Wis. 2d 62 (2006).
EXCEPTIONS:
 - a. an order denying a motion to suppress evidence or exclude a defendant’s statement may be appealed despite a guilty plea, under Wis. Stat. §971.31(10). Note there is no corresponding rule in juvenile code cases;
 - b. a double jeopardy claim that can be resolved on the basis of the record as it existed at the time of the plea, *see Kelty*;
 - c. “statutory” double jeopardy, *see* §939.71 and *State v. Lasky*, 254 Wis. 2d 789 (Ct. App. 2002) ;

- d. unauthorized repeater enhancement, *see State v. Hanson*, 244 Wis. 2d 405 (2001);
- e. lack of subject matter jurisdiction, *see State v. Bush*, 283 Wis. 2d 90 (2005).

D. SENTENCING ISSUES

All claims for sentence relief must be raised in the trial court by PCM, with notice to the prosecution:

- 1. Illegal sentence
- 2. Erroneous exercise of discretion
- 3. Sentence based on inaccurate information
- 4. Claim that state's sentence recommendation breached plea agreement, *see State v. Williams*, 249 Wis. 2d 492 (2002).
- 5. Erroneous sentence credit
- 6. "New factor" sentence modification:
 - (a) "new factor" must be something unknowingly overlooked or nonexistent at original sentencing;
 - (b) must be highly relevant to imposition of sentence;
 - (c) failure to argue new factor that exists at time a sentence modification motion is filed on other grounds waives the right to assert it at a later date, *see State v. Casteel*, 247 Wis. 2d 451 (Ct. App. 2001).
- 7. PCM is also required when you are seeking relief from a resentencing, *see State v. Walker*, 292 Wis. 2d 326 (2006).

E. SERIAL LITIGATION BAR: FAILING TO RAISE AN ISSUE IN YOUR DIRECT APPEAL WILL PREVENT YOUR CLIENT FROM EVER RAISING IT IN A SUBSEQUENT §974.06 POSTCONVICTION MOTION, ABSENT 'SUFFICIENT REASON.'

- 1. All claims that a defendant can bring must be consolidated into one motion or appeal, as claims that could have been raised on direct appeal or in a previous §974.06 motion are barred from being raised in a subsequent §974.06 motion, absent a showing of sufficient reason for why the claims were not raised on direct appeal or in a previous §974.06 motion. *See* Wis. Stat. §974.06(4) & *State v. Escalona-Naranjo*, 185 Wis. 2d 168 (1994).
- 2. This procedural bar to serial litigation applies where a defendant actually filed a postconviction motion or pursued a direct appeal, and includes appeals processed under the no-merit procedure of §809.32; *see State v. Tillman*, 281 Wis. 2d 157 (Ct. App. 2005).

EXCEPTIONS:

- (a) procedural bar inapplicable where arguably meritorious issues were overlooked by counsel and the court in a no-merit report; *see State v. Fortier*, 289 Wis. 2d 179 (Ct. App. 2006).
- (b) procedural bar inapplicable where issue is adequacy of proof of habitual criminality enhancer, or when penalty imposed is longer

than permitted by law; *see State v. Flowers*, 221 Wis. 2d 20 (Ct. App. 1998).

VI. PERFECTING YOUR RULE 809.30 APPEAL

A. HOW TO FILE A POSTCONVICTION MOTION

1. Motion is due within 60 days after service of the transcript or court record, whichever is later; *see* §809.30(2)(h)
2. PCM gets filed with clerk of circuit court. The filing date is date the motion is actually received and date-stamped by clerk, *not* the day you mail it.
3. You must also serve a copy of PCM on D.A. and, if you challenge constitutionality of statute, on the Attorney General; *see* §806.04(11).

B. WHEN DOES MY PCM REQUIRE A HEARING?

1. If your issue requires fact-finding (e.g., ineffective assistance of counsel claims and plea withdrawal claims), you must request an evidentiary hearing.
2. The circuit court may deny your motion without a hearing if the motion presents conclusory allegations that fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief.; *see State v. Love*, 284 Wis. 2d 111 (2005).
Therefore:
 - a. Be sure your claims and attached affidavits are precise.
 - b. List all factual allegations you intend to prove at a hearing.
3. If a hearing is scheduled and you need your client at the hearing (e.g., where there are substantial issues of fact regarding events in which the defendant participated), you'll need to get the court to sign an order in advance in order to have your client produced to court for the hearing.

C. THE CIRCUIT COURT MUST DECIDE PCM BY WRITTEN ORDER.

1. The circuit court has 60 days to decide your motion (unless an extension is requested). If the circuit court does not decide your PCM within 60 days of filing and there's been no extension, the motion is considered denied and the circuit court clerk is required to immediately enter an order denying the motion; *see* §809.30(2)(i).
2. Sometimes the circuit court will enter a briefing schedule and order the D.A. to respond to your motion. If this happens, you may need to request an extension of time from the Court of Appeals for the circuit court's decisional deadline so that the court has sufficient time

to hold a hearing if necessary and then decide the motion after the briefs are submitted.

3. If a hearing on your motion is scheduled, prepare orders both granting and denying the PCM and bring them to the hearing for the court's signature at the conclusion of the hearing.
4. You must file your notice of appeal within 20 days after entry of the written order denying the motion; *see* §809.30(2)(j).
5. Your NOA must indicate that you are appealing both from the order denying the PCM and from the judgment of conviction.

D. HOW TO FILE AND SERVE A NOTICE OF APPEAL

1. If no PCM is filed, the NOA must be filed within 60 days after you receive the last transcript or circuit court record, whichever is later; OR if you are appealing after the denial of a PCM, then you must file the NOA within 20 days after entry of the order denying relief. 809.30(2)(h) & (j).
2. NOA is filed with the clerk of circuit court, and a copy is sent to the COA. The NOA is not considered filed until it is actually received and date-stamped by the clerk of circuit court. Filing may be accomplished by mail or in person. Filing by fax is *permitted only if local court rules permit*, as set forth in §801.16.
3. A copy of the NOA must be sent to the COA, and a copy also served on the state (Attorney General in felony, and the D.A. in misdemeanor cases); *see* §809.10(1)(c); §809.80(2). You must also serve the A.G. if the appeal challenges the constitutionality of a statute; *see* §806.04(11).
4. The NOA must contain (*see* §809.10(1)(b)):
 - a. case name and number
 - b. judgment or order being appealed from and the date it was entered
 - c. whether the appeal is from one of the types of cases specified in §752.31(2) (which includes misdemeanors) & is therefore a single-judge appeal;
 - d. whether the case is entitled to statutory preference (non-juvenile criminal appeals have no statutory preference)
 - e. specify the event that triggers the deadline for filing of the NOA, e.g., date of service of last transcript or copy of court record where no PCM was filed; or date of the order denying PCM; or the date of any other NOA deadline established by COA order.
 - f. if counsel is public-defender appointed, attach a copy of the order appointing counsel so filing fees are waived.

E. MOTIONS FOR A THREE-JUDGE PANEL

1. While felony cases are decided by a 3-judge COA panel and may be published, misdemeanor and juvenile appeals are decided by one judge and will not be published; see §§752.31 and 809.23(1)(b)4 and (4)(b). If you want the COA decision in a 1-judge appeal to be published, you will need to file a motion requesting a 3-judge panel; see §§752.31(3) and 809.41.
 - a. factors weighing in favor of publication are set forth in §809.23(1) and include: case sets precedent; resolves a conflict in prior decisions; contributes to legal literature; or is of substantial and continuing public interest.
 - b. note that 3-judge appeals are less likely to be expedited, and the state may be represented by A.G.
2. Motion for 3-judge panel must be filed in the COA and must accompany the copy of the NOA that you send to the clerk of COA. Failure to file a motion waives the right to request a 3-judge panel. A copy of the motion must be served on the A.G. (as well as the D.A. in misdemeanor cases). A.G. may file a response within 11 days of service. Any other party may file a motion for a 3-judge panel within 14 days after service of NOA. See §809.41(1).
3. If the need for a published decision first becomes apparent while the appeal is pending, counsel can write a letter to chief judge of COA stating good reasons, asking that case be heard by 3-judge panel.
4. Chief judge of COA determines whether to grant request for 3-judge panel, can do so *ex parte*, and may change his decision on the motion any time prior to a decision on the merits of the case. See §§809.41(2) and 752.31(3).
5. Chief judge can also *sua sponte* order an appeal to be heard by a 3-judge panel; see §809.41(3).

F. HOW TO FILE AND SERVE THE STATEMENT ON TRANSCRIPT.

1. Within 14 days after filing the NOA, appellant must:
 - a. Send letters to all court reporters requesting service of copies of the transcripts on opposing counsel and make arrangements to pay for them; see §809.11(4)(a). SPD payment forms are available at <http://www.wisspd.org/html/acd/acdForms.asp>
 - b. If a transcript has not yet been filed in the circuit court that is necessary for your appeal, your Statement on Transcript must also contain a statement by the court reporter that you have requested copies of the transcript for the parties and made arrangements to pay for the original transcript and the copies; the date

on which you requested the transcript; and the date on which the transcript must be filed and served; *see* §809.11(4)(b).

- c. File the original Statement on Transcript with the COA. A copy of the Statement must be filed with the clerk of circuit court and served on opposing counsel (D.A. in misdemeanors and A.G. in felonies).

VII. THE NO-MERIT PROCEDURE UNDER §809.32

A. THE NO-MERIT REPORT (NMR)

1. If appointed counsel concludes that no issues of arguable merit exist for a direct appeal, counsel must advise the client of the right to a no-merit report (NMR). A NMR identifies anything in the record that might arguably support an appeal and discusses the reasons why each identified issue lacks merit; *see* §809.32(1)(a).
2. A NMR must be filed when (a) there are no issues of arguable merit and (b) the clients requests that the report be filed or the client declines to have the appointed attorney close the case without further representation. *See* §809.32(1)(b)2; *State ex rel. Ford v. Holm (Ford I)*, 269 Wis. 2d 810 (2004).
3. A client who has strategically declined a potentially meritorious challenge to his conviction or sentence is not entitled to the option of a “partial” NMR that discusses the remaining aspects of the case. *See State ex rel. Ford v. Holm (Ford II)*, 296 Wis. 2d 119 (2006).
4. Prior to filing a NMR, counsel must discuss all potential issues with the client and inform the client of his options (i.e., to have counsel file the NMR, or close the case without an appeal, or close the file so the client can proceed with an appeal *pro se* or with an attorney that the client retains). *See* §809.32(1)(b)1.
5. Counsel must inform the client that if a NMR is filed, counsel will serve a copy of the transcripts and court record on the client within 5 days after the client requests them. *See* §809.32(1)(b)2 and (d).
6. Counsel must inform the client that he may file a response to the NMR within 30 days after service of the NMR, and that counsel may then file a supplemental NMR that may contain facts, possibly including confidential information, outside the record to rebut allegations in the client’s response. *See* §809.32(1)(b)2.
7. To initiate the no-merit procedure, counsel must file a NOA from the judgment of conviction (and, if a PCM was filed, also from the order denying the motion). The “no-merit NOA,” SOT and NMR must be filed within the later of 180 days from service of the last transcript and circuit court record, or within 60 days after entry of the order denying a postconviction motion. Copies of the no-merit NOA and SOT must be served on the state, but copies of the NMR itself, the transcripts and court record do not need to be served on the other parties. *See* §809.32(2).

8. Counsel must append a signed certification to the NMR that certifies that counsel has complied with the client counseling and notification provisions of Wis. Stat. §809.32(1)(b). See §809.32(1)(c) for the form of this certification.
9. Three copies of the NMR must be filed in the COA and a copy served on the client, and counsel must file a statement in the COA that counsel has served the NMR on the client. See §809.32(1)(d).
10. If the client requests a copy of the transcripts and court record, counsel must provide this to the client within 5 days. Counsel must then file a statement in the COA advising the court that counsel has complied with this requirement. See §809.32(1)(d).
11. The client then has 30 days from service of the NMR to file a response to the NMR. The clerk must send a copy of any response to counsel within 5 days after filing. See §809.32(1)(e).
12. Within 30 days of receipt of the client's response, counsel may then file with the COA and serve on the client a supplemental NMR that rebuts by affidavit, with facts outside the record, claims made in the client's response. See §809.32(1)(f).

B. DETERMINATION OF THE NMR BY THE COURT OF APPEALS.

1. If disputed facts exist between counsel and the client, COA may remand the case to the circuit court for an evidentiary hearing and fact-finding before deciding the NMR. See §809.32(1)(g).
2. If COA accepts the NMR and releases counsel, counsel must still inform the client about his right to file a *pro se* petition for review under Rule 809.62. See §809.32(3).

C. NO-MERIT PETITION FOR REVIEW

1. If a fully-briefed appeal is taken in the Court of Appeals and relief denied, and appointed counsel is of the opinion that a petition for review in the Wisconsin Supreme Court would be frivolous and without arguable merit, the attorney must discuss the reasons for this opinion with the client and advise the client that he has the right to file a petition for review.
2. If requested by the client, the attorney shall file with the Supreme Court a portion of a petition for review satisfying the requirements of §809.62(2)(d) and (f) (statement of the case and facts, and an appendix). The client is then responsible for filing a supplemental petition that satisfies the remaining requirements of §809.62(2)(a),(b),(c), and (e). The attorney's portion of the petition and the client's supplemental petition must both be filed within 30 days after the date of the decision or order of the court of appeals. This deadline is jurisdictional and is not extendable. An opposing party may file a response to the petition within 14 days after service.

CIVIL APPEALS FROM VERDICT TO NOTICE OF APPEAL

Barbara J. Janaszek
Whyte Hirschboeck Dudek S.C.
555 East Wells Street
Suite 1900
Milwaukee, WI 53202

- I. Entry of Final Order Required for Appeals of Right
- A. Final = “[D]isposes of the entire matter in litigation as to one or more of the parties....” Wis. Stat. § 808.03(1).
- B. Must be “entered,” i.e. must be in writing and filed with the office of the clerk of courts. Wis. Stat. § 806.06(1)(b).
- C. Confusion and clarification: *Harder, Tyler and Wambolt*.
1. *Harder v. Pfitzinger*, 2004 WI 102, ¶ 8, 274 Wis. 2d 324, 682 N.W.2d 398.
 - The final document for purposes of appeal need not be the final document in the trial court file. 274 Wis. 2d 324, ¶ 17.
 - A court “disposes of the entire matter in litigation” by making an explicit statement of finality. *Id.*
 - Here, the appealable document was the order for judgment (rather than the judgment) because it was an “unequivocal order to dismiss all of the claims against each party.” *Id.*
 2. *Tyler v. The Riverbank*, 2007 WI 33, ¶ 19-20, 299 Wis. 2d 751, 728 N.W.2d 686.
 - Notes that “an explicit statement of finality” can be done either by: (1) explicitly dismissing the entire matter in litigation as to one or more of the parties; or (2) explicitly adjudging the entire matter in litigation as to one or more of the parties. 299 Wis. 2d 751, ¶ 3.

- Identifies three factors that help to determine whether a particular judgment or order is “final” for purposes of appeal pursuant to Wis. Stat. § 808.03(1): “(1) it has been entered by the circuit court, (2) it disposes of the entire matter in litigation as to one or more of the parties, (3) it states on the face of the document that it is the final document for purposes of appeal.” 299 Wis. 2d 751, ¶ 26.
- Holds that the appellant’s filing was timely because the document entitled “Judgment” which had the magic words “[T]he claims of the Plaintiff are dismissed with prejudice” was the document that disposed of the entire matter in litigation. *Id.* ¶ 22.

3. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670.

- After September 1, 2007, a final judgment or order must contain a statement that it is final for purposes of appeal on its face. 299 Wis. 2d 723, ¶ 49.
- Mandates that the final judgment rule be liberally construed:

We anticipate that there may be final orders and judgments that arguably dispose of the entire matter in litigation as to one or more of the parties, but which do not contain a clear statement that they are the documents from which appeal of right may follow. In such cases, the appropriate course is to liberally construe documents in favor of timely appeals. That is, absent explicit language that the document is intended to be the final order or judgment for purposes of appeal, appellate courts should liberally construe ambiguities to preserve the right of appeal.

Id. ¶ 46.

D. Suggested Finality Language/Placement

- Insert on a separate line and in a clearly visible manner above the date and judicial signature line the following: This is a final and appealable order pursuant to Wis. Stat. § 808.03.

II. Prefiling Considerations.

A. Key Role of Trial Courts in our Judicial System.

1. Appellate court *reviews* determinations of the trial court; appellate review is limited to matters raised in the trial court.
2. Process of appellate review generally favors sustaining the trial court.
3. Prospects for success on appeal depend heavily on (1) making the appropriate record in the trial court so as to preserve issue for appeal; and (2) the applicable standards of review, i.e., the amount of deference, if any, the appellate court must give to the trial court's determinations.
4. Trial court errors that are not prejudicial, i.e., do not affect result, generally are considered "harmless." See Wis. Stat. § 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party.")

B. Preservation of Issues before Trial Court.

1. Summary disposition.
 - Decision denying summary judgment is not final or appealable as of right.
 - Since summary judgment is granted only where there is no issue of material fact and party is entitled to judgment as a matter of law, issues raised by argument in opposition to motion are preserved for appeal.
2. Jury trials.
 - As a general rule, to avoid waiver, specific objections to admissibility, form of instructions to the jury, form of the special verdict, etc. must be made in the trial court. Wis. Stat. §§ 805.11; 901.03(1)(a) and (b); 805.13(3); 805.13(4).
 - In a jury trial, a party waives all claims of error not raised in motions after verdict, although timely objection was made at trial. *Suchomel v. Univ. of Wis. Hosp. & Clinics*, 2005 WI App 234, 288 Wis. 2d 188, 708 N.W.2d 13. See Wis. Stat. § 805.15(5).
 - Regardless of whether a proper objection has been made, both the supreme court and the court of appeals have discretion to reverse if the real controversy has not been tried or it is probable that justice has miscarried. Wis. Stat. §§ 751.06, 752.35.
3. Trials to the court:

- Sufficiency of evidence issue may be raised on appeal regardless of whether a party has objected or moved for a new trial on that ground. Wis. Stat. § 805.17(4).
- The time for filing an appeal is extended by a timely motion for reconsideration. If the court amends the judgment, time for initiating appeal commences to run upon entry of amended judgment; if motion is denied, time for initiating appeal commences to run at earlier of denial of motion on record or by entry of order; if court does not decide motion within 90 days after entry, the time for initiating appeal commences to run 90 days after entry of judgment. Wis. Stat. § 805.17(3).

C. Standards of review.

1. Different kinds of issues trigger different levels of review, e.g.,
 - Trial court's factual findings are affirmed unless clearly erroneous. Wis. Stat. § 805.17(2).
 - Jury findings are sustained if there is *any* credible evidence to support them, with evidence reviewed in light most favorable to the verdict. *Morden v. Cont'l AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659.
 - Trial court's conclusions or interpretation of law are reviewed *de novo*, that is without deference to the trial court. *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).
 - Where question involve both factual and legal issues, appellate court typically gives great weight to the factual portion but independently reviews legal conclusions. *Peplinski v. Fobe's Roofing, Inc.*, 193 Wis. 2d 6, 19, 531 N.W.2d 597 (1995).
 - Generally, discretionary decisions are affirmed if the trial court has explained its reasoning. See *Gaugert v. Duve*, 2001 WI 83, ¶ 44, 244 Wis. 2d 691, 628 N.W.2d 861. However, the appellate court may reverse for erroneous exercise of discretion where the trial court fails to provide adequate reasoning or makes an error of law. *Id.*
 - Review of a summary judgment is *de novo*, with the appellate court applying the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987)

2. As an error correcting court, the Court of Appeals applies standards of review religiously.
3. Suggestion: Prospects for success on appeal are greatly enhanced if you can identify at least one prejudicial error of law that has properly been preserved in the trial court and which the appellate court is required to review independently, without deference to the trial court.

III. Filing a Civil Appeal.

A. Time.

1. Critical: Timely appeal is necessary to appellate jurisdiction. Wis. Stat. § 809.10(1)(e).
2. 45/90 day rule: Notice of appeal must be filed within 45 days of entry of final order or judgment if written notice of entry is given within 21 days of entry and within 90 days if notice of entry is not given. Wis. Stat. §§ 806.06(5), 808.04(1).
 - The 45 day period commenced with entry of the final order or judgment, not with filing or service of the notice of entry. *Fredrick v. City of Janesville*, 91 Wis. 2d 572, 578, 283 N.W.2d 480 (Ct. App.), *rev'd* on other grounds, 92 Wis. 2d 685, 285 N.W.2d 655 (1979).
 - When a party denies receiving notice of entry, the matter is remanded to the trial court for an evidentiary proceeding. *Mullen v. Braatz*, 179 Wis. 2d 749, 508 N.W.2d 446 (Ct. App. 1993).
3. Motion for reconsideration after trial to the court stays time for appeal. Wis. Stat. § 805.17(3). However, there appears to be no indication that motions for reconsideration filed after entry of a final order in other contexts, such as summary judgment, have the same effect. Be on the safe side: file the notice within the 45/90 day rule.

B. Notice must be filed with the circuit court; notice is filed when received by the clerk of the circuit court. Wis. Stat. § 809.10. (Hand delivery is best; mail is risky.)

C. Notice must be filed with appeal fees (\$195.00 for fee of clerk of court of appeals, \$15.00/\$20.00 for fee of clerk of circuit court, depending on county. Wis. Stat. § 809.25(1)). However, failure to timely submit the appeal fee does not deprive court of jurisdiction. *Douglas v. Dewey*, 147 Wis. 2d 328, 433 N.W.2d 243 (1989).

- D. Form/content of notice of appeal.
1. A notice of appeal must state the order or judgment appealed from, including the case number and date of entry; whether appeal is to be decided by one judge pursuant to § 752.31(2) rather than by a three-judge panel; and whether the appeal must be given preference by statute. Wis. Stat. § 809.10(1)(b). (See Appendix A.)
 2. Appeal brings before the appellate court all of the judgment or order appealed from as well as all previous non-final rulings, orders, etc. Wis. Stat. § 809.10(4).
 3. Wisconsin appellate courts construe notices of appeal liberally. Minor errors such as mislabeling a judgment as an order or an order as a judgment or including an incorrect date of order generally does not affect validity of the notice of appeal. Wis. Stat. § 809.10(1)(f).
 4. A notice of appeal must be signed by an attorney admitted to practice or by an individual pro se litigant. *Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 152 N.W.2d 401 (1997). Since a corporation must appear by counsel, a notice of appeal on behalf of a corporation cannot be signed by a non-lawyer. *Id.* A non-lawyer who signs a notice of appeal on behalf of a corporation violates the unauthorized practice of law statute; such violation voids the appeal. *Id.*
- E. Docketing Statement: At time notice is filed, a copy must be sent to the Clerk of the Court of Appeals, along with the original and one copy of the completed Docketing Statement. Wis. Stat. § 809.10(1)(c) and (d). (See Appendix B.)
- F. Appearing Pro Hac Vice on Appeal.
1. It appears that, historically, the four districts have taken varying positions on whether pro hac vice admission to the circuit court entitles one to sign papers filed in the Court of Appeals. (It was my recent experience that, while District 3 of the Court of Appeals accepted a Petition for Leave to Appeal signed by local counsel that also listed names of out-of-state counsel admitted pro hac vice in the circuit court, the court requested a copy of circuit court's pro hac vice order.)
 2. A petition is pending before the Supreme Court regarding amendments to Supreme Court Rule 10:03(4). The petition proposes, among other things, that an order granting nonresident counsel's motion to appear and participate in an action or proceeding shall continue through subsequent appellate or circuit court proceedings in the same matter.

MOTIONS PRACTICE:

Tips, Problem Areas, and Recent Developments

I. OVERVIEW OF MOTIONS PROCESS

A. Motions come in to clerk's office to be date stamped and entered into SCCA computerized docket.

(1) *Tip: Do not send motions directly to judge's chambers or staff*

B. Some procedural motions may be acted on by clerk's office using form orders previously approved by the court.

(1) Examples: Voluntary dismissals in civil cases (but note, different process in voluntary dismissals in criminal cases).

(2) Note: this is why some orders do not have a judge's name on them and may be issued much faster than others.

C. Remaining motions are sent in daily buckets over to chambers.

D. Motions attorney reviews motions & prepares draft order.

(1) Note: in Dist. I, all one-judge motions are handled by the presiding judge. Three-judge motions are assigned to panels that rotate monthly.

(2) *Tip: If a motion is based in part upon prior procedural history at the court, it's a good idea to summarize that history or at least refer to the date of a relevant prior court order. Do not assume that the same atty will be handling a subsequent motion because motions responsibility rotates among central staff attorneys.*

E. Draft order is circulated to a single motions judge on a procedural question or a motions panel when relief would "reach the merits or preclude the merits from being reached." *See* Ct. App. IOP VI(3)(c). For example, a motion for summary disposition (Rule 809.21) that is to be denied will generally be handled by one judge because the merits are not being reached.

A summary disposition motion that is granted must be decided by three judges (except, of course, in a one-judge case).

F. The approved order is mailed to the parties and the correspondence file is returned to the clerk's office.

II. KEY CHAPTER 809 PROVISIONS FOR MOTIONS PRACTICE

A. Rule 809.14 – Motions

(1) Under § 809.14(1), a motion must state the relief sought and the grounds upon which the motion is based, and may be supported by a memorandum.

(a) *Tip: there is no requirement that a motion be accompanied by an affidavit.* Unlike the trial court, the court of appeals cannot resolve factual disputes. It can act upon uncontradicted assertions by parties or facts stipulated by the parties or take judicial notice of such things as file stamps in the record. However, if the resolution of a motion will require resolution of a factual dispute, it may be necessary to remand the matter to the circuit court for fact finding.

(b) *Tip: Do not submit a draft order for the court to sign.* Appellate judges do not physically sign any orders or opinions. The court drafts and formats all of its own orders and then releases them under the court's seal.

(c) *Note:* If the record has not yet been transmitted to the court of appeals, you may need to provide the court with a copy of any relevant documents from the record to support the motion. Conversely, if the record has been filed, you do not need to submit an appendix containing everything in the record.

(d) *Tip: When requesting an extension, identify the current due date and ask for a date certain, rather than just the number of days.*

- (2) Under § 809.14(2), a procedural motion may be acted upon without waiting for a response. If an order is issued before the response time has run, the opposing party has 11 days to file a motion for reconsideration.
- (a) Note: The term “procedural” motion is not defined in the rules, but is generally applied to such things as requests to:
- (i) Modify the briefing schedule;
 - (ii) Enlarge the size of a brief;
 - (iii) Reduce the number of briefs to be filed or excuse a party from some other formal briefing requirement;
 - (iv) Consolidate cases;
 - (v) Supplement or correct the record;
 - (vi) Compel production of the transcripts;
 - (vii) File a non-party brief; or
 - (viii) Amend the caption;
- (b) *Tip: If you are planning to object to a procedural motion, you might want to contact the clerk’s office to alert the court that a response is coming.* Otherwise, it is likely that the motion may be acted upon before you have filed your response – although a response which crosses in the mail with an order will still be treated as a motion for reconsideration.
- (3) Under § 809.14(3), motions which may affect the disposition of an appeal, the content of a brief, the record on appeal, or consolidation of an appeal automatically toll the briefing schedule — except in TPR cases.

B. Rule 809.12 — Relief Pending Appeal

- (a) Under § 809.12, a motion for relief pending appeal (usually a stay of the judgment or order from which relief is sought or an injunction) should be directed to the circuit court first, unless it would be impracticable to do so.
- (i) Note: The court generally views impracticability in terms of urgent time constraints, not a belief that the circuit court is unlikely to grant relief.
- (ii) Note: The court may grant a temporary *ex parte* order granting relief while waiting for the opposing party to respond.
- (iii) As a corollary, § 808.075(3) gives the trial court authority to act on all issues until the record has been filed, except in appeals under § 809.30, where the trial court’s authority ends after the notice of appeal has been filed, except in specified areas.
- (b) The court of appeals will review a circuit court order regarding relief pending appeal under the erroneous exercise of discretion standard. ***State v. Gudenschwager***, 191 Wis.2d 431, 439- 440, 529 N.W.2d 225 (1995).
- (i) *Tip: Don’t forget to provide the appellate court with a copy of the trial court’s order regarding relief pending appeal, or an excerpt of the transcript where the ruling was issued. A transcript is particularly important when the trial court’s order does not discuss the reasoning, but says “for the reasons stated on the record.”*
- (c) The criteria for staying a lower court order are whether: (1) the moving party is likely to succeed on the merits; (2) the moving party will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to the other interested parties if the stay is

granted; and (4) the stay would not harm the public interest. *Faust v. Faust*, 178 Wis.2d 599, 602, 501 N.W.2d 810, 811 (Ct. App. 1993).

(d) The criteria for staying execution of a money judgment are: (1) the likelihood that the appellant will succeed on appeal; (2) the collectibility of the judgment in the event that the appellant does not succeed on appeal, taking into account the appellant's ability to provide an undertaking or other security; (3) the recoverability of money paid in execution of the judgment in the event the appellant does succeed on appeal; (4) any special harm which may occur to one of the parties if the judgment is or is not paid until completion of the appeal; and, if relevant, (5) the interest of the public. *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120 ¶¶ 18-23, 237 Wis.2d 498.

(e) There is a separate provision for release on bond pending appeal — §809.31. Those motions also go first to the trial court.

C. Rule 809.15 — Record on Appeal

(1) § 809.15(1)(a) specifies the items which are normally to be included in the appellate record.

(a) Note: items such as trial briefs or correspondence to the court are not automatically included.

(2) § 809.15(2) requires the clerk to send out an index of the record on appeal and provide the parties with a 10 day inspection period.

(a) *Tip: The inspection period is the proper time to ask the clerk to add any items that are not automatically included in the record, as well as double checking that the necessary transcripts have been prepared and included.*

(3) § 809.15(3) directs that motions to supplement or correct the record be directed to the court in which the record is currently located.

(a) *Note:* The request goes to the clerk of the circuit court, not the court itself, and the court of appeals should be copied on the request.

D. Rule 809.19 — Briefs & Motions to Strike for Nonconformance

(1) § 809.19 sets forth all of the formal requirements for preparing briefs, as well as the deadlines for filing them.

(2) When the appellant's opening brief or the respondent's brief is not filed by the deadline, the clerk's office routinely issues a notice of delinquency providing five days to file the brief.

(a) If an appellant still does not file the brief or an extension motion explaining the delinquency, it is the court's general practice to issue a *sua sponte* order dismissing the appeal about 10 days later (depending on the court's backlog or absences in the clerk's office). *Therefore, motions to dismiss an appeal based on the appellant's failure to file a brief are generally unnecessary, and will routinely be denied if the brief is less than a week late.*

(b) If a respondent still does not file a brief, the appeal will be submitted to the court with the appellant's brief and the record. The court will then decide whether to address the merits or summarily reverse based on the respondent's failure to file a brief. *Tip: If the respondent is choosing not to file a brief because of the expense or for some other reason, counsel should write a letter to the court explaining those reasons. Otherwise, the court may conclude that the respondent does not wish to contest the appeal.*

(3) Before accepting a brief for filing, the clerk's office conducts an initial review to see if the brief is in substantial compliance with formal requirements such as page limits and certification. If the clerk's office is not sure whether to accept a flawed brief, they submit it to the court. The

- court will frequently deem technical violations, such as using the wrong font, insignificant, and accept the brief for filing.
- (4) If the court has accepted a brief to which the other party objects on the grounds of noncompliance, that party may move to strike the brief.
- (a) Note: As in its initial review, the court may decide that the defect is insignificant. The appellate rules do not specify criteria, but the court is generally concerned with whether the defect actually impairs the court's ability to review the issue(s) on appeal.
- (b) Note: When the court does strike a brief or a portion of a brief, the general practice is to allow the party an opportunity to correct the defect. The court will not strike the brief and proceed to dismiss the appeal, unless there is some additional egregious circumstance, such as the offending party having already been directly warned by the court not to commit the violation.
- (i) *Tip: Since a motion to strike will most often result in the other party having an opportunity to cure the defect, you should consider pointing out the defects in your opponent's brief in your own brief instead of filing a motion to strike.*

E. Rule 809.21 — Summary Disposition

- (1) § 809.21 permits the court of appeals to dispose of an appeal summarily, either on the court's own motion or on the motion of a party.
- (a) Note: summary dispositions are done by order, rather than opinion, and therefore are not published on Westlaw or Lexis.
- (b) *Problem: No criteria are listed in the rule.* The court applies different criteria to assign a case for summary disposition on its own motion than it does to grant a party's motion for summary disposition.

(2) Ct. App. IOP § VI(1) provides that a case may be disposed of summarily by the court's own order following screening if the panel unanimously agrees on the decision and that the issues involve no more than the application of well-settled rules of law or controlling precedent, or the issues relate to sufficiency of the evidence or trial court discretion which are clearly supported by the record, and "the issues may be resolved by merely stating the reasons for the decision without a detailed analysis."

(a) *Note: These are the criteria the court uses to assign a case to be drafted as a summary order on its own motion after the case has been briefed.* This does not mean that the court will grant a motion to summarily dispose of a case on a party's motion before it has been briefed merely because one party contends the case may be resolved on the basis of well settled law.

(3) Heffernan's "Appellate Practice and Procedure in Wisconsin" § 15.3 suggests that motions for summary disposition may be filed by a respondent who believes an appeal to be without merit or an appellant who believes the circuit court was so clearly in error that this will be readily apparent to the court of appeals.

(i) Note: while it is true that such motions may be filed, they rarely succeed, unless based on a clear procedural or jurisdictional flaw in the adversary's argument. Generally speaking, arguments on the merits can be decided on the parties' briefs.

(4) Motions to dismiss or summarily reverse based on a party's noncompliance with an appellate rule also rarely succeed because the court's preferred remedy is to first order compliance.

(5) Motions to dismiss for lack of jurisdiction are appropriate, but often unnecessary.

- (a) Note: The court performs a *sua sponte* jurisdiction check on every case once the record has been filed, and will order jurisdictional memoranda if there is a problem.
 - (b) *Tip: Please wait until after the record has been filed before filing a motion to dismiss based on lack of jurisdiction.*
- (6) Motions to dismiss on the grounds that the appeal is moot are appropriate. Note, though, mootness does not prevent the court from reaching the merits under appropriate circumstances. *See State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 5, 245 Wis. 2d 607, 629 N.W.2d 686.

F. Rule 809.50 — Petitions for Leave to Appeal

- (1) § 809.50 permits a party to file a petition for leave to appeal a nonfinal order within 14 days after entry of the order.
- (2) The court has discretion to grant interlocutory review when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. § 808.03(2)
 - (a) “Termination of the litigation” usually means the issue must be completely dispositive, not just that it would encourage settlement negotiations or reduce the number of issues at trial.
 - (b) To “clarify further proceedings” usually means that the trial court has expressed confusion or issued contradictory rulings or that the ruling in question will have some significant domino effect (for instance, a class action certification), not just that the case would be tried slightly differently under a different ruling from the trial court.

- (c) Having to go to trial or to litigate extra issues does not in and of itself constitute a “substantial injury” unless there is some additional claim such as immunity or double jeopardy, or some special hardship such as bankruptcy proceedings. Trying a case is also not “irreparable injury” as long as the issue can be preserved for review on a latter appeal.
- (d) An issue is not of “general importance in the administration of justice” if it just involves the application of well-settled law to the specific fact situation of the case, unless it is a recurring fact situation that generally evades review for some reason.
- (3) Even if one of the threshold criteria has been met, interlocutory appeal is still disfavored and will not be granted absent compelling circumstances. *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268, 569 N.W.2d 45 (Ct. App. 1997). The petitioner must demonstrate both that there is a substantial likelihood of success on appeal, and that the necessity of immediate review outweighs our general policy against the piecemeal disposition of litigation. *Id.* at 268 n.2; *State v. Salmon*, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991).
- (a) Demonstrating a “likelihood of success on appeal” does NOT require a full-blown argument on the issue you want reviewed. Remember, you are asking permission to file a brief, so just summarize the issue(s) and the basic facts necessary to understand them. *See* §809.50(1)(a) and (b).
- (b) Remember that there is no guarantee the motions panel who decides a petition will be the same panel assigned to decide the case if leave is granted.
- (c) Consideration of the merits of the issue most often comes into play in the negative — that is, if it is very clear that the trial court was right,

there is no need to interrupt the lower court proceedings, even if the other criteria have been satisfied.

(d) As we explained in *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120 ¶ 19, 237 Wis.2d 498, 614 N.W.2d 565 (discussing likelihood of success on appeal in the context of a stay):

- ◆ The standard of appellate review is one aspect of the likelihood of success on appeal. When the decision is entirely discretionary, and the circuit court applied the correct legal standard to the facts and explained its reasoning, the deference given such decisions makes reversal more difficult. Reversal of factual findings is even less likely. On the other hand, because of the de novo standard of review for legal issues, if there is not clear and binding precedent on point, and if the circuit court concludes the issue is a close one or a complex one, the likelihood of success on appeal will generally be greater. In the same vein, applicable legal presumptions may provide some gauge of the likelihood of success on appeal.
- ◆ *Tip: Therefore, one of the most useful arguments a petitioner can make about likelihood of success on appeal is that the appeal would raise a question of law, and particularly an issue of first impression.*
- ◆ *Tip: If you are thinking of petitioning for leave to appeal a discretionary determination or order based on factual findings, think twice.*

“INTERLOCUTORY APPEALS”:
APPEALS BY PERMISSION UNDER
WIS. STATS. (RULES) 808.03(2) AND 809.50.

By: RANDALL E. PAULSON
Assistant State Public Defender
September, 1999
(Updated January, 2004)

SUMMARY OF CONTENTS

- I. Should an interlocutory appeal be attempted? (Page 3)**
 - A. An Interlocutory Appeal versus a petition for a supervisory writ. (Page 3)
 - B. The Statutory Criteria and the ultimate criterion. (Page 4)
 - C. Types of Cases where interlocutory appeals are necessary or favored. (Page 5)
 - D. Types of cases where interlocutory appeals are especially disfavored. (Page 7)

- II. What must be done in the trial court before an interlocutory appeal may be attempted? (Page 7)**
 - A. Give the trial court an opportunity to address all issues before attempting an appeal. (Page 7)
 - B. Have the trial court sign and enter an order reflecting the ruling. (Page 7)
 - C. Request preparation of, and make arrangements to pay for, all needed transcripts for the court and all parties. (Page 7)
 - D. Apply for any needed stay in trial court proceedings. (Page 8)
 - E. Determine whether opposing counsel in the court of appeals is the district attorney or the attorney general. (Page 9)

- III. What must be filed in the court of appeals? (Page 10)**

- A. Petition. Counsel must file a petition seeking to appeal a non-final order within 14 days after entry of the order. The petition must include a date-stamped copy of the trial court's order. Rule 809.50(1). (Page 10)
 - B. Supporting Memorandum. (Page 11)
 - 1. Issues Presented.
 - 2. Statement of Facts and Procedural History.
 - 3. Statement demonstrating need for immediate review.
 - 4. Argument.
 - 5. Conclusion that concisely states the relief sought.
 - C. Appendix. (Page 12)
 - D. Motion for any needed Stay not provided by trial court. (Page 13)
 - E. Consider a motion for a three judge panel. (Page 13)
- IV. What happens after the petition is filed? (Page 13)**
- A. A response is due within 14 days. (Page 13)
 - B. If the petition is denied, the denial will not be reviewed by the supreme court. (Page 14)
 - C. If the petition is granted and the appeal is not disposed of summarily under Rule 809.21, the appeal proceeds under rules governing appeals as of right. (Page 14)
 - D. A grant of leave to appeal from a non-final order or judgment does not authorize cross-appeals as of right by other parties from the same or from another non-final order or judgment. (Page 15)

Other sources of Information. (Page 15)

“INTERLOCUTORY APPEALS”

I. Should an interlocutory appeal be attempted?

With the partial exceptions described in subsection C, *infra*, interlocutory appeal petitions—seeking interference by an appellate court with proceedings in a trial court—are disfavored and will probably not be granted. The petitioner's overarching challenge is to demonstrate, **in the initial petition and memorandum**, that the statutory criteria are met **and** that an appeal would be successful on the merits.

Interlocutory appeals should not be commenced solely for delay. It is unethical to file any motion or institute any proceeding solely to cause delay. Moreover, filing a petition for interlocutory relief solely for delay is not even effective in most cases: a frivolous petition can be disposed of in less than a month. On the other hand, if an issue arises that meets the criteria for interlocutory relief, counsel may find that the delay involved is either tolerable or actually helpful to the client.

The criteria to be met are addressed in subsection B, *infra*. A preliminary consideration is whether the client can endure (or would in fact benefit from) the delay. A few strategic considerations: Parties generally cannot enforce trial court level timelines while creating the delays inherent in interlocutory appeal proceedings. *See, Section II. D., infra*.

The procedures governing stays (and the legal effects of a stay) are discussed in sections II.D. and III.D, *infra*. The effects of stays, the need for tolling of deadlines, and all strategic consequences of pursuing an interlocutory appeal must be evaluated before a petition is filed.

A. An interlocutory appeal versus a petition for a supervisory writ.

The term "interlocutory appeal" is not statutory. Rather, Wis. Stat. Sec. 808.03(2) and Wis. Stat. Sec. (Rule) 809.50 (1) refer to “appeals by permission,” and appeals from "a judgment or order not appealable as of right."

Interlocutory appeals differ from “regular” appeals because they involve orders not appealable of right. Interlocutory appeals differ from supervisory writ petitions because writ petitions are not “appeals.”

As of right vs. permissive. An appeal as of right (the “regular” appeal) lies from a final order. Interlocutory appeals are not "as of right," but "by permission." They concern nonfinal orders. One petitions for permission to appeal; if granted, an appeal may ensue, or the court may summarily dispose of the appeal under Rule 809.21.

Appeal vs. writ. Writ proceedings in the appellate court are an alternative to an interlocutory appeal. The purpose of a petition for a writ is to obtain intervention to prevent a

trial judge's flouting of "plain legal duty." Writ proceedings are not "appeals" at all. They are requests that the appellate court act, not under its appellate jurisdiction, but in its supervisory capacity or in its exercise of original jurisdiction to issue a prerogative writ in order to enforce the law. A petition for a writ must show that an appeal (including an interlocutory appeal) would be inadequate and that the court must use its supervisory (or, in the case of the supreme court, superintending) authority.

At common law, courts had prerogative power to issue the writs in aid of their jurisdiction. The types of writs were distinctly labeled, such as *mandamus* ("We command"...the performance of a particular act), *quo warranto*, *certiorari* ("to be informed of"), prohibition, *coram nobis* ("in our presence").

The writs of prohibition and mandamus have been merged into the "supervisory writ" discussed in Rule 809.51, which governs writ procedure. There are instances where the relief sought could appropriately be granted either in the context of a supervisory writ or an appeal by permission. In such cases, **it may be advisable to plead in the alternative, allowing the appellate court to use the procedures it deems most appropriate.** See, *State ex rel. Oman v. Hunkins*, 120 Wis.2d 86 352 N.W.2d 220 (Ct. App. 1984) (discussing criteria for supervisory writ and differences between supervisory writ proceedings and appeal).

Another reason to file alternative petitions for leave to appeal and for a supervisory writ is that more than one ground for relief might exist. For example, if petitioner seeks removal of the trial judge because the request for substitution was timely but also because the trial judge should be disqualified for bias, the petitioner should seek a supervisory writ on the substitution issue and interlocutory relief on the bias issue. Note that the standards for granting relief differ between the two types of proceedings.

After determining the ground for relief, it is advisable to research the manner in which appellate courts have granted it other cases. Did the courts follow interlocutory appeal procedures or did they grant a supervisory writ?

A petition for leave to appeal a nonfinal order must be responded to within fourteen days. In contrast, the appellate court decides whether the respondent must answer the petition for a supervisory writ. If the court determines that the petition is insufficient, it may deny the petition *ex parte*.

The remainder of this outline addresses permissive (interlocutory) appeals.

B. The statutory criteria and the ultimate criterion.

Statutory Criteria:

Section 808.03(2) lists the criteria the court of appeals must consider when deciding whether to grant a petition for appeal by permission:

1. Whether an appeal would materially advance the termination of the litigation or materially clarify further proceedings in the litigation.
2. Whether an appeal would protect the petitioner from substantial or irreparable injury.
3. Whether an appeal would clarify an issue of general importance in the administration of justice.

Overarching the explicit statutory criteria is the **ultimate criterion: whether the petitioner would succeed on the merits**. As pointed out in Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin, State Bar of Wisconsin, 2002:

The most important criterion for determining whether an appeal should be granted is not expressly included among the statutory criteria listed in sec. 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. Only in this context can the general criteria listed in sec. 808.03(2) be given much significance. Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings. A petition for leave to appeal that does not show likely trial court error will generally be denied.

Id. at §9.4, Ch. 9, p. 3.

C. Types of cases where interlocutory appeals are necessary or favored.

Interlocutory appeals are **necessary** to effectively litigate any claim of a **defective bind over** and a defective **preliminary examination**. Conviction following a "fair and errorless" trial has been held to cure any arguable defect in the preliminary hearing. *State v. Webb*, 160 Wis.2d 622, 467 N.W.2d 108 (1991). Such defects, according to *Webb*, might include:

1. claims of errors of law likely to recur in the ensuing trial;
2. allegations that the proceeding should be terminated because of preemption by federal law;
3. challenges to the subject matter jurisdiction of the court;
4. challenges to the personal jurisdiction of the court; and

5. challenges to the constitutionality of the laws under which a petitioner is being prosecuted.

NOTE: Challenges raised in a petition for leave to appeal are preserved for a later appeal as of right, even if the court of appeals denies the petition for leave to appeal, *State v. Wolverton*, 193 Wis.2d 234, 533 N.W.2d 167 (1995) (noting that claim of defective bind over based on undue restriction of right to cross examine witnesses must be raised in an interlocutory appeal).

The court of appeals has strongly suggested that **judicial substitution** issues are deemed waived unless the defendant challenges them by either seeking administrative review by the Chief Judge of the district, or asking the court of appeals to exercise its supervisory authority. *State v. Damaske*, 212 Wis.2d 169, 185-86, 567 N.W.2d 905 (1997). The issue would also have been preserved if an objection had been made to the trial court, and if the defendant had proceeded to trial, rather than entering a no contest plea. *Id.* at 186-87.

To be on the safe side, **always seek review by the chief judge of the denial of a substitution request before approaching the court of appeals.** This is required in any civil case, such as a juvenile case: *Barbara R.K. v. James G.*, 2002 WI App 47, 250 Wis.2d 667, 641 N.W.2d 175. While *Barbara R.K.* may not be applicable to criminal cases, seeking administrative review from the chief judge is a relatively fast and easy way to preserve the issue. It sometimes holds potential for relief.

Interlocutory appeals are encouraged for claims that a prosecution violates the petitioner's rights to be free from **Double Jeopardy**. In *State v. Jenich*, 94 Wis.2d 74, 288 N.W.2d 114 (1980), the supreme court recommended that the court of appeals grant petitions for leave to appeal nonfinal orders which denied motions to dismiss for Double Jeopardy.

Interlocutory appeals should be granted routinely where the petitioner is challenging an order **waiving the jurisdiction of the juvenile court** in favor of adult court prosecution. *State ex rel A.E. v. Green Lake County Circuit Court*, 94 Wis.2d 98, 288 N.W.2d 125 (1980). For extensive practical assistance in these cases, consult Virginia A. Pomeroy, Gina M. Pruski and Susan E. Alesia, **Wisconsin Juvenile Law Handbook**, Chapter 13, State Bar of Wisconsin, May, 2002.

Generally, interlocutory appeals will succeed most often in cases where the **standards of review** increase the likelihood of a reversal (success on the merits for petitioner). The standard of review is a critical determinant of the outcome of any appeal. An appellate court is unlikely to accept an appeal to review a purely factual determination. Factual determinations are upheld unless clearly erroneous. Discretionary determinations (including waiver determinations) are similarly difficult to overturn on appeal. However, in the waiver context, the supreme court recognized in *A.E.*, *supra*, that interlocutory review is likely the only appellate review that is available to juveniles as a practical matter.

D. Types of cases where interlocutory appeals are especially disfavored.

Interlocutory appeals, in practice, are disfavored in all types of cases (even those in which they are ostensibly encouraged). It would seem, though, that a petitioner would have an especially onerous burden when appealing **denial of a suppression motion**. Under Section 971.31(10), the denial of the motion can be appealed as of right following conviction even when a guilty plea is entered. Note: Suppression issues are not preserved under sec. 971.31(10) unless they are raised in the suppression motion *and* ruled on by the trial court.

II. What must be done in the trial court before an interlocutory appeal may be commenced?

A. Give the trial court an opportunity to address all issues before attempting an appeal.

Litigate all issues in the trial court first. Raise more than nominal objections that might be sufficient to preserve an issue for an appeal as of right. The appellate court will demand proof that the petitioner made every effort to resolve the case in the trial court before resorting to a petition for appeal. Waiver is commonly found by appellate courts in appeals as of right, and waiver is an especially inviting rationale for refusing to hear a petitioner seeking a permissive appeal.

B. Have the trial court sign and enter an Order reflecting the ruling.

Rule 809.50 (1) requires entry of a written order prior to petitioning for leave to appeal under sec. 808.03(2). Make sure you have raised all issues and made all arguments before a written order is entered, as **the entry of the order triggers a 14 day deadline for filing the petition**. (The deadline is extendable under Rule 809.82(2), but such an extension request would not be looked upon at all favorably, inasmuch as the petition itself is not encouraged.)

C. Request preparation of, and make arrangements to pay for, all needed transcripts for the court and all parties. See Rule 809.11(4).

If time is not of the essence, you might be able to order the transcript and obtain it prior to drafting the trial court's order, so that the petition can cite to the transcript and so that the transcript is available to the court of appeals immediately. In many cases, the chances of prevailing are increased if the court of appeals is able to grant leave to appeal the nonfinal order and summarily reverse the order at the same time. The court of appeals can do this under Rule 809.21, which allows for summary disposition.

If the petitioner desires summary disposition (*e.g.*, concerning a simple matter, like a trial court's refusal to grant bail), it is well to advise the court of appeals of that desire in the petition so that the opposing party has the opportunity to address it. It is also best, regardless

of whether summary disposition is being sought, to provide the court of appeals with as much material as possible demonstrating the compelling need and entitlement to relief.

D. Apply for any needed stay in trial court proceedings.

Trial court proceedings are **not** automatically stayed upon filing a petition for leave to appeal. The petitioner must move separately for an order staying the proceedings.

The court of appeals will not grant a stay unless the petitioner has moved for one in the trial court or unless the petitioner can show that it was impracticable to seek a stay from the trial court. Rule 809.12 requires a trial court motion for a stay prior to moving for one in the court of appeals. *See generally*, Sec. 808.07(2) and Rule 809.52, in addition to Rule 809.12. NOTE: Rule 809.14 describes general requirements for motion practice in the court of appeals.

The motion for a stay in the court of appeals must demonstrate that the petitioner would be unduly harmed unless a stay is granted. Often, this can be accomplished by stating simply, "Failure to stay the proceedings would moot the appeal." The motion should also demonstrate the likelihood of success on the merits. It is permissible to refer to the petition (if that has been filed or if it accompanies the motion), but the motion should be a reasonably "self-contained" document that makes this showing. (If the petition itself is quite short, there is nothing wrong with putting the motion for a stay in the same document. Just be sure that that motion is broken out separately in the caption on the cover page, so that the court is aware of it immediately.)

If time is of the essence, *e.g.*, to prevent destruction of evidence or to ensure tolling of trial court deadlines, consider requesting that the court of appeals hear the stay motion *ex parte* under Rule 809.14 (2). The court may either do so, or convene a telephone hearing between the presiding judge and counsel in order to expedite consideration of the stay request.

In *State ex rel. Rabe v. Ferris*, 97 Wis.2d 63, 68-69, 293 N.W.2d 151 (1980), the defendant's statutory right to a speedy trial was subordinated to the state's ability to enforce a stay of trial court proceedings pending the state's interlocutory appeal of a trial court order. (*Rabe* declined to decide whether constitutional rights to a speedy trial would be similarly infringed.)

Rabe does not definitively decide whether filing a petition for leave to appeal automatically tolls trial level time limits. Its reasoning strongly suggests, however, that tolling is **not** automatic upon the filing of a petition, but that it can be accomplished by either the trial court or the appellate court if they grant a stay of proceedings in the sound exercise of discretion. Thus, for example, if one appealed a judge's refusal to self-disqualify under Sec. 757.19 *et seq.* (or to recuse himself or herself based on case law requirements) one might wish to litigate that refusal through an interlocutory appeal while reserving the ability to file a substitution request (which is available only once) under Sec. 971.20. Tolling the time limits of Sec. 971.20 should be possible by obtaining the proper stay order from the trial court or appellate court. (This is especially true given case law holding that a defendant has the right to

intelligently exercise the substitution right, and that time limits can be relaxed to assist that process. *See, Tinti v. Waukesha County Circuit Court*, 159 Wis.2d 783, 464 N.W.2d 853 (Ct. App. 1990)).

An order staying proceedings, directed to the circuit court, tolls the running of any time period within which an act is to be done in that court. *In the Interest of W.P.*, 153 Wis.2d 50, 449 N.W.2d 615 (1990) (temporary 30 day extension of juvenile dispositional order was tolled by stay).

NOTE: In *W.P.*, the supreme court "conclude[d] that [the court of appeals'] order was sufficient to toll the temporary 30 day extension order entered pursuant to sec. 48.365(6)." *Id.* at 57. The supreme court was not called upon to address whether a stay order issued by the circuit court would have stayed the time limits. Therefore, even when the circuit court has granted a stay, it might be prudent to ask the court of appeals to continue it.

E. Determine whether opposing counsel in the court of appeals is the district attorney or the attorney general.

Generally, the district attorney represents the state in misdemeanor and juvenile matters, and the attorney general represents the state in felony matters. *See* Rule 809.80(2)(b) (District attorneys generally represent state in cases that are decided by one judge panels of the court of appeals under s. 752.31(3).) and sec. 978.05(5) (District attorneys may represent the state in other criminal appeals "[u]pon the request and under the supervision and direction of the attorney general)."

Even when the opponent is normally the district attorney, "[i]f a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding (sic) and be entitled to be heard." Sec. 806.04(11). So it may be necessary to serve both the district attorney and the attorney general.

NOTE: A document is not deemed filed with the court until the court actually receives it, but it is deemed served on opposing counsel when it is deposited in regular mail, properly addressed and with adequate postage. An affidavit of mailing is a good idea. *See* Rules 801.14(1), (2) and (4), and 809.80(2)(a). If the petition is granted, and the court orders briefing, the briefs may be filed upon mailing if the requirements of Rule 809.80(4) are met.

III. What must be filed in the court of appeals?

A. Petition.

The petition and supporting memorandum **must be filed within 14 days of entry of the order** described in section II.B, *supra*. A copy of the order appealed from, with the trial court clerk's date stamp, must be attached to the petition.

The petition and supporting memorandum, collectively, must contain everything listed in section B, *infra*. **The combined total length may not exceed 35 pages (if a monospaced font is used) or 8,000 words (if a proportional serif font is used). Rule 809.50(1).** Rule 809.50(4) also requires that a statement be attached to the petition which indicates whether the petition is produced with a monospaced or a proportional serif font, and, if a proportional serif font is used, sets forth the word count.

Rule 809.81 sets forth all of the other form requirements (size, number of copies, type style, cover, captions, spacing, margins, pagination, etc.).

NOTE: After attempting to identify for oneself the current requirements concerning the number, form and length of documents to be filed in the appellate court, it is a good idea to consult the clerk with any questions before filing and serving the petition. Assuming that counsel has already made a good faith effort to identify the applicable rules, the staff in the clerk's office tries very hard to be helpful and seldom give inaccurate advice. The clerk's telephone number is (608) 266-1880.

The petitioner has some flexibility in deciding how detailed the petition should be and how much it should refer to and incorporate the supporting memorandum. In extremely simple cases, a petition alone can include everything. If a petition and supporting memorandum are both filed, they should clearly set out the procedural history, what steps have been taken to obtain needed transcripts, the facts and the argument.

NOTE: The petition itself--in addition to whatever is contained (perhaps more comprehensively) in the supporting memorandum, **must** contain the sections described in Rule 809.50(1), (a) through (d). For example, Rule 809.50(1)(b) requires a "statement of the facts necessary to an understanding of the issues." Such a statement--perhaps truncated--must be in the petition. The petition might then cite to a more comprehensive statement of facts in the supporting memorandum.

TIME LIMIT: The petition and any supporting memorandum must be filed within 14 days after entry of the order described in Section II.B, *supra*. Rule 809.50(1). A few important principles:

--The deadline for **filing** is **not** satisfied on the day of mailing. Filing is not timely unless the clerk receives the document within the time set for filing. Rule 809.80(3)(a).

--The deadline for **service** is satisfied upon mailing with proper address and postage; the opponent has up to three days added to their deadline if service was effectuated by mail. Rule 801.15(5).

--The 14 days starts on the day after the order is entered and ends on the 14th day thereafter, unless it is a day that the clerk of courts office is closed. Rules 801.15(1)(b) and 809.82.

TIME LIMIT ISSUE: May a party create a new deadline by simply moving the trial court to reconsider an order already entered, and then seeking to appeal the denial of reconsideration? Answer: Probably not, especially if the reconsideration motion was filed solely to create a "new" time limit. Even if the court of appeals did not formally rule that a petition from the denial of reconsideration was untimely, it could find that the petitioner's lack of diligence demonstrated that there was no urgent need for interlocutory relief. On the other hand, if the reconsideration is sought because the trial court truly was not given the opportunity to respond to all of the arguments, the appellate court would be unlikely to find a petition from denial of reconsideration to be untimely, for such a finding would discourage complete litigation of issues in the trial court. The ideal practice for the putative petitioner is not to have the trial court sign an order--thus triggering time limits--until the petitioner is certain that all issues have been litigated.

The best practice, if a motion for reconsideration is contemplated, is to avoid having the trial court enter a written order until the reconsideration motion has been filed and litigated. This avoids triggering a deadline in the first instance.

If a basis for reconsideration arises while the appeal is pending, consider filing a motion for remand in the court of appeals. *See, Metro Greyhound Mgt. Corp. v. Racing Bd.*, 157 Wis.2d 678, 698, 460 N.W.2d 802 (Ct. App. 1990). There the court held that such motions "serve an important function. First, a trial court's reconsideration may obviate the necessity for an appeal... Second, ... the trial court's [reconsideration] decision can hone its analysis, and thus assist appellate review."

B. Supporting Memorandum.

As in all appellate practice, but especially in this area, the petitioner must be brief enough so that the submissions will be read, yet thorough and persuasive in the initial petition, because there is no guarantee that a more comprehensive brief will be received later.

If at all possible, every factual assertion made in the memorandum should be supported by a citation to the transcript or other court document upon which the assertion is made. Every legal assertion should be supported with a citation to authority.

1. Issues Presented.

Put the issue(s) in the form of a question that shows concisely but precisely how the trial court ruled and why the ruling is both erroneous and in need of immediate rectification.

The court of appeals may specify the issue or issues it will review if it grants the petition for leave to appeal. Rule 809.50(3).

2. Statement of Facts and Procedural History.

Even if only one discrete issue is being litigated, the appellate court is aided by a few short paragraphs that specifically detail the dates in the procedural history (when charged, bound over, etc., when the motion in question was filed, and when and how it was heard and disposed of). The statement of facts, focused on the issue presented, should be brief but sufficient to show the significance of the issue to the broader controversy. Cite to transcripts and other sources whenever possible.

3. Statement demonstrating need for immediate review.

The argument section should amplify the bases for the petition. This "statement" section, however, should specifically state how each criterion relied upon is met. In keeping with section I.A, *supra*, this section might usefully include a brief statement as to why success on the merits is likely (*e.g.*, citing to the primary authority relied upon and contrasting that authority with the trial court ruling).

4. Argument.

Remember, again, that there is no guarantee that the court will grant the petition and then allow a subsequent brief. So the petition and memorandum should, in effect, *be* the brief.

5. The Relief Sought.

If the injustice of the petitioner's plight can be summarized, it may be appropriate to do so at the conclusion of the petition or memorandum. However, the most important purpose of the conclusion (which is not specifically required in the rules) is to provide a succinct statement of the relief the petitioner hopes to obtain.

C. Appendix.

The rules do not require an appendix, except that **Rule 809.50(1)(d) requires that a "copy of the judgment or order sought to be reviewed" be attached to the petition.** For the reasons discussed in section II.C, *supra*, the ideal situation is one in which the court can be provided with as much of "the record" as possible at the petition stage. (Technically, the "record" will be transmitted by the clerk only after a petition for leave to appeal is granted,

unless the court of appeals both grants the petition and summarily disposes of the appeal, in which cases the trial court clerk would not transmit the record. The point is that the court of appeals will have greater confidence in overturning the trial court, or even agreeing to review its decision, if it has copies of as much **relevant** material as possible.)

D. Motion for any needed stay not provided by trial court.

See, Section II.D, supra.

E. Consider a motion for a three judge panel.

An appeal in a felony case will be heard by a three judge panel and its decision (if leave to appeal is granted) is subject to being published. The petitioner will have the opportunity to argue for publication in the brief that follows the grant of leave to appeal.

If the petitioner anticipates summary disposition under Rule 809.21, an argument for publication should be made in the petition. The argument should address the publication criteria in Rule 809.23.

If the case is not a felony, it will probably be heard by a one judge panel. Consult Sec. 752.31 to find out. One judge decisions cannot be published, so they have no precedential effect. Rule 809.23(1)(b) 4.

A one judge decision may well be in the best interests of your client. Statistically, it is easier to persuade one judge than three. In addition, the court of appeals incurs less political pressure by granting relief in a non-published decision. (This should be considered when deciding whether to seek publication in a felony case.)

On the other hand, the client may be well served by an effort to obtain publication. If the court of appeals can be convinced that the issue is sufficiently important to warrant publication, that might reinforce the argument for granting leave to appeal.

If publication is desired in a case normally decided by one judge, a party may move for a three judge panel. In a regular appeal, that motion must accompany the notice of appeal, Rule 809.41. In interlocutory appeals, the order granting leave to appeal constitutes the notice of appeal, Rule 809.50(3). Therefore, the motion should be filed, if possible, with the petition seeking leave to appeal. If a basis for publication arises after the deadline, remember that the Chief Judge of the Court of Appeals has the authority to convert the case to a three-judge case. Rule 809.41(3). A party may write to the chief judge and request such an order.

IV. What happens after the petition is filed?

A. A response is due within 14 days.

The respondent's 14 day deadline is computed the same way as the petitioner's. Rule 809.50(2).

B. If the petition is denied, the denial will not be reviewed by the supreme court.

In *In the Interest of J.S.R.*, 111 Wis. 2d 261, 330 N.W.2d 217 (1983), the juvenile first petitioned the court of appeals for leave to appeal a nonfinal order concerning discovery. Before the court of appeals decided that petition, the juvenile petitioned the supreme court to allow for bypassing the court of appeals. The supreme court denied the bypass petition, reiterating its holdings that the decision whether to grant leave to appeal is subject to the discretion of the court of appeals, not to be reviewed by the supreme court, *Id.* at 262, citing *Aparacor, Inc. v. DILHR*, 97 Wis.2d 399, 293 N.W.2d 545 (1980); *State v. Whitty*, 86 Wis.2d 380, 272 N.W.2d 842 (1978); and *State v. Jenich*, 94 Wis.2d 74, 97a, 292 N.W.2d 348, 349 (1980).

The supreme court has never agreed to review a court of appeals' denial of a petition for leave to appeal a nonfinal order. Such review is unlikely. However, *J.S.R.*, *supra*, 111 Wis.2d at 263, admits that the rule against such review is a "matter of policy" that is "theoretically subject to certain exceptions." These could include certification of an issue by the court of appeals or the intervention in an action by the supreme court on its own motion. *Id.* "Neither procedure is likely to be invoked in the absence of unusual circumstances. In any event, the litigants themselves cannot initiate the process by means of a bypass petition." *Id.*

This author attempted to persuade the supreme court to review the denial of a petition for leave to appeal. The argument was that, even though the court of appeals denied the petition, it did so after conducting the equivalent of a full-blown appeal that should be subject to review. The court of appeals, after the petition and response had been filed, had remanded the case for an evidentiary hearing before a referee (the trial judge was a witness), had thereafter received the transcript along with findings by the referee, and had permitted the parties to supplement the petition and response. Relying on numerous cases holding, *e.g.*, that an appellate court is not bound by "...labels... but will look beyond the form and label of the document to the substance and nature of the determination," (*In re Corporation of Town of Fitchburg*, 98 Wis.2d 635, 647-48, 299 N.W.2d 199 (1980)), the petitioner sought review based on the claim that the court of appeals had, in effect, heard an appeal despite denial of the petition for leave to appeal. Review was denied, with one dissent.

C. If the petition is granted and the appeal is not disposed of summarily under Rule 809.21, the appeal proceeds under rules governing appeals as of right.

Granting the petition has the effect of filing a notice of appeal. The petitioner's next responsibility is to file a docketing statement, *if required by Rule 809.10(1)(d)*, within 11 days after the order granting the petition for leave to appeal. Rule 809.50(3).

See generally Rules 809.10, .11, .15, .18, .19, .22, .23, .24 and .26 for the rules governing appeals as of right.

- D. A grant of leave to appeal from a non-final order or judgment does not authorize cross-appeals as of right by other parties from the same or from another non-final order or judgment.**

Cross appeals require a separate petition for leave to appeal a non-final order. Rule 809.50(3).

Other Sources of Information.

1. Wisconsin Statutes:

Chapter 808 (Appeals and Writs of Error).
Chapter 809 (Rules of Appellate Procedure).
Chapter 752 (Court of Appeals).

2. Michael S. Heffernan, **Appellate Practice and Procedure in Wisconsin**, Third Edition. Chapter 9. State Bar of Wisconsin, October 2002.

3. Internal Operating Procedures of Wisconsin Court of Appeals. (These are printed at the end of the Wisconsin Statutes, *e.g.*, Vol. V, p. 6252-57, softbound edition, 2001-03.)

4. Virginia A. Pomeroy, *Outline, Interlocutory Appeals*. **Wisconsin Defender**, Vol. 2, No. 2, March/April 1994, p. 12.

5. Virginia A. Pomeroy, Gina M. Pruski and Susan E. Alesia, **Wisconsin Juvenile Law Handbook**. Chapter 13. State Bar of Wisconsin, May 2002.

**MILWAUKEE BAR ASSOCIATION BENCH/BAR
COURT OF APPEALS COMMITTEE**

APPEALS FROM START TO FINISH

April 18, 2008

“TIPS FOR A WRITING A PERSUASIVE BRIEF”

**Judge Lisa Neubauer, presenting
Materials written by Judge Joan F. Kessler**

1. Know your audience

- a. Our volume of work
- b. What we already know
- c. What we probably don't know because it's unusual law

2. Introduction is no place for argument

- a. Why are you here
- b. What do you want us to do
- c. Why should we do it

3. Only the facts that matter

- a. Make us want to help your client
- b. Focus on the immediate context – not from when the earth cooled
- c. Be scrupulous about using the record

- d. Take nothing out of context – it sounds like a fib
- e. Include the bad facts – your opponent will
- f. Extra adjectives are not helpful

4. Write like a reporter

- a. Short is better; less is more
- b. Identify sources clearly
- c. Sound objective

5. No personal attacks, insults or innuendos – no matter how annoyed you are!

6. Make the argument physically easy to follow

- a. Table of contents that includes argument headings
- b. Physically easy to read
- c. Organized, logical presentation
- d. Repeating the same argument multiple times does not make it more persuasive

7. Make the argument text clear and logical

- a. What law should have been applied--citations
- b. What law was applied. –citations
- c. What did the trial court do wrong?—law or facts?
- d. What critical fact was disputed (making summary judgment improper)

- e. For “erroneous exercise of discretion” isolate the fact critical to court’s decision for which record has absolutely no support
- f. Fewer issues generally more persuasive than shotgun approach

8. Appendix is important—it is to help us find critical documents easily

- a. This should not be a duplicate of the entire record.
- b. The two or three documents on which case turns should be here!
- c. Table of contents should make documents easy for us to find – both in appendix and in the record

9. Format of the brief

- a. Forget fancy fonts and tiny font size
- b. ALL CAPS reads like shouting
- c. Margins are used, please leave them for us

10. The Pro se adversary provides opportunities

- a. We, too, get out the Excedrin with these briefs
- b. Act as a translator -- tell us what you think the person means
- c. Point out failures in brief if they are serious (e.g. no citations to record, or adding things not in the record are common)
- d. Be courteous, professional, logical and brief.

Getting Your Petition for Review Granted

Ellen Henak

Assistant State Public Defender

Julie Anne Rich

Supreme Court Commissioner

- I. **Step One: Make sure your case meets the technical prerequisites for review and is filed on time.** Filing a petition for review requires that the decision of the Court of Appeals be adverse to the party filing the petition and that the decision be a final decision.
- A. Only adverse decisions of the Court of Appeals are proper subjects for review. Wis. Stats. §§808.10, 809.62(1). To be adverse, the result or disposition itself must be adverse to the petitioning party. It is not enough that the reasoning of the opinion be adverse. Disputed rationales do not make a decision adverse. *Neely v. State*, 89 Wis.2d 755, 758, 279 N.W.2d 255 (1979).
- B. To be subject to review, the action of the Court of Appeals must be a decision and involve a written opinion or order. *Henderson v. Rock Co. Dept. of Soc. Servs.*, 85 Wis.2d 244, 446, 270 N.W.2d 581 (1978).
1. A court of appeals denial of leave to appeal is not subject to review. *Id.*
 2. An order granting or denying leave to appeal a nonfinal order also is not subject to review, although the decision on the merits itself is subject to review. *See Aparacor, Inc. v. DILHR*, 97 Wis.2d 399, 403-04, 293 N.W.2d 545 (1980).
 - a. A court of appeals denial of leave to appeal is not subject to review. *Id.*;
 - b. A court of appeals denial of a stay is not subject to review. *In Interest of A.R.*, 85 Wis.2d 444, 270 N.W.2d 581 (1978).
- C. A petition for review is timely if it is filed within 30 days of the decision below. Wis. Stats. §§808.01, 809.62(1); *First Wisconsin National Bank of Madison v. Nicholaou*, 87 Wis.2d 360, 274 N.W.2d 704 (1979). This deadline is **not** extendable because the Court loses subject matter jurisdiction after thirty days. *St. John's*

Home v. Continental Cas. Co., 150 Wis.2d 37, 43, 441 N.W.2d 219 (1989).

1. A petition is not considered filed until it is **physically** received in the clerk's office in Madison. *Gunderson v. State*, 106 Wis.2d 611, 318 N.W.2d 779 (1982). Office hours are 7:15 a.m. to 5:00 p.m. This rule is strictly enforced.
 - a. A petition for review may not be filed by facsimile or by email. *Waupaca Co. DHHS v. Phillip J.E.*, 2007AP1074-AC (unpublished order)
2. A petition due on a weekend or legal holiday is not due until the following workday. *Id.* §801.15(1)(b).
3. This time is tolled for incarcerated, *pro se* petitioners only from the time they deliver the petition to prison authorities for mailing and provided they file a certification or affidavit setting forth the date on which the petition was delivered to the proper institution authorities for mailing. *State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis.2d 1013, 635 N.W.2d 292.
4. The filing of a motion for reconsideration in the court of appeals does **not** toll the 30-day filing requirements for petitions for review.
5. A \$195 filing fee must accompany the petition for review, Wis. Stats. §809.25(2)(a)1, although the state is exempt from this requirement, *id.* (2)(b), as are people who have been determined to be indigent. Wis. Sup. Ct. Internal Operating Procedures L2.
 - a. A person for whom an indigency determination has been made in the Court of Appeals need not submit a new affidavit of indigency to be considered indigent for purposes of a petition for review. *Id.*
 - b. Clients of the State Public Defender are considered to be indigent.

II. Step Two: Think beyond your own case. Less than 10 percent of petitions for review are granted. Convincing the Wisconsin Supreme Court to hear your case generally requires thinking beyond your own case. The advocate's key job in the petition for review is to convince the Wisconsin

Supreme Court that his or her case is a good vehicle for the Court to use to teach something about the law that would not otherwise be clear or to establish a new policy.

- A. The primary function of the Wisconsin Supreme Court “is that of law defining and law development.” *Cook v. Cook*, 208 Wis.2d 166, 189, 560 N.W.2d 246 (1997).
- B. Wisconsin Statutes §809.62(1) provides criteria that the Wisconsin Supreme Court will consider but these criteria are not controlling. They are only guidelines.
 - 1. The grant of review is a matter of discretion.
 - 2. Think about whether you have a significant constitutional issue, whether your case involves the need for policy or a change in policy, whether your case presents a novel and important question of law, whether the circumstances that gave rise to your issue are likely to recur, and whether there is disagreement within the appellate courts on what the law is.

III. **Step Three: Explain your case in its broader context.** One way to avoid the trap of simply repeating your arguments and staying with the narrow confines of your own case is to begin by drafting the reasons for granting review.

- A. Cite the guideline which applies, Wis. Stats. (Rule) 809.62(2)(c), but do not just cite the guideline that applies!
 - 1. If your issue is recurring, cite other cases or other sources (such as newspaper articles or scholarly articles) that demonstrate that the issue is frequent and hot.
 - 2. If your issue is novel, explain what implications it has in other setting or in other areas of law. Give hypothetical examples.
 - 3. If there is a split on the question, demonstrate the split. See what other jurisdictions are doing and, if they are also split, show that as well with citations to those cases.
 - 4. If you are arguing that there is a need for a change in policy, make sure you explain what the old policy is and what has changed that makes it unwise to continue the existing policy.
- B. The five “guidelines” set forth in Wis. Stats. (Rule) 809.62(1) are:

1. A real and significant question of federal or state constitutional law is presented.
 2. The petition for review demonstrates a need for the supreme court to consider establishing implementing, or changing a policy within its authority.
 3. A decision by the supreme court will help develop, clarify, or harmonize the law, and
 - i. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation;
 - ii. The question presented is a novel one, the resolution of which will have statewide impact; or
 - iii. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
 4. The court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court or the supreme court or with other court of appeals' decision.
 5. The court of appeals decision is in accord with the opinions of the supreme court or the court of appeals, but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.
- C. If none of the guidelines are present, write a statement of any other substantial or compelling reasons for review. Wis. Stats. (Rule) 809.62(2)(c).

IV. Step Four: Make sure your statement of the issues presented clearly relates to your reasons the Court should grant review. Remember that issues of law have a much greater chance of getting a petition granted than a petition that raises issues of fact or involve the use of discretion.

Too often, practitioners will explain why their case is important but then draft their statements of issues either so broadly or so narrowly that the Court cannot see how this case will serve the purpose you claim it will.

- A. If your petition for review is granted, you will not be able to raise any issues that were not identified in your petition for review unless

the Court orders otherwise (and you should not wait for that to happen). Wis. Stats. (Rule) 809.62(6).

1. If the court of appeals has not decided all of your issues, you must raise those unaddressed issues in your petition for review or they may be deemed to be waived. *State v. Johnson*, 153 Wis.2d 121, 124, 449 N.W.2d 845 (1990).
 - B. Typically, issues are stated as questions and are approximately one sentence in length. Avoid long lists of issue statements.
 - C. You must also tell the Court how the circuit court and the court of appeals resolved the issue. Wis. Stats. (Rule) 809.62(2)(a).
- V. **Step Five: Make your headings explain why review should be granted and for what issue. Draft your argument.** When you write your argument, you should be elaborating on the reasons that support granting review. Although you may wish to show that the court below was wrong, that alone is not very compelling. Your argument should show error below but it also should be drafted to emphasize how setting that error right will serve broader purposes. You will need to discuss the merits but you also want to focus on the reasons the Court should grant review.
- A. Make sure that you speak of what happened in the circuit court as well as the Court of Appeals. Doing so often can help you explain that broader context.
 - B. Consider an introductory paragraph for each section of your argument that clearly identifies the reason for granting review, the issue, and the key facts. Consider the paragraph a way to highlight why the Court should grant review.
- VI. **Step Six: Make sure that the form and contents of your petition meet the requirements.** Strict rules govern the length, appearance, and contents of a petition for review. If you feel you need to exceed the length requirements, you may file a motion requesting an extension of the page limit but this should be very rarely done.
- A. Check your contents.
 1. You must have a table of contents. Wis. Stats. §809.62(2)(b). You need not have a table of authorities although many people include one.
 2. You must have a statement of the issues. Wis. Stats. §809.62(2)(a).

3. You must have a statement of reasons for granting review. Wis. Stats. §809.62(2)(c).
4. You must have a statement of the case. Wis. Stats. §809.62(2)(d). You can separate out the facts and also have a statement of facts.
 - a. Making your statement of the case lengthy and convoluted may very well hurt the likelihood of review being granted in your case. A long and involved statement of the case often suggests that the issues may be unique to your case.
 - b. Making your statement of facts lengthy and convoluted similarly will hurt the likelihood of a grant of review. It suggests the case is highly fact-specific.
 - c. If possible, adopt the facts as the Court of Appeals saw them. If the facts appear undisputed (or largely undisputed), you increase the chance of review because you increase the chance that your issues will be seen as legal issues.
 - d. If you are filing a petition for review in a case that is required by law to be confidential (for example, appeals under Chapters 48, 938, and 55, and paternity cases), you should not include an individual's complete name in any document filed with the court. You must refer to individuals only by their first name and first initial of their last name. This includes the petition for review and briefs. If you include portions of the record in an appendix to the petition for review (or brief), the portions should be reproduced so that only the first name and first initial of the last name is shown.
5. You must have an argument section.
6. You should have a conclusion. Your conclusion should **not** be that the Court of Appeals was wrong. The Supreme Court is not an "error correcting" court. You should explain that the Court should grant review and briefly (one-sentence) reiterate why.

7. You must have an appendix. Wis. Stats. (Rule) 809.62(2)(f). Your appendix consists of (in this order):
 - a. the decision of the Court of Appeals
 - b. judgment orders from the circuit order
 - c. any other key orders
 - d. any findings of fact
 - e. any conclusions of law and memorandum decisions of the circuit court and administrative agencies as is necessary to understand the petition.
 - f. any other portions of the record which are needed to understand the petition.

E. Check the formatting issues.

1. Your cover should be white. Wis. Stats. §809.62(4).
2. Consider your font. Wis. Stats. §§809.19(8)(b), 809.62(4).
 - a. If in proportional serif font (such as Times):
 - i. it may not be more than 8,000 words long, not including the appendix
 - ii. use 13 point body text and 11 point for quotes.
 - iii. you must have a minimum leading (or spacing) of 2 points but you can have more.
 - iv. you must have a maximum of 60 characters per full line of body text which generally is met if your side margins are 2 inches
 - b. If in monospaced font (such as Courier)
 - i. it may not be longer than 35 pages, not including the appendix
 - ii. use a size of ten characters per inch
 - iii. double-space it.
 - iv. use a 1.5 inch margin on the left side and a 1.0 inch margin on all other sides.

3. Italics can only be used for citations, headings, emphasis, and foreign words. Wis. Stats. §§809.19(8)(b), 809.62(4).
4. Make sure the petition is securely bound on the left side only. Heavy strength staples are allowed by rule. Wis. Stats. §§809.19(8)(b), 809.62(4).

VII. Step Seven: Await the response or cross-petition.

- A. The opposing party may file a response to your petition within fourteen days after service of the petition for review.
- B. If the opposing party seeks modification of an adverse decision, the party may file a petition for cross-review either within the original thirty days for filing a petition for review within thirty days after the filing by another party of a petition for review.
- C. The statutes do not provide for filing a reply to the response. In the unusual situation in which the response raises a completely new and unexpected issue or completely misstates material and key facts or law, a petitioner may file a motion seeking leave to file a reply, accompanied by the reply. *This situation should be rare and the reply should be extremely brief.*

VIII. Step Eight: Await a decision from the Wisconsin Supreme Court to see if the Court will grant review. Three justices must agree to hear your case for the petition to be granted. Wis. Sup. Ct. Internal Operating Procedures III. B. 1.

- A. After the petition is filed, it is assigned to a court commissioner for analysis. Under the Internal Operating Procedures, the court commissioner has fifty days to prepare and circulate a memorandum to the court which contains an analysis of the petition and a recommendation for the granting or denial of the petition. The memorandum may also recommend submission on briefs without oral argument. The court commissioner then circulates to each justice of the Wisconsin Supreme Court the memorandum, the petition for review, any responses, and an agenda sheet at least two weeks prior to the conference and the justices of the Court review the material.
- B. At least once each month, the court holds a conference at which each court commissioner reports on the petitions for review to be considered at that conference. The chief justice will state the name of the case and ask if any member objects to the recommendation.

1. If there is no objection to the recommendation, the court commissioner's recommendation is accepted. If any justice objects to the recommendation or wishes to discuss it, a discussion ensues. Following discussion, the court decides whether to grant or deny the petition and whether to schedule it for oral argument. A petition may be held until a subsequent conference to permit additional research or consideration. In fact, you likely will not receive notification of the Court's action on your petition for several months.
- C. If review is denied, a one-page order will be issued. If review is granted, the court commissioner will prepare an order setting forth the decision to grant review. If there is any limitation of issues, the order will set out those limitations. The order also will set out the briefing schedule.

**Examples of “Reasons for Granting Review” from Some
Successful Petitions for Review
(Drafted by Ellen Henak)**

Example 1 (from September of 2006):

Reasons for Granting Review

This case raises the question what a defendant must allege with regard to his own understanding of the nature of the crime to receive an evidentiary hearing on his claim that his plea was not knowing, intelligent, and voluntary. This commonly recurring legal question has constitutional roots. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Hampton*, 2004 WI 107, 274 Wis.2d 379, 390, 683 N.W.2d 14. Answering it involves law that the majority characterized as “highly complex and too often counter-intuitive,” *see* App. 123, and resulted in an opinion recommended for publication which the dissent criticized as “only add[ing] to the confusion,” *see* App. 132.

A guilty plea has constitutional implications. The constitution requires that a guilty plea be knowing and voluntary. *Boykin v. Alabama*, 395 U.S.238, 242-43 (1969). A defendant must have “a full understanding of the charges against him,” *State v. Bangert*, 131 Wis.2d 246, 257, 389 N.W.2d 12 (1986), including, when relevant, an understanding of party-to-a-crime liability, *see State v. Brown*, 2006 WI 100 ¶55, ___ Wis.2d ___, 716 N.W.2d 906. Because guilty pleas resolve the overwhelming majority of cases, *see, e.g., Alshuler, The Trial Judge’s Role in Plea Bargaining, Part I*, 76 Colum. L. Rev. 1059 n.1 (1969), “[t]aking pleas is an increasingly important and complex state in a criminal proceeding and is the source of frequent litigation.” *Hampton*, 274 Wis.2d at 390. One of the common areas for litigation is whether the allegations made in a postconviction motion are sufficient to require a trial court to grant an evidentiary hearing. *See, e.g., Brown*, 2006 WI 100; *Hampton*, 274 Wis.2d 379; *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996).

In *Hampton*, 274 Wis.2d at 388, the defendant alleged that he did not understand that the trial court was not bound by the prosecutor’s recommendation. This Court held that the allegation was sufficiently non-conclusory to warrant an evidentiary hearing. *Id.* at 406. As this Court stated,

that the defendant did not understand is, admittedly, conclusory; but the allegation raises a question of *fact* and perhaps law that requires resolution.

The allegation that a defendant did not understand something is qualitatively different from the allegation of a legal conclusion such as “counsel’s performance was deficient and resulted in prejudice to the defendant” or “the defendant’s plea was not voluntary.” These *legal* conclusions cry out for supporting facts, and these supporting facts must be alleged to satisfy the defendant’s burden for an evidentiary hearing.

Id. at 406-407 (emphasis in original).

The dispute here is whether *Hampton* applies. The majority of the Court of Appeals held that *Hampton* applied only to *Bangert* claims and Mr. Howell’s claim was a *Bentley*¹ claim. App. 112. The dissent reasoned that *Hampton* applied because Mr. Howell’s claim was a *Bangert* claim and because, in any event, *Hampton* applied to *Bentley* claims.

This case therefore presents the specific questions whether all postconviction motions seeking plea withdrawal must be characterized as either *Bangert* claims or *Bentley* claims, if so, how to characterize those claims, and whether the pleading requirements concerning the defendant’s lack of understanding of the nature of the crime vary by claim. The facts relevant to resolving this issue are not in dispute. This Court should grant review to clarify this recurring legal question, *see* Wis. Stats. (Rule) 809.62(1)(a) & (c)(3), and because, assuming both Mr. Howell and the dissent are correct, the decision of lower court is in conflict with this Court’s decision in *Hampton*, *see* Wis. Stats. (Rule) 809.62(1)(d), and publication of the lower court’s decision will create significant confusion.

Example 2 (from February of 2004):

REASONS FOR GRANTING REVIEW

Under certain circumstances, Wisconsin Statutes Chapter 980 allows people found to be sexually violent persons to be placed on supervised release. *See* Wis. Stats. §§980.06(2)(b), 980.08. Unfortunately, as the Assistant Attorney General indicated at oral argument in the Court of Appeals, the state was and is

¹ *See State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996) (ineffective assistance of counsel claim).

unable to implement court orders for supervised release in Milwaukee County. *See* App.133 (Schudson, J., dissenting). As numerous other cases have indicated, *State v Sprosty*, 227 Wis.2d 315, 595 N.W.2d 692 (1999); *State v. Keding*, 214 Wis.2d 363, 571 N.W.2d 450 (Ct. App.1997); *State v. Castillo*, 205 Wis.2d 592, 556 N.W.2d 425 (Ct. App.1996), *rev. dismissed as improvidently granted*, 213 Wis.2d 488, 570 N.W.2d 44 (1997), the problem also occurs statewide.

In Milwaukee, the state currently is confronting the problem in the trial courts. In *State v. Billy Morford*, Milwaukee Co. Case No. 96CF966242, the trial court, granted Morford's petition for supervised release on November 27, 2002. More than two years later, Morford is only in a temporary placement. Similarly, in *State v. Robert Carney*, Milwaukee Co. Case No. 98CI000018, the trial court granted Carney's petition for supervised release on November 13, 2002. Two years later, no placement has been found. It is unlikely any acceptable supervised release plan will be developed in those or future cases because "the statutory mandate requires basic 'halfway house resources' which are not available to the subjects of Chapter 980...." R104:12; *see* David Doege, *Judge Orders Release of Child Molester*, Mil. J. Sentinel, November 28, 2002, at 3B.

This case therefore presents the real, significant, and recurring constitutional question of statewide impact whether the unavailability of supervised release placements causes Chapter 980 to be unconstitutional as applied. *See* Wis. Stats. (Rule) 809.62(1)(a), (c)(2) & (3).

This case also presents the question whether a presumption of constitutionality attaches when a statute is challenged as applied. When a statute is challenged directly, courts must presume the constitutionality of the statute and must indulge every presumption favoring the validity of the statute. *See State v. Post*, 197 Wis.2d 279, 541 N.W.2d 115 (1995), *cert. denied sub nom Schmidt v. Wisconsin*, 521 U.S. 1118 (1997). When the challenge is to the application of a statute, this Court has not applied this presumption of unconstitutionality. *See, e.g., State v. Dodson*, 219 Wis.2d 65, 580 N.W.2d 181 (1998); *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325 (1990); *State v. Miller*, 202 Wis.2d 56, 549 N.W.2d 235 (1996). Nevertheless, the Court of Appeals applied such a presumption in deciding this case. App.126.

This issue is a real and significant question of constitutional law, *see* Wis. Stats. (Rule) 809.62(1)(a), and is a question of law which is likely to recur unless resolved by this Court, *id.* 809.62(1)(c)(3). This Court also should take review of this issue because the Court of Appeals' decision is in conflict with opinions of this Court. *Id.* 809.62(1)(d).

This Court also should take review to decide whether *State v. Morford*, 2004 WI 5, 655 N.W.2d 546, 259 Wis.2d 480 applies retroactively. In *Morford*, this Court held that Wisconsin Statutes §980.08(6m) and not §806.07(1)(h) “governs granting relief for the State from a chapter 980 committee’s supervised release when the committee is confined in an institution awaiting placement on supervised release.” Because the issue in *Morford* was moot, *see id.* at ¶6, this Court had no opportunity to consider this aspect.

Motions for reconsideration by the state have been common. *See Morford*, 2004 WI 5 at ¶10 (noting that the issue has arisen at least four times in published cases since 1996). This Court therefore should grant review of this novel issue of law to develop the law because its resolution will have statewide impact and is likely to recur unless resolved by this Court. Wis. Stats. (Rule) 809.62(1)(c)(2) & (3).

Example 3 (from August of 2006):

Reasons for Granting Review

This case involves the failure of Illinois to comply with its obligations under the Interstate Agreement on Detainers and presents the purely legal question of the effect of that failure on Mr. Townsend’s Wisconsin case. The question is a particularly vexing one which resulted in both a majority opinion and a dissent in the Court of Appeals. Given the number of governmental bodies which have enacted the Agreement, the situation presented in this case is likely to recur. This Court therefore should grant review to resolve the recurring legal question of the remedy when a sending state under the Agreement fails to comply with its notice provisions to the defendant. *See* Wis. Stats. (Rule) 809.062(1)(c)(3).

Almost all states and the federal government are signatories to the Interstate Agreement on Detainers, *see Meadows, Interstate Agreement on Detainers and the Rights It Created*, 18 Akron Law Review 691, 693 (Spring 1985), including

Wisconsin and its border states. 730 ILCS 5/3-8-9; Iowa Code §821.1; Mich. Stats. Ann. §780.601; Minn. Stats. §629.294; Wis. Stats. §976.05. This Agreement provides a procedure for getting a defendant who is a prison in one state to another state in which he has a pending case. *See, e.g.,* Wis. Stats. §976.05.

The Agreement is intended “to encourage the expeditious and orderly disposition of [outstanding charges] and determination of the proper status of any and all detainees.” *See* Wis. Stats. § 976.05(1). Wisconsin and other states entered into the Agreement because “the party states” found that proceedings in such circumstances “cannot properly be had in the absence of cooperative procedures.” *See id.*

Accordingly, the Agreement creates two different procedures for speedy resolution of cases. The Article IV procedure allows prosecutors from a receiving state to make “a written request for temporary custody” to resolve charges. *Id.* §976.05(4) If prosecutors make such a request and the governor of the sending state does not disapprove within 30 days, then the receiving state is “entitled to have [the defendant]...made available,” *id.* §976.05(4)(a), and a trial must commence within 120 days of the arrival of the defendant in the receiving state, *id.* §976.05(4)(c). If the trial does not commence in time, the Agreement requires dismissal of the charges with prejudice.

The Article III procedure at issue in this case applies after a state lodges a detainer and requires an official in the state which has custody of the defendant to “promptly inform [the defendant] of the source and contents of any detainer...and of [his] right to make a request for final disposition.” *Id.* §976.05(3)(c). If the defendant requests final disposition, the trial must begin within 180 days or the Agreement requires dismissal of the charges with prejudice. *Id.* 976.05 (3)(d).

Unfortunately, the proximity of Illinois to Wisconsin and the problems within the Illinois prison system make recurrence of the situation at bar likely. As the trial court noted, “[t]he evidentiary hearings [in this case] only illuminated one thing that both sides agree upon; that the organization of the Illinois prison system, specifically in Cook County is a state of total disarray.” R58:5. In addition, notification mistakes have happened across the country. *See, e.g., United States v. Reed*, 910 F.2d 621 (9th Cir. 1990); *Schofs v. Warden, FCI, Lexington*, 509 F.

Appeals from Start to Finish

MBA

April 18, 2008

Supp. 78, 82 (E.D. Ky. 1981); *People v. Lincoln*, 601 P.2d 641, 644 (Colo. 1979);
State ex rel. Garner v. Gray, 55 Wis. 2d 574, 583, 201 N.W.2d 163 (1972).

SUPERVISORY WRITS

Colleen D. Ball
Appellate Counsel, S.C.

I. Supervisory Relief: Mandamus and Prohibition.

II. Requirements for Supervisory Relief.

A. Legal standard.¹

1. The petitioner has a clear legal right to the action sought.
2. The duty sought to be enforced is positive and plain.
 - Generally, discretionary duties do not qualify.²
3. Substantial injury will occur if relief is not afforded.
4. There is no other adequate remedy at law.
 - Appeal as a matter of right?³
 - Interlocutory appeal?

B. Procedure.

1. Similar to petition for interlocutory appeal.⁴
2. Caption change: lower tribunal, court, officer or judge and all other parties become respondents.
3. Deadline: petition must be filed “promptly.”⁵

¹ *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶6, 287 Wis. 2d 795, 706 N.W.2d 161.

² *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶24, 271 Wis. 2d 633, 681 N.W.2d 110.

³ *In the Interest of Tiffany W.*, 192 Wis. 2d 407, 425, 532 N.W.2d 135 (Ct. App. 1995).

⁴ See Wis. Stat. §809.51(1) and Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, Chapters 10 and 26 (2006) re form, contents and filing of petition.

⁵ *Kalal*, ¶17.

III. Supervisory Relief Versus Interlocutory Appeals.

- A. Different legal standards.
- B. As a strategy for reaching the supreme court.
 - A petition for supervisory relief must first be brought in the court of appeals unless that is impractical.⁶
 - A party ordinarily cannot petition for review of a court of appeals' decision denying an interlocutory appeal.⁷
 - A party can petition for review of a court of appeals' decision denying a petition for supervisory writ.
 - Petition for review requires 3 votes; petition for supervisory writ requires 4.

IV. Examples of Cases Where Appellate Courts Have Granted Supervisory Relief.

- A. To compel a judge to grant a request for judicial substitution.⁸
- B. To review a John Doe judge's actions.⁹
- C. To compel a trial court to comply with an appellate court's mandate.¹⁰
- D. To compel a government agency to comply with the open records law.¹¹

⁶ Wis. Stat. § 809.71; *In re Imposition of Sanctions in Alt v. Cline*, 224 Wis. 2d 72, 96, 589 N.W.2d 21 (1999).

⁷ *In re Interest of J.S.R.*, 111 Wis. 2d 261, 262-263, 330 N.W.2d 217 (1983).

⁸ *State ex rel. Mateo D.O. v. Circuit Court for Winnebago County*, 2005 WI App 85, ¶15, 280 Wis. 2d 575, 696 N.W. 2d 275.

⁹ *State ex rel. Hipp v. Murray*, 2007 WI App 202, ¶9, __ Wis. 2d __, 738 N.W.2d 570.

¹⁰ *State ex rel Blackdeer by Blackdeer v. Town of Levis*, 176 Wis. 2d 252, 259, 500 N.W.2d 339 (Ct. App. 1992).

¹¹ *Stahowiak*, ¶7.

**SUPERVISORY WRITS
IN STATE CRIMINAL CASES**

ROBERT R. HENAK
Henak Law Office, S.C.
316 N. Milwaukee St., #535
Milwaukee, WI 53202
414-283-9300
henaklaw@sbcglobal.net

- I. For Authority and General Standards for Supervisory Writs in Wisconsin's appellate courts:
 - A. Colleen Ball's outline
 - B. Wis. Const. Art. VII, §5(3)
 - C. Wis. Stat. § 752.01
 - C. Wis. Stat. (Rule) 809.51
 - D. Heffernan, et al., *Appellate Practice and Procedure in Wisconsin*

- II. Common Law Habeas Corpus
 - A. Habeas Petition in Court of Appeals
 - 1. Used to challenge ineffectiveness of appellate counsel when alleged errors or omissions took place in Court of Appeals
 - a. failure to raise or to properly brief issue preserved in circuit court. *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992). Compare *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App.1996) (distinguishing between claimed ineffectiveness of appellate counsel, that must be raised in the Court of Appeals under *Knight*, and claimed ineffectiveness of post-conviction counsel, that must be raised in the circuit court under Wis. Stat. §974.06)
 - b. failure to file appeal or No Merit brief, *State ex rel. Santana v. Endicott*, 2006 WI App 13, 288 Wis.2d 707, 709 N.W.2d 515; *State ex rel. Smalley v. Morgan*, 211 Wis.2d 795, 565 N.W.2d 805 (Ct. App. 1997)
 - c. where request for extension of time for pursuing direct appeal or related deadlines under Wis. Stat. (Rule) 809.30(2) is error

of counsel, proper procedure is habeas in Court of Appeals under *Knight* rather than Motion to Extend time under Wis. Stat. (Rule) 809.82(2). *State v. Evans*, 2004 WI 84, 273 Wis.2d 192, 682 N.W.2d 784

2. Habeas is an “equitable remedy.” *E.g.*, *Evans*, ¶¶40, 54; *see Knight*, 168 Wis.2d 519-21. Does this mean habeas relief may be based on other than constitutional ineffectiveness grounds????
3. Habeas remedies
 - a. “[h]abeas corpus is an equitable doctrine that would allow the court of appeals to tailor a remedy for the specific facts of each case.” *Evans*, ¶¶40, 54; *see Knight*, 168 Wis.2d 519-21
 - b. If errors resulted in denial of an appeal, remedy is a new appeal.
 - c. If errors resulted in the failure to raise or adequately argue a specific issue on the appeal, remedy is whatever remedy would have been appropriate had that issue been properly raised (i.e., new trial, resentencing, etc.)

B. Habeas Petition in Supreme Court

1. Used to challenge errors in Supreme Court and ineffectiveness of appellate counsel when alleged errors or omissions took place in Supreme Court, e.g., failure to file timely petition for review. *See generally State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis.2d 1013, 635 N.W.2d 292; *Schmelzer v. Murphy*, 201 Wis.2d 246, 548 N.W.2d 45 (1996). Likely also would cover other attorney errors in Supreme Court, such as failure to raise or to properly brief issue preserved below, failure to file brief, etc.
2. Also appropriate where Court of Appeals inadvertently mailed decision to defendant's former counsel, so that defendant did not learn of affirmance until after period to petition for review in Supreme Court had expired. *State ex Rel. Jose Dejesus Fuentes, V. Wisconsin Court of Appeals, District IV*, 225 Wis.2d 446, 593 N.W.2d 48 (1999).

C. Habeas Procedure

1. *See generally* Wis. Stat. (Rule) 809.51
2. Considered a new action, not continuation of previous action.
3. File petition in applicable court. A supporting brief may also be filed, but generally results in unnecessary duplication.
4. Combined length of petition and brief:
 - a. 35 pages if monospaced font used (e.g., Courier)
 - b. 8,000 words if proportional serif font used (e.g., Times New Roman)
 - c. Statement must be attached identifying whether the petition is produced with a monospaced font or with a proportional serif font. If proportional serif font used, must set forth word count. Wis. Stat. (Rule) 809.51(4).
 - d. Identification of Parties:
 - i. Petitioner: “State ex rel. Party Name”
 - ii. Respondent: Warden (if petitioner incarcerated) or Secretary of Department of Corrections (if petitioner on supervision)
 - e. Contents of petition:
 - i. Statutory requirements, Wis. Stat. (Rule) 809.51(1)(a)-(d). The petition shall contain:
 - (a) A statement of the issues presented by the controversy;
 - (b) A statement of the facts necessary to an understanding of the issues (and “identify[ing] precisely what counsel did or failed to do,” *Santana*, ¶9);
 - (c) The relief sought; and

(d) The reasons why the court should take jurisdiction.

ii. Address fully both the legal arguments supporting your ineffectiveness claim and those regarding any possible defenses to relief, such as waiver or laches. *See Santana*, ¶9.

f. Dicta in *Santana*, ¶10 states that the requirements of *statutory* habeas corpus contained in Wis. Stat. §782.04 also apply to *common law* habeas corpus proceedings under *Knight*. The issue was not briefed in *Santana* and, for the reasons stated in my attached letter to the Publications Committee, *Santana's dicta* is erroneous.

i. The requirements of §782.02:

Such petition **must be verified** and must state in substance:

(1) That the person in whose behalf the writ is applied for is restrained of personal liberty, the person by whom imprisoned and the place where, naming both parties, if their names are known, or describing them if they are not.

(2) That such person is not imprisoned by virtue of any judgment, order or execution specified in § 782.02.

(3) The cause or pretense of such imprisonment according to the best of petitioner's knowledge and belief.

(4) If the imprisonment is by virtue of any order or process a copy thereof must be annexed, or it must be averred that, by reason of such prisoner being removed or concealed a demand of such copy could not be made or that such demand was made and a fee of \$1 therefor tendered to the person having such prisoner in custody, and that such copy was refused.

(5) In what the illegality of the imprisonment consists.

- ii. The requirements of §782.02(1), (3), and (5) make sense and presumably already would fall within the requirements of Rule 809.51.
 - iii. The requirement that the petition allege that the person is not imprisoned by a judgment specified in §782.02, however, is impossible in a habeas petition alleging ineffectiveness of appellate counsel. Section 782.02 provides that “[n]o person shall be entitled to prosecute such a writ who shall have been committed or detained by the virtue of the final judgment or order of any competent tribunal of . . . criminal jurisdiction.”
 - iv. *Santana’s* requirement of verification (i.e., swearing to the contents of the petition under oath and before a notary) is redundant to the requirements in Wis. Stat. §§802.05(1) (requiring that all pleadings be signed) and (2) (the signing and presentation of a pleading constitutes a certification, subject to sanction, that the pleading is factually accurate, warranted by existing law or nonfrivolous argument, and not presented for an improper purpose)
 - v. Although erroneous and *dicta*, it is **highly recommended** that counsel nonetheless comply with the additional requirements imposed by *Santana* to the extent possible pending reversal by the Supreme Court.
5. Number of copies:
 - a. Court of Appeals: original and four copies
 - b. Supreme Court: original and eight copies
 6. Filing fee: currently \$195
 7. Court may refer case to referee or circuit court where fact-finding required. *Evans*, ¶¶40, 52; *Knight*, 168 Wis.2d 521
 8. Limitations on Habeas Relief
 - a. “[A] defendant may file only one habeas petition under

Knight unless that defendant can adequately explain why all issues relating to the representation of appellate counsel were not raised in the first petition.” *State ex rel. Schmidt v. Cooke*, 180 Wis.2d 187, 190, 509 N.W.2d 96 (Ct. App.1993); see *Evans*, ¶35.

- b. No statutory deadline, but laches applies. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900; *Evans*, ¶49.
 - i. Application of laches to ineffectiveness claim is questionable on constitutional grounds. See *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (obligation is on state to insure that defendant’s right to counsel, so that any delay resulting from the denial of that right is attributable to the state)

III. Other Supervisory Writs

Supervisory writs may be used in criminal cases, just as in civil cases, to either order a lower court to perform a mandatory duty (mandamus) or to prohibit a lower court from taking action it is has no legal authority to perform (prohibition). Thus, a supervisory writ may be appropriate to require the Circuit Court or the Court of Appeals to issue a decision following an unreasonable delay (although such a writ cannot require a particular result absent a mandatory duty to reach that result).

The Court of Appeals, moreover, has jurisdiction to issue supervisory writs over a judge presiding over a “John Doe” proceeding, even though the judge is not acting as a “court.” *In re John Doe Proceeding*, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260

HENAK LAW OFFICE, S.C.

Attorneys at Law

Robert R. Henak
Amelia L. Bizzaro

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
Telephone [414] 283-9300
Facsimile [414] 276-5525

January 11, 2006

Court of Appeals Publication Committee
c/o Wisconsin Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688

RE: State ex rel. Santana v. Endicott, Appeal No. 2005AP332

I am writing, both in my role as Amicus Chair for the Wisconsin Association of Criminal Defense Attorneys and as a concerned appellate litigator with 17½ of appellate experience, to request that the Committee *not* order the publication of this case.

The Court in *Santana* reaffirmed its holding in *Smalley v. Morgan*, 211 Wis.2d 795, 565 N.W.2d 805 (Ct. App. 1997), to the effect that counsel's failure to pursue an appeal must be raised in the Court of Appeals in a *Knight* petition rather than in the circuit court. The Court went on to emphasize, however, that dismissal of Santana's circuit court habeas petition was without prejudice, and that he was still free to file his challenge in a *Knight* petition. In *dicta*, the Court further set forth what it viewed as requirements for such a petition.

I do not object to the holding or most of the language in the decision. I find the Court's attempt to provide guidance to Mr. Santana commendable. However, I object to publication for two reasons.

First, Mr. Santana was not represented by counsel in this matter. I believe as a matter of principle that the Court should be very hesitant to publish decisions in which one or both parties are unrepresented by counsel.

The adversarial system recognizes that even the most conscientious judges cannot be all-knowing and that the correct answer to a legal or factual dispute is best resolved when both sides present their best arguments. Only under those circumstances can the Court be assured (to the degree possible) that the arguments on both sides have been fully marshaled and it is not missing something important.

While litigants have no right to the appointment of counsel in habeas proceedings, that is a different issue from whether a particular decision should be published. An individual no doubt may suffer an injustice should the absence of counsel result in a judgment against him, but that injustice generally is limited to the particular litigant. Should that decision be published, however, it becomes controlling precedent which only the Supreme Court can correct. Any errors in a published decision resulting from the absence of full adversarial testing thus could negatively affect any number of individuals in the period before the error is corrected.

Second, while the result in *Santana* is unassailable under Wisconsin authority, as is the Court's discussion of other procedural avenues available to Mr. Santana, I do not believe that the same is true of the admonitions contained in Paragraph 10 of that decision regarding the perceived requirements for a *Knight* petition. The Court there states that, in addition to the requirements of Wis. Stat. (Rule) 809.51 regarding writs in the Court of Appeals, the petition must comply with the requirements of Wis. Stat. §782.04, including the requirement that a petition be verified.

I believe that the dicta in ¶10 is misplaced and that any published decision on this matter should await full adversarial presentation of the question. Specifically, the requirements for statutory habeas petitions contained in Wis. Stat. §782.04 cannot be applied wholesale to common law habeas petitions such as *Knight* petitions. Moreover, decision regarding which of those provisions should be applied to *Knight* petitions is better left to the Supreme Court as the policy-making branch of the Courts, at least in the absence of pending dispute on the issue before this Court.

As the Committee is aware, there is a difference between statutory and common law habeas corpus. Chapter 782 sets forth the requirements of *statutory* habeas, a primary condition of which is that “[n]o person shall be entitled to prosecute such a writ who shall have been committed or detained by the virtue of the final judgment or order of any competent tribunal of . . . criminal jurisdiction.” Wis. Stat. §782.02.

A *Knight* petition, however, is a type of *common law* habeas petition. Because the petitioner in such an action is seeking to challenge the effectiveness of counsel on the appeal from a criminal conviction, he or she necessarily “has been committed or detained by the virtue of the final judgment or order of any competent tribunal of . . . criminal jurisdiction.” As such, the person filing a *Knight* petition cannot meet the requirement of §782.04(2) (transposed to the *Knight* context by the *Santana dicta*) that

he or she verify and state “[t]hat such person is not imprisoned by virtue of any judgment, order or execution specified in s. 782.02.” Section 782.04, by its terms, thus is not applicable and cannot be applicable to common law habeas petitions, such as *Knight* petitions, challenging one’s detention as the result of a criminal conviction.

The question then becomes which, if any, of the other requirements of statutory habeas (and particularly, the verification requirement) should be imposed as well on common law habeas as a matter of judicial prerogative and, if so, who should make that determination and when. As far as I can tell, the issue has not previously been resolved. Although the Court of Appeals did hold in *Maier v. Byrnes*, 121 Wis.2d 258, 358 N.W.2d 833 (Ct. App. 1984), that verification was necessary to a properly filed habeas petition, the petition at issue was a *statutory* petition under Chapter 782, to which the verification requirements of §782.04 directly apply. The Court in *Maier* did not address, and thus did not decide, whether verification was required for common law habeas petitions.

There are, of course, potential benefits to the verification requirement in assuring “that the statements contained therein are presented with some regard to considerations of truthfulness, accuracy and good faith.” *Santanta*, ¶10, quoting *Maier v. Byrnes*, 121 Wis.2d 258, 262-63, 358 N.W.2d 833 (Ct. App. 1984). It may be argued, however, that the same benefits already are provided by the requirements in Wis. Stat. §§802.05(1) (requiring that all pleadings be signed) and (2) (the signing and presentation of a pleading constitutes a certification, subject to sanction, that the pleading is factually accurate, warranted by existing law or nonfrivolous argument, and not presented for an improper purpose), so that the addition of a verification requirement in common law habeas is not necessary.

I also note that the majority of *Knight* petitions are filed by *pro se* prison inmates. Few such litigants have any significant understanding of legal procedure, and many have learning disabilities and other educational lacks. To place yet another procedural hurdle between them and the courts by imposing a verification requirement should require more than a desire for formalistic symmetry with the requirements of statutory habeas.

I acknowledge that it may be that the Courts, after reviewing such arguments and any contrary arguments which may be presented, will nonetheless impose a verification requirement on those filing *Knight* petitions. Perhaps they will reject such a

HENAK LAW OFFICE, S.C.
Court of Appeals Publication Committee
January 11, 2006
Page 4

requirement.

My purpose here is not to have the Publication Committee resolve that issue. Rather, my point merely is that the issue is far too important and far-reaching to be decided by way of *dicta*, without briefing by the parties, and with one of the parties unrepresented by counsel.

I accordingly ask that the Committee *not* order the decision in *Santana* to be published unless that decision is amended to delete ¶10. I thank the Committee for considering this request.

Respectfully submitted,

HENAK LAW OFFICE, S.C.

Robert R. Henak

cc: Hon. Richard S. Brown
Hon. Neal P. Nettesheim
Hon. Harry G. Snyder
Mr. Luis Santana
AAG James Freimuth

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. _____

STATE OF WISCONSIN ex rel.

C _____ S _____,

Petitioner,

v.

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent.

**PETITION FOR
WRIT OF HABEAS CORPUS**

C _____ S _____, by undersigned counsel, respectfully petitions this Court pursuant to Wis. Stat. §752.01, Wis. Stat. (Rule) 809.51, and *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992), for a writ of habeas corpus on the grounds that he was denied the right to appeal and the right to the assistance of counsel on appeal. S _____ respectfully asks that the Court reinstate his right to pursue post-conviction motions and a direct appeal under Wis. Stat. (Rule) 809.30 and §974.02 in *State v. S _____*, Dunn County Case No. _____.

Given the nature of the claim asserted, Mr. S _____ requests an evidentiary hearing on this petition. *See State v. Machner*, 92 Wis.2d 797, 804, 285

HENAK - Supervisory Writs

N.W.2d 905, 908 (Ct.App.1979).

STATEMENT OF ISSUE

Whether Mr. S _____ was denied his rights to a direct appeal and to the effective assistance of counsel on appeal when his post-conviction counsel failed to perfect his appeal, thus mandating reinstatement of his direct appeal rights.

STATEMENT OF FACTS

On _____, the Dunn County Circuit Court, Hon. William C. Stewart, Jr., presiding, sentenced Mr. S _____ to a total of 20 years incarceration, consisting of 10 years initial confinement and 10 years extended supervision, following his conviction by a jury of one count of violating Wis. Stat. §948.02(1). *State v. S _____*, Dunn County Case No. _____.

S _____ timely filed his Notice of Intent to Pursue Post-Conviction Relief pursuant to Wis. Stat. (Rule) 809.30(2)(b) on _____.

Although S _____'s trial attorney, _____, was not retained to handle the appeal for him, she did order the necessary transcripts pursuant to Wis. Stat. (Rule) 809.30(2)(f), and made payment for those transcripts from funds provided by S _____'s wife, L _____ S _____. *See Exhibits 1 and 2.*

On _____, 2002, C _____ and L _____ S _____ retained Attorney _____ for purposes of post-conviction review and appeal in this matter. _____ sent a substitution of counsel form to Ms. _____ on June 3, 2002, and sent her an authorization to release her file in this matter on June 6, 2002. Ms. _____ forwarded her file and all transcripts she had received to _____ on June 10 and 11, 2002.

Ms. _____ signed and mailed the substitution of counsel form to Mr. _____ on June 26, 2002, along with a letter indicating that all transcripts she had requested had been filed. Mr. _____, however, failed to sign that document until

September 12, 2002, and failed to file it with the court until September 25, 2002. Copies of _____'s June 26, 2002 letter and the Substitution of Counsel are attached as Exhibits 3 and 4.

Although he had been informed that all transcripts requested had been produced, thus triggering the 60-day period for filing a post-conviction motion or notice of appeal pursuant to Wis. Stat. (Rule) 809.30(2)(h), Mr. _____ failed to file such a motion or notice of appeal within that time frame. Indeed, although he informed the S_____s on several occasions over the next two plus years that he would file such a motion shortly, he never did. Nor did he ever move this Court for an extension of time for filing such a motion pursuant to Wis. Stat. (Rule) 809.82(2).

L_____ and C_____ S_____ subsequently retained undersigned counsel in place of Mr. _____. Counsel thereafter met with Mr. _____, obtained the file from him, reviewed the record, met with Mr. S_____, and conducted additional investigation. Based on that review and investigation, counsel has determined that there are substantial grounds on which to challenge Mr. S_____’s conviction.

RELIEF REQUESTED

Mr. S_____ respectfully asks that this Court enter an order fully reinstating his right to pursue post-conviction motions and a direct appeal under Wis. Stat. (Rule) 809.30. He further asks that the Court grant him at least 45 days from the Court’s decision in which to file his post-conviction motion.

REASONS JUSTIFYING REQUESTED RELIEF

Although Mr. S_____ had a fundamental right to the assistance of counsel on his one direct appeal as of right, he did not receive the effective assistance of such counsel and, as a consequence, lost his right to a direct appeal.

A. S _____ Was Denied the Effective Assistance of Counsel on Appeal

1. Applicable legal standards

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, and to the effective assistance of counsel on his first appeal as of right in the state courts, *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985). The right to counsel is intended to help protect a defendant's rights because he cannot be expected to do so himself. *E.g.*, *Evitts*, 469 U.S. at 396 ("An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake").

The Supreme Court established the general standard for assessing claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). That test is two-pronged. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *See, e.g., id.* at 687. The same standard applies, with appropriate modifications, to claims of ineffective assistance of appellate counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *see State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

The deficiency prong is met where counsel's representation "fell below an objective standard of reasonableness." *State v. Johnson*, 133 Wis.2d 207, 395 N.W.2d 176, 181 (1986), *quoting Strickland*, 466 U.S. at 688. In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

It is not necessary, of course, to demonstrate total incompetence of counsel, and the petitioner makes no such claim here. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronin*, 466 U.S. 648,

657 n.20 (1984). “[T]he right to effective assistance of counsel ... may in a particular case be violated by even an isolated error ... if that error is sufficiently egregious and prejudicial.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or inattention rather than a reasoned defense strategy. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Kimmelman*, 477 U.S. at 385; *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001); *State v. Moffett*, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989); but see *State v. Koller*, 2001 WI App. 253, ¶¶8, 53, 248 Wis.2d 259, 635 N.W.2d 838.

A defendant generally must show that counsel's deficient performance prejudiced his defense. “[A] counsel's performance prejudices the defense when the ‘counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Johnson*, 395 N.W.2d at 183, quoting *Strickland*, 466 U.S. at 687. “The defendant is not required [under *Strickland*] to show ‘that counsel's deficient conduct more likely than not altered the outcome of the case.’” *Moffett*, 433 N.W.2d at 576, quoting *Strickland*, 466 U.S. at 693.

Rather, “[t]he question on review is whether there is a reasonable probability” of a different result but for counsel's deficient performance. *Moffett*, 433 N.W.2d at 577 (citation omitted). “Reasonable probability,” under this standard, is defined as “probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland*, 466 U.S. at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. *Strickland*, 466 U.S. at 695. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the “fairness” of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000).

However, actual denial of the assistance of counsel altogether is legally presumed to result in prejudice and can never be treated as harmless error. *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *State ex rel. Seibert v. Macht*, 2001 WI 67, ¶19, 244 Wis.2d 378, 627 N.W.2d 881, modified on denial of reconsideration, 2002 WI 12,

249 Wis.2d 702, 639 N.W.2d 707. Counsel’s abandonment of a client’s appeal, for instance, is a *per se* violation of the right to counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *Betts v. Litscher*, 241 F.3d 594, 597 (7th Cir. 2001). “Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy.” *Penson*, 488 U.S. at 87; *see Seibert*, ¶19.

2. Mr. _____ Acted Unreasonably by Failing to Perfect S _____’s Appeal

Mr. _____ was retained to pursue post-conviction motions and a direct appeal from Mr. S _____’s conviction. He was informed that the transcripts had been ordered and produced and either knew or should have known that these acts triggered his responsibility to file either a notice of appeal or post-conviction motion on Mr. S _____’s behalf within 60 days. Wis. Stat. (Rule) 809.30(2)(h). Yet, he neither filed such a document nor asked this Court to extend the time for such filing under Wis. Stat. §809.82(2).

Where, as here, counsel knows that his client wishes to appeal yet fails to perfect that appeal, that failure “constitute[s] *per se* ineffective assistance of counsel.” *United States v. Nagib*, 56 F.3d 798, 801 (7th Cir. 1995). The failure to comply with such a request is inherently unreasonable and thus constitutes deficient performance. *Id.*

See also Roe, 528 U.S. at 477:

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. [Citations omitted]. This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

This is not a situation in which counsel reasonably evaluated the record and,

after full consultation with his client, was directed to close the case without filing an appeal. *Compare State ex rel. Ford v. Holm*, 2004 WI App 22, 269 Wis.2d 810, 676 N.W.2d 500. S _____ insisted on an appeal and never consented to closing it.

Nor, for his part, did Attorney _____ intend to merely close the case. He signed and filed the substitution of counsel form nearly three months after he had received it from S _____'s trial counsel and *after* the time for filing S _____'s post-conviction motions or notice of appeal had expired. Over a period of more than two years, he repeatedly responded to correspondence from the S _____s by stating he was working on the case and would have something filed shortly. *E.g.*, Exhibit 5. At no time did _____ suggest that post-conviction motions or an appeal would be frivolous.

3. S _____ Was Prejudiced by Mr. _____'s Failure to Perfect His Appeal

Generally, the victim of deficient attorney performance must show resulting prejudice. *Strickland*, 466 U.S. at 687. That standard does not apply here, however. “[W]henver the ineffective assistance is such as to deprive one totally of the right to appeal, the prejudice showing is presumed.” *See State ex rel. Flores v. State*, 183 Wis.2d 587, 516 N.W.2d 362, 373 (1994). Because the failure of counsel to perfect an appeal requested by his client demonstrates an “[a]ctual or constructive denial of the assistance of counsel altogether,” *Strickland*, 466 U.S. at 692, “a defendant [is] not required to show prejudice under *Strickland* if he instructed his lawyer to appeal and his lawyer failed to do so.” *Nagib*, 56 F.3d at 801, citing *Castellanos v. United States*, 26 F.3d 717, 718 (7th Cir. 1994).

In *Roe v. Flores-Ortega*, 528 U.S. 470, 481-86 (2000), for instance, the Court addressed the situation where counsel acted unreasonably by failing to file a notice of appeal. The Court recognized that it “normally ‘appl[ies] a “strong presumption of reliability” to judicial proceedings and require[s] a defendant to overcome that

presumption,” 528 U.S. at 482 (citations omitted). It is that presumption which underlies the general requirement that the defendant show that counsel’s errors “actually had an adverse effect on the defense.” *Id.* (citations omitted).

The Court noted, however, that a different standard applies where, as here, “counsel’s alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.” *Id.* at 483. “[W]e cannot accord any “presumption of reliability” [citation omitted] to judicial proceedings that never took place,” as when counsel’s deficient performance results in forfeiture of an appeal. *Id.*

The only showing of prejudice required under these circumstances, therefore, is that the defendant likely would have proceeded with the appeal process but for counsel’s deficient performance. *Id.* at 484 (“to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed”).

Where, as here, the defendant had instructed counsel to appeal prior to counsel’s deficient performance, he has made the required showing. *Id.* at 485, citing *Rodriquez v. United States*, 395 U.S. 327 (1969). The defendant need not show as well that he has specific appealable issues to raise:

We similarly conclude here that it is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed.

Roe, 528 U.S. at 486 (emphasis in original).

The constitutionally required remedy for the denial of appeal due to the ineffectiveness of counsel is to restore the defendant to the position he would have occupied but for the denial. In other words, he must be granted his direct appeal as

of right with the assistance of counsel, *Betts*, 241 F.3d at 597; *see Penson*, 488 U.S. at 86-88. S _____ accordingly is entitled to reinstatement of his right to a direct appeal with the assistance of counsel.

CONCLUSION

As the Seventh Circuit held in *Castellanos, supra*,

[i]f the defendant told his lawyer to appeal, and the lawyer dropped the ball, then the defendant has been deprived, not of effective assistance of counsel, but of any assistance of counsel on appeal. Abandonment is a per se violation of the [S]ixth [A]mendment.”

26 F.3d at 718. That is exactly what happened here. Mr. _____ “dropped the ball.”

Mr. S _____, therefore, respectfully asks that the Court grant the requested writ and order reinstatement of his direct appeal rights under Wis. Stat. §974.02 and (Rule) 809.30.

Dated at Milwaukee, Wisconsin, _____.

Respectfully submitted,

C _____ S _____, Petitioner

HENAK LAW OFFICE, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 809.51(4) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Rule 809.51(4) for a petition produced with a proportional serif font. The length of this petition is 2,493 words.

Robert R. Henak

RRH Habe Pet.wpd

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. _____

STATE OF WISCONSIN ex rel.

I_____ E_____,

Petitioner,

v.

JOHN R. BERTRAND,
Warden, Green Bay Correctional
Institution,

Respondent.

VERIFICATION

Under oath, I state that the allegations of the Petition for Writ of Habeas Corpus filed on October 11, 2004, are true, except as to those matters in which I did not personally participate, and as to those matters, I believe them to be true.

Subscribed and sworn to before me
this ___ day of _____, 2006

Robert R. Henak
Counsel for Petitioner I_____ E_____

Notary Public, Wisconsin
My Commission expires: _____

RRH Habe Pet Verification.wpd

I attended the *Appeals from Start to Finish* program co-sponsored by the Milwaukee Bar Association's Bench/Bar Court of Appeals Committee and the State Public Defender's Office held on April 18, 2008.

I would like this program to count toward the SPD's legal education requirement for SPD appellate certification.

Name (please print): _____

Signature: _____

Date: _____

Please either mail or fax completed form to the SPD's Madison Appellate Office at:

Mailing address:
State Public Defender's Office-Appellate Division
17 S. Fairchild Street
3rd Floor
Madison, WI 53703

Fax Number:
608.264.8563

EVALUATION

**Appeals from Start to Finish
April 18, 2008**

Your feedback is important to us. Please respond to the following questions, 5 being highest.

This program was what I expected _____Yes _____No
Comments:

Program content 5 4 3 2 1
Comments:

Written materials 5 4 3 2 1
Comments:

Speakers 5 4 3 2 1
Comments:

Topic 5 4 3 2 1
Comments:

Format 5 4 3 2 1
Comments:

Facilities/Location 5 4 3 2 1
Comments:

What did you find most valuable?

What program would you like to see the MBA Court of Appeals Bench/Bar Committee present in the future?

Overall comments:
